

judication, that it was null and informal, because he being constituted assignee to most of the debts for which it was led, he had raised his charge to enter heir against Eccles before he had got these assignations in his person, and so the charge was *filius ante patrem*.

ANSWERED, *1mo*. He had a debt due to himself, which was sufficient to support the charge, that debt being antecedent thereto; *2do*. Before the charge to enter heir was executed, he had all these assignations in his person; which was sufficient, the giving the charge being the true application of the diligence:

REPLIED,—They did not quarrel the adjudication as to his own debt, but only *quoad* those conveyed to him; *2do*. The charge being the warrant by which he was charged to enter heir, and these assignations being posterior to the date of the charge, they were unwarrantable and destitute of a warrant; and so the Lords found, *15th November 1666, Abercrombie*, marked both by Stair and Dirleton; though Dirleton subjoins another between *Kennedy* and *Hamilton* to the same purpose, yet the first speaks only of an assignation taken after the summons was executed.

The Lords divided on the question, five against five, and the President for the time did cast the balance by finding the adjudication not null, though the charge preceded the assignations, seeing the execution on the charge was posterior; and so repelled the objection.

*Vol. II. Page 179.*

1703. *February 13.* JAMES SCOTT *against* WILLIAM SIMPSON.

JAMES Scott, servant to Mr Archibald Hamilton, advocate, gave in a complaint against William Simpson, servant to Robert Boyd, writer, that he had the day before beat him to the effusion of his blood, in the afternoon, when the Lords were sitting; and craved redress. Simpson, being brought by a macer, acknowledged his fault, but ALLEGED the Lords were risen before the quarrel fell out; which exculpation the Lord accepted, seeing, if it had been done while they were sitting, it was death by the 177th Act of Parliament 1593; therefore, they sent him to prison, and ordained him the next day to stand with a paper on his brow, mentioning his crime, betwixt nine and ten in the forenoon, at the great door of the Parliament-House, guarded by some of the Town of Edinburgh's company, to be a terror and example to others, and there to crave pardon on his knees; all which was executed, and on his humble application he was at last liberated out of the prison. He had no means, else he had been likewise fined, and extruded the Session-House.

*Vol. II. Page 180.*

1703. *February 23.* GEORGE BAIN'S HEIRS *against* ALEXANDER YOUNG.

PATRICK Suity being established a factor at Campvere, by the royal boroughs, he found Alexander Young, merchant in Edinburgh, his cautioner. George Bain, merchant there, did send over some parcels of goods to the said Patrick, to the value of 2500 merks; and having received no account of the product from the factor, the said George's heirs pursue Alexander Young the cautioner, for count, reckoning, and payment; who ALLEGED, *1mo*. That a great part of the

goods sent was tallow, for which the cautioner can never be liable, because the export thereof is prohibited by the 12th Act 1621 ; and he being his cautioner, in his public character and capacity, it can never extend to what he acted unwarrantably and illegally, for wrong can have no warrant ; and the meaning of his bond of cautionary could only make him liable for staple goods transported, and not for what stands prohibited by express law, though merchants venture on such prohibitions on the prospect of gain ; and cautioners cannot be judges, nor known to all the goods they export.

ANSWERED,—*1mo.* That act is plainly in desuetude, as appears by the 37th Act 1661, where the exporter of tallow is obliged to bring home bullion ; *2do.* In the book of rates there is an imposition upon exported tallow, which is an evident dispensation with its export.

The Lords repelled the cautioner's allegiance, in respect of the answer.

Then, *2do.* He ALLEGED,---That the said Patrick, the factor, was recalled and discharged by the boroughs from his office in July 1675, at which time most of these goods now pursued for were in his hands unsold, and so the cautioner cannot be countable therefore ; because, from the date and period of his being exactorator, the bond of cautionary fell and ceased, it enduring no longer than the boroughs trusted him in that office.

ANSWERED,---It was not the sale and disposal of the goods that made the cautioner liable, but the time of his receipt of the same, at which time it is not pretended he was discharged ; and in all thir cases *initium est spectandum* : and it were ridiculous for a cautioner, for a tutor, curator, or chamberlain, to pretend he is free, because, though he intromitted with the victual during the standing of the office, yet he had not sold it till his office was ended ; even so here.

REPLIED,---He wrote to some other merchants there, to secure his goods when he heard Patrick Suity was put off ; which was an evidence he looked on the cautioner as free.

DUPLIED,---Whatever prudential caution he used to secure the goods, it can never liberate you ; but, as a cumulative security, it was a favour done to the cautioner.

The Lords likewise repelled this second allegiance, and decerned against Young the cautioner.

*Vol. II. Page 181.*

1703. *February 27.* JOHN GRAHAM of DOUGALSTON *against* CAPTAIN SANDERSON.

CAPTAIN Sanderson, being heritor of the lands of Balvy, did grant a factory, by way of contract, to John Graham of Dougalston, for uplifting the rents of these lands, during his abode in Ireland ; and the Captain, coming to Scotland in 1702, gave in his double to be registrate, and took out horning thereon ; but, after inspection, Dougalston found the double given in as a principal was but a copy, and had neither of their subscriptions ; and thereon raised improbation against Captain Sanderson, as the user of a false writ.

ANSWERED,---It was very true the writ he gave into the register proved only to be a mere copy ; but it is as true, that was the paper he got from Dougalston