

they shall bring in their client to depone; and, besides, he has already deponed in this cause, in another pursuit before the Bailies of Edinburgh, and denied the libel.

The Lords were displeas'd with that custom of marking persons present, when they are only there by their procurators; and order'd it to be rectified: but, in respect of the circumstances in this cause, they turn'd the decret to a libel, and reponed the defender to his oath. *Vol. II. Page 444.*

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1708. *June 25.* SIR JAMES ELPHINSTON *against* LORD SALTON.

IN 1692 Lord Salton signs a bond, blank in the creditor's name, for 1000 merks, wherein Mr John Buchan was principal, and my Lord cautioner, to be a fund of credit for Mr Buchan to raise the money; but he, not having use for it then, kept it beside him till the year 1701; and being debtor to Sir James Elphinston, he gives him this bond in part payment; whereupon Sir James charging my Lord, he suspends, and raises a process of exhibition and delivery of the bond, on this ground, That it lay many years in the debtor Mr Buchan's hand, after the term of payment, not made use of, and so must be reputed *instrumentum apud debitorem repertum*, and consequently *solutum* and extinct; and Mr Buchan, by his letter and declaration, denies that ever he delivered it to Sir James; but when his house was burnt, in the Meal-market, in February 1700, he sent some bundles of his papers to Sir James's chamber, and it seems this has been amongst them: and though this bond is prior to the Act of Parliament in 1696, discharging blank-bonds, yet, its delivery being posterior to that act, it will fall, under the prohibition of that act, to be null.

ANSWERED,—Whatever has been Mr Buchan's part in this cause, Sir James Elphinston's acquisition of it is both honest and fair; and, to convel Mr Buchan's declaration, he produces a fitted account betwixt them, wherein Mr Buchan declares, that he had given him this bond in part payment of his debt; and the Act 1696, discharging blank-bonds, has no retrospect, and so concerns not this case: and the brocard of a writ *apud debitorem* were good, if my Lord could instruct that this bond had been ever out of Mr Buchan's hand, before its delivery to Sir James; for then it could not be kept up to afford a fund of credit oftener than once.

The question was stated,—Repel my Lord Salton's defence, or appoint Sir James to depone on the time and manner of his receiving it, and exhibit, reserving against delivery? And the Lords being equally split, it carried, by the President's vote, that he should depone before answer. *Vol. II. Page 445.*

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1708. *June 26.* THE TOWN of EDINBURGH and HAY their Collector *against* RUSSEL, FULTON, and other Merchants.

HAY having charged them to pay a merk upon the ton and pack of all goods