

piece of work, and cannot do it, but his *fidejussor* offers to complete it, the other party is not obliged to accept it; for *industria personæ eligitur*. *Replied*, It is not usual to forecast such accidents and events as the master's death; and, by the practice of London, though the master or apprentice die the next week, there is nothing repaid, unless specially pactioned: and, in Holland, it is divided into annual payments, and not all given in at the beginning, as with us; though by the canon, civil, or municipal, laws it were otherways.—THE LORDS, by plurality, found a recompence due to the apprentice in that event of the master's death during the currency; but did not think it was to be divided equally *pro rata temporis*, seeing the master had little benefit by his prentice's service during the two years it stood; and therefore would not sustain the repetition for the half, but only for a third of the apprentice-fee; and sustained that answer, that they offered to instruct him by a man past his apprenticeship, and he refused. The custom in Edinburgh is, that the deacon of the trade puts him to a new master.

*Fol. Dic. v. 1. p. 47. Fount. v. 2. p. 637.*

No 2.

1727. *January 20.*

HORSEBURGH *against* HYSLOP.

It being objected against indentures between a master and his apprentice, That they were null by the statute, eighth year of Queen Anne, imposing a duty upon sums stipulated by indentures, in regard that, contrary to that statute, five guineas had been paid to the master's wife more than the apprentice-fee inserted in the indentures. The LORDS found it relevant to annul the indentures, that the compliment to the wife was contracted or agreed for at or before signing the indentures; and also found it relevant, that the compliment was given with the master's knowledge after signing the indentures, and before tendering the duty, though not previously bargained for.

*Fol. Dic. v. 1. p. 48.*

No 3.

Found relevant to annul indentures upon the statute, 8th of Q. Anne, imposing a duty on the sums stipulated, that a present had been, before tendering the duty, given to the master's wife, with his knowledge, whether bargained for or not.

1738. *January 10.*

MACLEOD of Cadboll *against* WILLIAM SINCLAIR, Saddler in Edinburgh.

CADBOLL bound David Ross an apprentice to the said William Sinclair, paid L. 25 of apprentice-fee with him, and likewise became cautioner in the indenture; of which (upon Ross's deserting his master's service) Cadboll brought a reduction on the act *octavo Annæ*, entitled, 'An act for laying certain duties on 'candle, &c.' specifying, That, over and above the apprentice-fee, the defender covenanted the additional sum of a guinea to be paid to his wife, which accordingly was paid some time thereafter, and which, not being inserted in the indentures, inferred a forfeiture of double the apprentice-fee, besides voiding the inden-

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No 4.

A present of one guinea had been given to the master's wife, half a year after the date of the indenture. Found that the forfeiture by the statute is double the sum so re-

**No 4.**  
 ceived, recoverable only in Exchequer; and that action could not proceed at the instance of the cautioner in the indenture, to have it declared null, and to obtain repetition of the apprentice-fee, the apprentice having deserted.

tures; however, the pursuer did not insist on the penalty, but restricted his action to the nullity and repetition of the money paid.

For the defender, it was *pleaded*, That the penalty in the act, upon the receivers of any sums not contained in the indenture, is only a forfeiture of double of such sums received; the one half to the Crown, the other to the informer. *2do*, The guinea does not fall within the statute, it being no part of the apprentice-fee, directly or indirectly, but was given as a compliment to his wife, half a year after the date of the indentures, for taking care of the young man, who was kept at bed and board in the family; and, if such gratuity is constructed to fall within the act, it would reduce the most part of the indentures in Scotland, this being the known custom with respect to all house-apprentices.

THE LORDS found, That the forfeiture, by the statute, is only double the sum received by the defender's wife, and that the same is recoverable only in the Court of Exchequer; and therefore repelled the reason of reduction founded thereon; but found the indentures could yield no action, and that there is no repetition of the sum in these indentures competent to the pursuer.

*C. Home, No 80. p. 132.*

1742. June 29. JOHN, &C. WRIGHTS *against* ENSIGN LUMSDEN.

**No 5.**  
 A matter can reclaim an apprentice if he enlists.

ENSIGN LUMSDEN having enlisted George Clark, John Wright claimed him as his apprentice, conform to indentures produced. The Justices of Peace declared Clark free from his Majesty's service, and that he belonged to John Wright his master: Whereupon Ensign Lumsden offered a bill of suspension, and *pleaded*, That there was no express statute prohibiting the enlisting of apprentices; that there was nothing in an indenture to give it a preference, in that particular, to every other contract. It is no more than a contract in writing; and yet it was never pretended, that any other contract, verbal or in writing, did afford the creditor in such contract a right to claim his party from his Majesty's service. It was never alleged, that an hired servant, if enlisted, could be claimed by his master; yet he is as much under contract as an apprentice; with this difference, that the term of his service is generally shorter. If one was bound, by charter-party, to perform a voyage, this would not give the merchant a right to claim such man from the service; for this good reason, That there is no exception or exemption of persons in the acts of mutiny and desertion. *See act anno 12mo, Annæ Reginae.*

For the master it was *urged*, That the question is here about the power a person has of enlisting himself voluntarily; the King's prerogative has no concern in that matter; it must depend on the power one has over himself; and none can be a volunteer, unless he is at his own disposal: and, therefore, to encourage such people to enter into the service, they are to receive L. 4 Sterling as a premium, or enlisting money, by acts made in Queen Anne's time. And by none of the recruiting acts made in that reign, were they in force, as they are not, could