

pany him to the circuit Court of Justiciary, to be held at Jedburgh, 10th May, 1709, conform to her Majesty's proclamation: upon Mr. Joseph's failure in that piece of duty, Wedderburn caused Alexander Nisbet, his baron-officer, cite him personally at his dwelling-house of Ninewells, to compear the 28th of the said month, at a court to be held by Wedderburn's bailie at Hutton, who decerned him in absence to pay L.50 Scots of fine. Ninewells suspended upon this ground, that he was not lawfully cited, the copy being given to him at his house of Ninewells, which is not within the barony of Hornden: and the baron-officer could execute no summons without the barony.

REPLIED for Wedderburn,—Albeit the suspender was not cited within the barony of Horden, the citation is valid; because he is by his charter obliged to appear at all the charger's courts when required, whether he dwell within the barony or not; which implies, that he may be cited for that effect at any place.

DUPLIED for the suspender,—By attendance at courts, in the charter, personal suit and presence only is meant; and payment of feu-duties is meant by the doing every thing that the vassal ought in law to do: but he is not bound to answer to any action at the superior's instance, unless cited duly within the barony; for *extra territorium, jus dicenti impune non paretur*.

The Lords sustained the reason of suspension, That the baron-officer did execute the libel whereupon the decret charged on proceeded, *extra territorium*; and found the decret to be null.

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1711. February 2. PATRICK STRACHAN, Writer in Edinburgh, *against*
The Town of Aberdeen.

IN the action of extinction of an infeftment in the lands and fishing of Rutherstane, granted to the town of Aberdeen, in anno 1672, for security of L2800, at the instance of Mr. Patrick Strachan, who was infeft in the year 1674; the Lords found it instructed by documents produced, that the salmon fishing possessed by the town, was under tack for payment of ten barrels of salmon of tack-duty for the year 1679; and, therefore, presumed the rent of the fishing for the following years to be conform to the said tack, and found the town liable to count accordingly, unless they can elide the presumption by a contrary proof and documents: albeit it was alleged for the town, that though the rental of lands (whereof the natural growth and product is more fixed and determined,) is presumed to continue the same: yet in counting for casual rent, as that of a salmon-fishing, a precise rule cannot be laid down, nor so much as a presumptive rule, for subsequent years; but every year's product ought to be positively proved: in respect it was answered for the pursuer, that this pretended difference of casual and fixed rent, as to the manner of counting, hath no manner of foundation: for no rent is so fixed as not to be subject to alteration, and to rising and falling by different seasons and accidents, though some be liable to more hazards than others; and, therefore, the

rule of counting must be uniformly the same, till an alteration of the rent be made appear.

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1711. *February 13.* The MAGISTRATES of Paisley *against* their VASSALS.

IN the process at the instance of the town of Paisley against their vassals, the Lords, *July 20, 1710*, having found the defenders liable for their proportion of the cess in time coming, did now find them liable also for their proportion of the cess for the year 1705, and since then; and that the cess must be subdivided and proportioned among the heritors, by the commissioners of supply of the shire in manner following; viz. by leading before them a probation of the real rent of the whole lands in property and superiority liable in cess, and imposing and proportioning the said cess upon the lands in property and superiority, according to the real rent thereof.

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1711. *February 16.* ANDREW CUTLER, late Apprentice to the deceased HOMER GRIERSON, Chirurgeon in Dumfries, *against* MARGARET LITTLETON, Homer's relict.

IN the action at the instance of Andrew Cutler against Margaret Littleton, as representing Homer Grierson, for repayment of the half of L20 Sterling, paid in name of prentice-fee by the pursuer to Homer Grierson, with annual-rents thereof since the payment; upon the ground of law, *causa data non secuta*, the master having died while the half of the time of the prenticeship was to run: *Stair, Instit. Tit. Restitution, §. 17* :—

ALLEGED for the Defender,—No part of the prentice fee can be repeted: because the defender, after her husband's death, kept open shop and a young man capable to teach the pursuer, all the time contracted. And *July 24, 1707*, representatives of *Rule contra those of Reid*, one of three persons to whom a bond for 600 merks was granted for their overseeing the granter's interment, and children during their minority; having died before he was at any trouble or expense in overseeing the children; his representative was found, notwithstanding, to have right to the third part of the sum. Therefore, much more ought the defender to be asoilyied in this case; where the money was paid, and the prentice educated more than two years. The citations out of my Lord Stair's Institutions come not home to the case: for things given *intuitu matrimonii*, if marriage do not follow, or be dissolved within year and day, return to the giver, because in that case marriage is reputed not to have been.

REPLIED for the pursuer,—Since indentures, that are mutual obligements, continue till the expiration of the prenticeship, *eo momento* that the master died