

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

George Clark be pressed into the service. It would seem absurd, therefore, that the will of him, who is not at his own disposal, but is a bound apprentice, should liberate him from his master's service.

The LORDS refused the bill of suspension.

Fol. Dic. v. 2. p. 32. C. Home, No 200. p. 333.

* * * The same found in a case, in which the parties were STEWART against GRANT, 26th November 1778, not collected.

Fol. Dic. v. 2. p. 32.

1754. February 14.

SYLVESTER DONALDSON against WILLIAM FULTON.

FULTON put out his son apprentice to Donaldson shoemaker. The sum to be given with the apprentice was not inserted in the indenture; but, in lieu thereof, Fulton accepted a bill for L. 3: 3 Sterling, payable to Donaldson. Donaldson having charged on this bill, Fulton suspended; and the case was reported by Mr Alexander Boswell of Auchinleck, Lord Probationer.

Pleaded for Fulton the suspender: No action can lie on this bill; for that the indenture on account whereof it was granted, is itself void. The act *act. Ann. cap. 8.* provides, that the full sum of money received, or in anywise directly or indirectly given, with every apprentice, be inserted in the indenture; and in default thereof, that the indenture be void, and the apprentice incapable of acquiring his freedom, or of exercising his intended profession. Now, in the present case, the sum given with the apprentice was not inserted in the indenture, but a distinct security taken for it; the indenture is therefore void by the statute; and the bill, as it cannot be separated from its cause, must be also void.

Pleaded for Donaldson the charger: When the sum given with the apprentice is not inserted, the act *act. Ann. cap. 8.* voids the indenture, but not any separate obligation for such sum: And therefore, although the indenture should be found void, the bill must subsist. The cause of granting the bill was not that the apprentice might be free of a corporation, but that he might be taught the trade of a shoemaker; and this cause is not removed by the voiding of the indenture.

THE LORDS sustained the reasons of suspension.

A. J. Grant.

Alt. Wedderburn.

Reporter, Auchinleck.

Fol. Dic. v. 3. p. 32. Fac. Col. No 98. p. 148.

Dalrymple.

No 5.

No 6.

A man binding his son apprentice inserted no sum in the indenture as apprentice-fee; but, in lieu thereof, accepted a bill to the master. The indenture null on the statute, and the bill not actionable.