

and twelve, which was the day appointed ; and instruments were taken thereon in his name and Dun's : there was also an instrument taken by Pitcurr's procurator, that he had attended with Dun's bond and caption, in the upmost storey of the tolbooth, where prisoners used to be incarcerated, from nine to one of the clock the said day ; and thereupon protested, that Dun might be liable for the debt.

And, having charged him upon this bond, Dun SUSPENDS on this reason,—That he had performed, by Fullertoun's appearing, the time appointed, within the tolbooth.

The charger ANSWERED, That the suspender had not fulfilled : *1mo.* Because he had not entered him prisoner, unless he had presented him to the jailer or magistrate, as a prisoner, and had required them to call publicly if there was any person having Pitcurr's caption that might have necessitated the magistrate or jailer to detain him prisoner : in which case, Pitcurr's procurator, who was attending above, in the tolbooth, in the room where prisoners used to be incarcerated, would have produced the caption : but all that Fullertoun did, was to come to the council-house, the doors whereof were and are ordinarily patent, and where prisoners stay not. *2do.* The bond bears,—“ That Fullertoun should present himself to remain prisoner for fulfilling the will of the letters of caption, and should procure no suspension.”

It was REPLIED, That this last clause was not a part of the obligation, but did only express the end for which Fullertoun was to be presented ; otherwise that would import, that if, at any time, he should have escaped, Dun should have been liable ; which could never have been understood, unless it had been so expressed.

The Lords found Dun's bond not to be fulfilled by the instruments produced ; seeing he offered him not to the magistrate as his prisoner, and required him to call for the other party to produce the caption : but did not find Dun liable for his escaping, if he were once a prisoner. *Vol. II, Page 697.*

1679. *February 21.* WILLIAM WHITE *against* THOMAS CHATTO.

WILLIAM White pursues Thomas Chatto for payment of £500 borrowed by him from the pursuer's wife, during the marriage, wherein the father had granted a bond in favour of Isobel Chatto.

The defender ALLEGED, That he could not be liable in double payment ; and was content to pay, either to the pursuer or to the said Isobel : who alleged, that her bond could not be taken from her, by being proven, by the defender's oath, to have been borrowed from his wife, but only to be proven by her own oath.

The PURSUER ANSWERED, That his libel was relevant to be proven by the defender's oath, that he had received sums of money from his wife, during the marriage ; and is not obliged to refer it to the oath of any other. But if the defender has granted bond to a third party, at his wife's desire, he did it *mala fide* : for he could not be ignorant that he should not have given a bond for money borrowed from a wife, but to herself or her husband ; and if, by doing otherwise, he run the hazard of that third party's denying the sum to have been

made up of the money received from the pursuer's wife, *sibi imputet* if he become liable in double payment.

The Lords found the libel probable by the defender's oath; and allowed him, if he thought it fit, to have the oath of the third party, whether the bond granted by him to her, was for the same cause; but would not receive it by way of quality, that he had given bond to a third party, at the wife's desire.

*Vol. II, Page 702.*

1679. *February 25.* The KING'S ADVOCATE *against* The EARL of NITHISDALE.

THE King's advocate pursues a reduction of this Earl of Nithisdale's right of the lands of Duncow, on this reason,—That, by the Act of Annexation, *anno 1593*, the lands of Duncow are annexed to the crown; and, accordingly, the rents thereof have been still counted for in Exchequer.

The defender produced a charter from the king *in anno 1540*, bearing expressly the lands of Duncow to be a part of the earldom of Galloway; which was dissolved, by Act of Parliament, to be set in feu-farm; and, accordingly, was feued to the Earl's predecessor: likeas the Act of Parliament dissolving the same is evident from the Acts of Parliament. The defender doth also produce a progress of the said lands down to himself.

And the Lords having, before answer, ordained either party to produce such evidences as they could anent the possession, it is clear, by the evidences adduced, that the Earl and his predecessors have been in immemorial possession of the said lands, by lifting the mails and duties thereof, by out-putting and in-putting tenants; and that there was never an account made in Exchequer thereof, but only of the feu-duty contained in the Earl's charter. And, as to the Act of Parliament 1593, it is a repetition of all the king's property, by several preceding annexations; and though it expresses Duncow in the denomination, which is not expressed in the former annexations, yet, before it was feued, it was a part of the lordship of Galloway, as the Earl's charter from the king bears; which the particular enumeration thereof doth not alter; but Duncow is expressed particularly, because, since the Earl's feu, it is divided from the rest of the lordship of Galloway, and makes a particular *æque*.

It was ANSWERED, That the king hath not, nor can have, a charter for his annexed property, but hath right thereto *jure coronæ*: and, therefore, showing that the lands of Duncow are annexed *in anno 1593*, it is to the king a sufficient right; and nothing but a posterior dissolution and feu can exclude the same.

The defender REPLIED, That an original annexation, expressing the particular manner of the lands coming to the crown by forefaulture, recognition, or otherwise, though done by Act of Parliament, by citation of parties, might be pleaded not to come in under the Act *salvo*, or under the cognizance of the Lords; yet, if this were extended to annexations, repeated by the Act 1593, or other Acts, it would, at one blow, annul all the feus of the king's property in Scotland, they being all therein enumerated, as lordships and baronies annexed to the crown; and, therefore, though they be a part of the king's property, yet that is without exclusion of the feus lawfully made after dissolution in Parliament, as this is prior to the said Act of Parliament.