Robert Malloch presents a bill of suspension of that act and order, whereon my Lord Whitehill, then Ordinary, gives a sist of execution; but either it was fully closed up before the intimation of the sist, or the tradesmen proceeded on their hazard. Robert Malloch, by a bill to the Lords, complains of this as a contempt of their authority, and contrary to law; which being referred to the Lord Anstruther, then Ordinary on the Bills, it was ALLEGED by the Magistrates, That the opening or closing of their ports was a point of government and policy of the burgh, and wholly in their own power. They acknowledged such ports and entries to the city as had been used and possessed past memory, or during the space of forty years, could not be shut up; but, within that space, they were judges to the convenience thereof, and, if they found any prejudice, they might alter it: and here there was a visible disadvantage, for their own tradesmen ran out to this place, and set up there, contrary to the foresaid 154th Act. And as to their working after intimation of the Lords' stop, they denied the same.

ANSWERED,—That the gates of cities were *juris publici*, and reckoned in law *inter res sanctas*; and where there is once a *jus quæsitum* to the people, the same cannot be taken away to their prejudice. And forty years' possession is too long, seven years' being sufficient, in such cases, to introduce the benefit of a possessory judgment. And the old Act 154th is now derogated from by the 31st Act 1693, introducing a communication of trade to burghs of barony and regality, they bearing a part of the burden with the burghs-royal; and this place of Moutrees-hill lies within the shire.

There also arose another debate between the Town and the said Robert.

He ALLEGED, That, in so far as his ground fronted with the North Loch, he had interest therein; as it is with heritors bounding to the banks of rivers, sec. 23 *et* 24, *Instit. de Rer. Div.* And therefore he filled it up with earth taken out of a quarry, and turned over the Loch to the Town's side, to their prejudice. The Town, on the other hand, did stop the vent and passage of the Loch, which made it overflow and drown Robert's new acquired ground; of which he likewise complained as an act of oppression.

They ANSWERED, The North Loch was wholly theirs, and within the royalty and contained in their charter; and therefore he could drain no part of it, especially to make it regorge and inundate on their side.

The Lords were going to take trial by examining the witnesses; but the Magistrates prevented it, by opening the said port of their own accord, without abiding an order, and let the sluice run. *Vol. II. Page* 110.

1701. *February* 25. ROBERT RUTHERFORD *against* SIR ROBERT DOUGLAS of AIRDIT.

I REPORTED Robert Rutherford against Sir Robert Douglas of Airdit, now of Gleanbervy, and the Children of Duncan Ronald, writer. Sir Robert, at Whitsunday 1699, left, in the hands of the said Duncan, his agent, £130 sterling, to be paid to one Ogilvy, on his clearing some right; but that not being so quickly done, it is resolved that Duncan shall lend out the money, but so as it may be easily

raised; for which end he gives it in to Robert Rutherford, cashier for Provost Home and the other commissaries to the army, and takes a ticket payable to himself; but the commissaries having met some time after, they, by an act of sederunt, subscribed with their hands, declared there was £150 sterling borrowed at Lammas 1699 from Sir Robert Douglas, for which they were to give him bond, with annualrent from the said term of Lammas. In the mean time, Duncan Ronald dies, and his son finding the ticket amongst his father's papers, he claims the sum. Sir Robert Douglas founding on the act of sederunt, Robert Rutherford suspends on double poinding: wherein Mr Ronald craved to be preferred, in respect of the clear liquid obligement given to their father for repayment of the said £150 sterling. Sir Robert Douglas urged that the money contained in that ticket was his; which he endeavoured to evince from thir probabilities and presumptions:—That he offered to prove, by the oath of Duncan Ronald's relict, his servants, and apprentices, that he depositated in his hands £150 sterling; and that, when he lent it to the commissaries of the army, he declared it was Sir Robert's money; and that the deceased Hugh Blair, then cash-keeper to the commissaries, has expressly set it down in his book, that it was Sir Robert's money; which fortifies the declaration contained in their act of sederunt.

Answered,—They opponed the ticket payable to Duncan Ronald and his heirs; and if he was but a trustee for Sir Robert, that now, by the late Act of Parliament 1696, can only be proven *scripto vel juramento* of the party intrusted; who being now dead, there remained no imaginable way to clear it but a declaration under Duncan Ronald's hand; which they did not pretend to have.

Replied,—That Act of Parliament did not concern this case, but was only intended where one did not think fit to insert their own name in a writ, but borrowed the name of another; and what if I trust a servant to pay or uplift a sum, must I have writ from him to instruct it was my money?

The Lords demurred if the Act of Parliament did extend to this case, and thought it not safe, by distinctions, to diminish the security of that new law. Yet, to have the matter fully before them, they allowed Sir Robert, before answer, to prove the facts condescended on by him, and gave him a diligence for recovery of Hugh Blair's books; and this in regard it was very presumable to be the same individual sum Sir Robert left with Mr Ronald. Yet some thought there might be two different sums; for there is here both *diversitas personarum et diversæ obligationum formæ et stipulationes*, though *eadem summa*. See Menochius *de Arbitrariis Judicum Quæst. lib. 2, cent. 3, cass. 213*; and Mascardus *de Probationibus*. *Vol. II. Page* 111.

1701. *June* 6. William Clopton and George Watson *against* Duncan M'Intosh.

William Clopton, merchant in London, and George Watson, his factor, pursue Duncan M'Intosh, merchant in Edinburgh, for £76 sterling, contained in his accepted bill of exchange in 1695.

Alleged,—No process at your instance, as factor; because Clopton, your constituent, is either turned bankrupt, conform to the statute in England, or,