

and unfit for any affairs, and that his mother managed all with his consent; and that he accepted the discharges, and that the same are in the charter kist; and that it was *utiliter gestum*, since Beinston would have comprised if they had not paid annualrent. *Item*, the payer was mother to both, viz. both Congilton and the Lady Beinston; and so, presumed to have a like affection and care for both. On thir considerations the Lords decerned both for principal and annualrents.

*Advocates' MS. No. 253, folio 112.*

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1671. November 14. ANDREW MARTIN *against* MR. JAMES KENNEDY.

THIS was a suspension of a decret obtained before the Bailies of Edinburgh, on thir two reasons, *first*, Because the said Andrew, pursuing as factor for an Englishman, no factory was produced, and so, he having no title, the decret was intrinsically null; *second*, Kennedy at that time was Sheriff-clerk of Aberdeen, and so not liable to the Bailies' jurisdiction.

It was ANSWERED to the *first*, They opponed the decret wherein he is holden as confest. To the *second*, He cannot be heard to decline the jurisdiction of the town; because they offer them to prove he resided forty days before the decret pronounced, within the town, or after it; and so by the constant practise, he must be answerable thereto.

This was found relevant, and admitted to probation.

*Advocates' MS. No. 254, folio 112.*

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1671. November 14. ARCHIBALD HYSLOP, Bookbinder, *against* MONTGOMERY of Mackbiehill.

THIS is a charge upon a bond of 200 merks; which was suspended upon this reason, That though the bond bore borrowed money, yet he offered him to prove by the charger's oath, that the true cause of granting this bond was not money received, but allenary for prentice-fee, to be paid by the defender for his son, whom he had bound to the charger. Which being granted, then the charge behoved to be suspended *simpliciter*, and the bond declared void and null; because he offered him to prove that the boy lived not half a year after his entry, and so there can be no prentice-fee due, and the bond falls *in non causam*. It is *causa data causa non secuta*; it now remains with the charger, *sine omni causa*.

ANSWERED,—That whatever would be, where the prentice-fee is due by an indenture, which has mutual obligations on both master and prentice; on the master to teach his calling, on the prentice to serve dutifully; yet it is far otherwise where there is a bond granted for borrowed money: in which case he obliges himself *in omnem casum* for the money, and undergoes the hazard, whatever it may be; unless he be able to make it appear, that *per eum et ejus culpa*

*stetit* that the boy stayed not out his whole time, or that he ran away because of hard and unaccustomed usage, or that he died.

REPLIED,—He acknowledged no difference betwixt an indenture and a simple bond save this, That an indenture was *probatio probata* to itself, and he needed no more to instruct the cause of the debt to be for prentice-fee but the indenture itself; whereas an absolute bond would militate against me without any remedy, if the party to whom I granted the bond be dead. But he being in life, I will cause his oath serve instead of a back-bond, and I will make him confess that the true cause of it is for prentice-fee; which being once done, then there remained no imaginary difference betwixt it and an indenture. But what defence would elide him charging on the indenture must undoubtedly meet a charge on this bond; and, therefore, if no prentice-fee due upon indenture could be craved when the boy died so shortly after, neither can it be sought upon a bond.

DUPLIED,—They offered them to prove that it was the custom of the burgh of Edinburgh, though prentices died within the years, yet the hail prentice-fee was due; and where the master died, then ere his relict or executors can have right to the prentice-fee, they must bind the boy to a master of the same trade for the years yet remaining.

They were to have the Lords' answer on it.

Then Sir J. Harper added another reason, That *esto* the Lords find prentice-fee due, though the prentice die presently after his entry, (which they will never do,) yet in this case it will never be due; because he offers him to prove the boy was starved with hunger and cold, in default of the charger.

ANSWERED,—He offers him to prove it was in his father's default, who hindered him to come home to his house to diet and bed. *Vide supra, numbers 133 and 134, [February 1671.]*

*Advocates' MS. No. 256, folio 113.*

1671. November 14. Anent a STEP-FATHER MARRYING HIS STEP SON'S RELICT.

THIS day it was questioned amongst the advocates, What was to be judged of a marriage where a step-father married his step-son's relict. *Exempli gratia*, if John Boyd, bailie, could marry Adam Steven his step-son's relict, (supposing Adam had been married and were dead,) or if rather it were not incest. That same question will occur in a step-mother, if she might lawfully marry her step-daughter's husband, the step-daughter being dead. The advocates were divided in their opinions. Sir George Lockhart thought it lawful. In my humble opinion, I think it noway safe; seeing *inter eas personas quæ locum parentum liberorum-ve inter se obtinent, nuptiæ contrahi non possunt usque in infinitum*, they being *ascendentes et descendentes*; so that if Adam were now on life and not Eve, he could not find a wife whom he could lawfully marry. *Item, in recta linea quicunque gradus prohibentur in cognatione seu consanguinitate, iidem prohibentur in affinitate*. And though the relation that intervenes betwixt me and my step-son's wife, be only *affinitas affinitatis* or *affinitas in secundo gradu, uxoris meæ filius* being to me *in primo genere affinitatis, illius uxor in secundo*, and so ought to