REPLIED,—Latent insufficiency of goods is always probable by witnesses; and the suspender will yet get declarations of their insufficiency from abroad.

The Lords found, Seeing he had neglected the order prescribed by the Act of Parliament, his reason founded on the brackishness and utter uselessness of the herring was now only probable by the charger's oath. *Vol. II. Page* 35.

1699. *January* 17. WILLIAM WALWOOD *against* ROBERT WALWOOD.

WILLIAM Walwood against Robert Walwood, his uncle and tutor, who being charged with sundry debts he had suffered to perish, he founded on a discharge he had got from his pupil some time after his majority, bearing, That he was convinced of his integrity, and therefore exonered him of all omissions, he making faithful account of all his intromissions, and delivering up to him all the inventories and count-books. William repeated a reduction he had raised of that discharge, That it was taken from him by surprise three or four days after he was major, *et ante redditas rationes*, and when he knew nothing of his affairs; and bore a quality of fair counting and delivering up the books: none of which he had done.

ANSWERED,—Omissions were odious, and might be discharged the next day after the expiring of his minority; and the provision in the discharge of counting was neither conceived *irritanter* nor conditionally, and so could not annul the discharge; and the truth is, he was ever willing to count.

The Lords sustained the discharge to exoner from omissions, and assoilyied from the reduction.

Then he craved allowance of £1500 of expenses wared out in selling the wines and other goods his brother left behind him. ANSWERED,—By the Act of Parliament 1672, a tutor neglecting to make inventory can claim no expenses. REPLIED,—His brother having left an inventory, he thought it needless.

2do. His discharge cutting off omissions, must also reach this of his neglecting to make an inventory. REPLIED, *1mo.* His brother's inventory was not full, neither what the law requires in this case. *2do.* The discharge only means omissions in seeking in debts and other deeds of administration, but can never be extended to the necessary requisite, previous to his entry of making inventories.

The Lords, by a narrow plurality, found it comprehended the omission in making of legal inventories, as well as other omissions. Some thought the discharge ought not to cover him, where the omissions were gross and considerable; for as *lata culpa æquiparatur dolo*, so none are presumed, under general words, to have discharged dole. *Vol. II. Page* 35.

1698 *and* 1699. The MERCHANTS of EDINBURGH *against* The VINTNERS.

1698. *June* 28.—Phesdo reported the advocation raised by Mr Charles Dal-

las, William Ross, and other Vintners, against Robert Watson, and sundry merchants in Edinburgh, of the pursuit raised by them against those vintners before the bailies, for payment of £48 sterling per tun of the wine sold to them. The reasons of advocation were, 1*mo*. The bailies were both judges and parties, in so far as Bailies Menzies and Nairne were traders in wine; and though Bailie Menzies was one of the tacksmen of the King's customs, yet he drove a covert trade notwithstanding. 2*do*. They committed iniquity in finding this defence only probable *scripto vel juramento*,---that the current price was agreed on; whereas this being *pactum ex incontinenti contractui adjectum*, it must be probable by witnesses, as the contract itself would be.

ANSWERED,---It is denied that the bailies who judged in this cause were concerned in the wine-trade this year; and the merchants are very well pleased to advocate to the Lords, if the vintners will find caution *judicatum solvi*; because, by the forms of process, it is long ere a probation taken comes in to be advised by the course of the roll, and they may break *medio tempore*, and so the pursuers lose their money; especially seeing, by a combination among the vintners, the price of the pint of French wine is lowered from thirty-two pence to twenty pence, at which rate they will pretend to make the merchants' price, to their great loss: for the Vintners pled, That, by the sudden falling of the price of the commodity, the merchants' price must also fall; and they cannot be liable any farther than what they actually got; as was found in the price of victual in *Sir Patrick Home's case* against *his Brother*, *in January* 1682; and in *February* 1682, between the *Viscount of Oxford and his Curators*, that the fiars of the year, or what price the neighbouring heritors got, was to be the rule. *Vide l.* 22. *D. de Rebus Cred.*

The Lords found that weight in the reasons as to pass the advocation; but, to prevent the Merchants' prejudice in the delay, they dealt with the parties to discuss the whole cause summarily on the bill, seeing they could not force the Vintners to find caution.

The Lords, upon a new hearing, decerned for the price at the rate of £28 sterling per tun, which the Vintners craved to be the price. And as to the remanent price, at the value of £48 per tun, as the Merchants claimed, the Lords allowed a conjunct probation as to the premier cost of the wine abroad, and the custom of setting a price between merchant and vintner, and the terms of payment, and the current rates. *Vol. II. Page* 7.

1699. *January* 20.---The debate betwixt the Merchants and Vintners of Edinburgh, (mentioned 28th June, 1698,) was this day determined, anent what should be the current price of the wines of the growth 1697 vended in 1698. The Lords had ordained the wine to be sold at thirty-two pence per pint. There being great quantities imported after the peace, the price fell in May 1698, in most taverns, to twenty pence per pint; at which the Merchants reclaiming, that the Vintners' deed ought not to diminish their price, the question arose,—Where there is no settled price agreed on, but wines taken at an indefinite rate afterwards to be condescended on, whether the current rate wines gave at the time of delivery must be the rule, as the Merchants contended, or if it should be regulated and constituted by the retailing price, as the Vintners pled; or if some other period or medium ought to be struck. The Merchants claimed £48 sterling per tun, as the price at their delivering the wines. The Vintners

offered but £28 sterling per tun, conform to their retailing price; which they contended to be the most equitable rule, on the sudden falling of the price by the Merchants importing too great quantities: and was so found in *January* 1682, betwixt *Sir Patrick Home and his Brother*, in the count and reckoning, that the prices of victual suddenly falling in 1655, Sir Patrick was not bound to count at the fiars, but only for what he got; and was also so decided betwixt my *Lord Oxford and his Curators;* and *l.* 15. *D. de Peric. et Commod. Rei Venditæ*, gives us a rule in such cases; and Cicero *de Officiis*, where a ship with corn arrives first at the market, and sells high, by concealing that a fleet of more ships will be there with relief, in a day or two, he does not act honestly in concealing.

ANSWERED for the Merchants,—That their price must not depend on so lubrick and various a circumstance as the price of retailing, for that may vary every month; and no general rule can be formed out of this uncertainty, *et res quæque perit suo domino;* and consequently the property of the wines being in the Vintners, they must run the risk of the falling of the price, or other accidental unforeseen damages.

The Lords finding themselves straitened to determine a middle price, *in jure*, prescinding from both extremes, they moved to the parties, if they would submit to the Bench as arbiters in the case; which they condescending to, the Lords fixed the price to be paid by the Vintners for the year 1697, to £35 sterling per tun. *Vol. II. Page* 36.

1699. *January* 27. JOHN MURRAY *against* SIR WALTER SETON.

SIR Walter Seton, advocate, having procured a gift from his Majesty to be Commissary Clerk of Edinburgh, vacant by the death of Sir Patrick Aikenhead, last clerk, and intending to present it to the commissaries to be installed; Mr John Murray, advocate, and brother to the Laird of Liviston, gives in a bill of advocation to the Lords, for stopping his admission till he were heard on a prior gift obtained by him when my Lord Tillibarden was secretary. Which being given up to Sir Walter to answer, he ALLEGED,—The said gift, though prior, could never compete with him, being null, as wanting *verum modum vacandi;* for though it bear to proceed on Sir Patrick Aikenhead's demission, yet truly he had not demitted at that time, but continued in the possession of the office long after; and Sir Patrick's letter to the secretary does noways import an actual demission, but only that Mr Murray and he had agreed towards his demission; which might be retracted: and that there was *locus pœnitentiæ* is evident; for, sundry months thereafter, they renew their communing, and, on new terms, Sir Patrick signed a demission ten days before his death.

REPLIED,—Sir Patrick's obligation to grant a demission was equivalent to an actual demitting, because he might have been compelled thereto.

DUPLIED,—The letter did not so much as amount to a personal obligation; and, though it had, the gift was still null, because the *modus vacandi* must always precede the gift; and a subsequent cause can never validate the same in competition with one more formal.