

day, on a report, decided. It was thus :—There was a bond, blank in the creditor's name. Hector's name was filled up in it; and, at the filling up, he grants a back-bond, declaring it to be merely in trust, to the behoof of, &c. Thereafter, Hector's creditors arrest this money in the debtor's hand. He to whom the back-bond was given, compares for his interest, and, by producing the back-bond, proves the money arrested to be his. (See Dury 14th November 1628, *Cumming*. See the Compend of Durie's Decisions, *verbo* Bands. See this decision elsewhere. See 22d February 1681, Poor of the West Kirk.)

ANSWERED,—The back-bond never being intimated, it can produce and found no more but a personal action against Hector, the granter; for the fee and property of the money, stood in Hector's person; and, if such back-bonds were allowed, it would open a door to all cheats. REPLIED,—The back-bond made the money his to whom the back-bond was given. That *teneris scire conditionem ejus cum quo contrahis, L. D. de Regulis Juris*. That, where a bond is appraised or adjudged, of which there was a discharge anterior, yet the discharge meets the assignee though it be a latent deed. See of discharges of bonds or tochers, of the same date with the obligations, *supra*, No. . See also of mutual and co-respective obligations, *supra*, [No. 377, December 1672,] in the *Master of Salton's* case.

The Lords found the back-bond needed no intimation, and that it affected the money so that it could not be arrested for the person's debt whose name was filled up in the bond, if the back-bond was truly of a date prior to the arrestment.

This decision was thought very strange by some; yet the Lords had formerly decided the same case thus: yea, they had found the same before, in a stronger case, *viz.* though it was comprised by the trustee's creditors from him, yet that the back-bond met the said singular successors.

The Lords were as sensible as any, of the many and great inconveniences which followed this decision: but wished a Parliament might remeid it, by ordaining such back-bonds to be registrate; for the Lords could not help it.

*Advocates' MS. No. 722, folio 319.*

---

1676. *December.* CASE of the SHIP called the CALMER.

IN December 1676, the King wrote a letter to the Lords of Session anent the ship called the Calmer, with Sir Lionell Jenkins, one of the Judges of the Admiralty of England, complaining the Lords should have declared that ship prize, only because some few in the ship were Hollanders; which could not, in law, infect the rest. This was charged upon John Inglis, and he blamed for informing the Swedes' resident, and the College of Commerce of Stockholme. The Lords wrote up a vindication of themselves in that affair, and a defence of our custom for not-publication of the testimonies of the witnesses whereupon it was adjudged and found prize: though it was alleged this concealment was only used in courts of equity in other parts of the world, where the parties get not leave to hear the witnesses' depositions; but, in all courts of law (such as is the Session) all the world over, the depositions of the witnesses are patent, and are so with us: for there be few parties and their advocates but *viis et*

*modis* they get a sight of the testimonies. It would seem this apology has not satisfied ; for the King, notwithstanding thereof, by his letter in April 1677, has called for the depositions and whole minutes of that process to be transmitted to him, and ordains the parties concerned to attend him at Whitehall. And John Cunyngame of Entirken, the King's writer, raised the summons for that effect, being of a new style, and unheard of before. Which is a most extraordinary Act, and astonished all : for, besides that it may be used as an argument of our dependance on England, all other processes may, on misrepresentation, be remanded to Court, and revised and recanvassed there ; so it is a sore wipe upon the Lords, as suspected of great injustice ; and is, by the most knowing persons, called twenty times worse than Almond's Appeal from them to the Parliament, (of which *vide supra*, No. 445, in February 1674,) or the advocates' address.

But, in the beginning of June 1677, his Majesty, being better informed, writes down a new letter to the Lords, retracting the former, and declaring the decisions of the Session shall be ultimate and definitive, &c. Yet see the treaty marine between our King and the French, in February 1677, article 12. It is hard to make a King contradict himself in a month's time.

*Advocates' MS. No. 516, § 11, folio 269.*

1677. *July 27.*—The case of the Calmer ship (*de quo vide supra*, No. 517, § 11,) being again debated this day, the Lords, of new, adjudged that ship, and found it prize. And the President tartly reproved John Inglis for blowing up the poor strangers, and making them believe the Lords had done them open and manifest iniquity and injustice, and either understood not, or discerned not conform to the law of nations. But, on the 31st of July, John Inglis having obtained a new hearing, they sustained this defence relevant to liberate and free that Calmer ship ; that Secretary Coventrie had a power to fraught the ships either of enemies, or allies, or neutrals, for his Majesty's service ; and that this ship was one which was accordingly so fraughted by him. And upon this knack, in a trace, did the Lords retract four consecutive sentences of their own, finding it prize ; and they now declared it free, for it was generally opined to be a free ship. Some thought Lauderdale influenced this change. There was much debate in this cause from the law of nations.

*Advocates' MS. No. 627, folio 298.*

1678. *February 7.*—This day the Lords, of new, advised the affair of that prize ship, called the Calmer ; and, because of John Inglis, advocate, his passion in this action, anagrammatized the clamour : and found the allegiance of competent and omitted was *juris positivi* and municipal, and so extended not to strangers ; but that the allegiance of proponed and repelled was *alterius fori*, and touched the sovereignty of the court, and would meet strangers as well as others. And, to knock the hail business in the head by the overruling power of the King's letter, impetrated by the Swedes' ambassador, and complaining of the Lords' procedure in the matter,—for there were four consecutive decreets finding it prize,—they indirectly reversed all they had done, and took it quite off the file, and found it a free ship, unless Souton, the master of it, should depone upon oath that it belonged to Holland. Now, Souton was clear to depone the contrary ; and this did so order the probation, that, if Souton had died *medio tempore*, the ship would have been simply free.

*Advocates' MS. No. 724, folio 319.*