

1709. *February 26.* JAMES FORREST *against* JOHN CRAIG.

IN a competition for the mails and duties of some tenements in Edinburgh, betwixt James Forrest and John Craig, servant to Sir Walter Pringle, advocate, upon two adjudications, Craig OBJECTED,---Your adjudication is null; because there is a day assigned for the debtor to produce a progress, and yet the decret is of the same day's date; which Forrest observing to have been a mere error and mistake in the extractor, in making the decret of the same date with the act assigning a day to the defender to give in a progress, in terms of the Act of Parliament in 1672; and that the minutes and warrants were right and tight; therefore he, at his own hand, takes up his decret, and causes mend it; and then, reproducing it in the clerk's hand, he competes. But it being challenged as not the decret of adjudication which he had made use of before, he acknowledged the same, but affirmed he might lawfully mend it, conform to the principal minutes and warnings of process in the clerk's office.

The Lords found his adjudication null; seeing he should have applied to them, representing the mistake, and craved their authority to have been interposed to the emendation thereof.

Then he, by a bill, craved the Lords would allow him yet to extract a new decret of adjudication, conform to the true minutes and warrants.

This the Lords also refused, to deter any from manufacturing of writs, or putting their hands to them, without warrant of a judge; and remembered they had done the like some years ago, betwixt Mr David Dewar, advocate, and David French, writer in Edinburgh.

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1709. *June 1.* The OWNERS of the KATHARINE of ROTTERDAM *against* CAPTAIN GORDON and the OFFICERS of STATE.

[See the Report of this Case, Dictionary 11,936. The following procedure was the consequence of it.]

THE President produced a writ of subpcena served against him and the clerks, directed from a court of delegates of the Admiralty of England, in pursuance of a treaty of commerce betwixt them and the States of Holland, narrating, that the ship called the Katharine of Rotterdam was condemned by the Scots Admiralty, and then, in a reduction, by the Lords, as a lawful prize; whereof the States having complained, they now served inhibition by a *certiorari* against the Scots judicatories, not to raise horning, or use other execution thereon, till it be reviewed.

The Lords thought this an encroachment and invasion upon their supreme power and jurisdiction, and contrary to the nineteenth article of the Union, confirming the privileges of the Session. And, however their sentences may be cognosed by the Parliament and House of Peers, yet they owned none others above them. Some were for slighting it, as expecting no satisfactory reparation. Others thought, the Lords being guardians and keepers of the liberties and privileges of the Session, they could not pass it unnoticed; and so the generality

inclined to send up a memorial to the Secretaries of State, complaining of it, that they might do their duty, whatever should be the event. This affair gave rise to sundry discourses upon the Union. *Vol. II. Page 499.*

1709. *June 4.* JOHN BURDEN *against* JAMES OLIPHANT of GASK.

THE deceased William Oliphant of Gask grants a bond to John Burden, bearing he had been his servant for several years, and it was reasonable he should not be a loser; therefore, in place of his fees and disbursements, he obliges his heirs to pay him 350 merks; and he pursuing James Oliphant, now of Gask, on the passive titles, for payment, he repeats a reduction, that it was on deathbed.

ALLEGED,—Ought to be repelled; because it is not a mere gratuitous bond, but depends upon an anterior onerous cause, his being five years immediately before his death in his service.

The Lords found the reason of deathbed relevant, as also his service; both to be proven *prout de jure*.

And the depositions of the witnesses coming this day to be advised, it was ALLEGED,—That the debtor's assertion in the narrative of the bond, bearing to be granted for services, was not probative, being a confession emitted on deathbed: and the witnesses did only prove his service, but not any paction or agreement for a settled fee; which is necessary *inter majores*; as was found, *12th February 1680, Ross against the Master of Salton*. And it is to be presumed, either there was none stipulated, or that it was paid, seeing they depone he got both board wages and clothes; and no use of payment is so much as alleged.

ANSWERED,—He has abundantly satisfied the terms of the Act, burdening him to prove his antecedent service, which he has done to a demonstration; and the Lords have ever sustained bonds though granted on death-bed, if depending on a just and necessary cause *ab ante*; as appears by the following decisions in *Dury, 7th January 1624, Shaw and Gray*; and *13th July 1632, Pollock against Fairholm*; and many times confirmed since.

The Lords first considered that, by the 83d Act, 1579, servants' fees, above three years, are prescribed, as presumed paid, unless redargued by oath, which could not be got of the heir; and therefore restricted the onerous cause to three years' service. And next, they thought 350 merks was too exorbitant a fee for that space, especially having been furnished both in meat and clothes: and they would follow the same rule they had lately done, in the pursuit, *Mr Ker against the Marquis of Lothian*, and modify it in so far as there seemed to be an *excessus*. And, therefore, modified the fee to forty pounds Scots per annum; and so brought down the bond from 350 merks to £120 Scots; and decerned for that sum. *Vol. II. Page 499.*