

## APPRENTICE.

1686. December 17.

ZACHARIUS MALVENIUS, Goldsmith in Edinburgh, *against* HEPBURN his  
Apprentice, and RICHARD BAILIE his Cautioner.

It is a charge upon an indenture against a prentice's cautioner for damage and interest. *1mo*, For his running away from his master's service. *2do*, For committing fornication, and so he ought to serve double the time. *Answered*, To the 1st, As for the condescence of his breaking away, all the former ones are past from by his taking him back; *dissimulatione tolluntur*. And for the last, I, the cautioner, offered him back to you within two or three days; and as the law decides in another case, *l. 48. D. de reg. jur. quicquid in calore iracundiæ fit vel dicitur non prius ratum est quam perseverantia et judicio animi factum esse appareat*; and therefore the servant having *brevi reversus, divertisse non videtur, et de minimis non curat lex*; and your cruelty in starving him was the cause of it; for though *modica castigatio* be allowed, yet *venter non habet aures*. And as to the fornication, it was never heard of till the boy was away, and is now raised, and his oath sought when he is in Virginia, merely to vex the cautioner; and though he were at home, it is *in materia turpi et criminali*, and so he cannot depone to the prejudice of his cautioner, a third party, to draw such an extravagant article of damage on him. The LORDS, on Redford's report, find the offering the prentice back again, in the terms of the allegiance, relevant to liberate the suspender thereafter; and that the fornication cannot be proven by the prentice's oath; and and the suspender producing the instrument of offer, the LORDS found it did not prove the offering of him back; but that the witnesses and notary must be examined thereon. (See PROOF.)

*Fol. Dic. v. 1. p. 47. Fountainball, v. 1. p. 438.*

1711. February 17.

CUTLER *against* LITTLETON.

By indentures past betwixt Homer Grierson, chirurgion in Dumfries, and Andrew Cutler and his friends, in 1706, the said Andrew is bound apprentice to the said Homer, to learn his art and trade of surgery, for the space of four years, and the master was to maintain him in bed and board; for which there was a separate bond given of the same date and witnesses for L. 20 Sterling, which was after-

### No 1.

A cautioner for an apprentice being charged upon an indenture for damages, on account of the apprentice having run away, it was found relevant, that the cautioner offered him back, within a few days.

### No 2.

The master having died at the end of two years, of a four years apprenticeship, the apprentice

No 2.  
found entitled  
to recom-  
pence for the  
time which  
had not ex-  
pired; but to  
the extent  
only of a  
third, not  
half, the ap-  
prentice fee.

wards paid. About two years after, the master dies, and the apprentice, being cast loose, was forced to bargain with another, and pay a new apprentice-fee: Whereon he intents a process against Margaret Littleton, his master Homer's relict, on the passive titles, for repetition and repayment of the half of the apprentice-fee, with annual rent since the payment, in regard he was destitute of insight in that calling, by his master's death. *Alleged, imo, Non constat*, it was paid, seeing that bond bore borrowed money. *Answered*, it is clearly *pars contractus*, being of the same individual date, and before the same witnesses. The LORDS thought it was sufficiently instructed to have been granted for the apprentice-fee. *2do, Alleged*, it cannot be repeated *conditione ob causam datam causa non secuta*, seeing the two years entertainment and instruction was but soberly paid by the L. 20 Sterling, which will be but fixpence a-day; and the first two years of any apprenticeship is of little or no use to the master, seeing they can neither compound drugs, nor phlebotomize, nor apply any thing to purpose; so they are all that time reputed but a trouble and burden; the third year they are indeed worthy of their meat, and thereafter they are worth more. Next, it was his own fault he deserted the house, for he still kept the shop according to the privilege indulged to tradesmen's widows, by the custom of royal burrows, and had a young man past his apprenticeship who served therein, by whom he might have been instructed and taught the time of his apprenticeship: and in a late case, 24th July 1707, betwixt Rule and Reid, the like was decided. Rule left 600 merks to Reid and other two neighbours, on this narrative, that they should oversee his interment, and inspect the education of his children. Reid, after the testator's death, scarce ever came abroad, but was by sickness confined to his house till his dying day; and this being objected against his representatives, that he should have no share of the legacy, he dying before the cause was fulfilled, yet the LORDS found he had right to his third part, seeing he had overseen the funerals, and outlived the term of payment: *Multo magis* here, the master having alimented and taught him for two years, which required a greater reward than any thing he got; and it was *bona fide* spent; so the master was more a loser than a gainer. *Answered*, The obligation was certainly *sine causa quoad* that space of time yet to run of the apprenticeship cut off by his death. And thus Stair, *tit. Restitution*, says, restitution takes place in these things *quæ cadunt in non causam*, though they at first came warrantably to our hands, if the cause fail; as in marriage dissolving within year and day, &c. And it is uncontrovertable by the common law, *ubi operæ sunt locatæ*, the work must be performed ere the reward can be sought; and if it be not fully performed, he must default the *merces* and hire *pro tanto*, l. 38. *D. locati*. And as to the offer of supplying it by another, *nullo modo relevat*, there being a *dilectus personæ* by whom I chose to be instructed; for there is a vast difference betwixt tradesmen, both *ratione ingenii, naturæ, doctrinæ, et institutionis*. And what if an apprentice ran away from his master, not through default, but, *ob sævitiam*, for his cruelty, will not the apprentice recover a part of his fee though paid? And l. 31. *D. de solutionib.* determines, if an artificer undertakes a

piece of work, and cannot do it, but his *fidejussor* offers to complete it, the other party is not obliged to accept it; for *industria personæ eligitur*. *Replied*, It is not usual to forecast such accidents and events as the master's death; and, by the practice of London, though the master or apprentice die the next week, there is nothing repaid, unless specially pactioned: and, in Holland, it is divided into annual payments, and not all given in at the beginning, as with us; though by the canon, civil, or municipal, laws it were otherways.—THE LORDS, by plurality, found a recompence due to the apprentice in that event of the master's death during the currency; but did not think it was to be divided equally *pro rata temporis*, seeing the master had little benefit by his prentice's service during the two years it stood; and therefore would not sustain the repetition for the half, but only for a third of the apprentice-fee; and sustained that answer, that they offered to instruct him by a man past his apprenticeship, and he refused. The custom in Edinburgh is, that the deacon of the trade puts him to a new master.

*Fol. Dic. v. 1. p. 47. Fount. v. 2. p. 637.*

No 2.

1727. *January 20.*

HORSEBURGH *against* HYSLOP.

It being objected against indentures between a master and his apprentice, That they were null by the statute, eighth year of Queen Anne, imposing a duty upon sums stipulated by indentures, in regard that, contrary to that statute, five guineas had been paid to the master's wife more than the apprentice-fee inserted in the indentures. The LORDS found it relevant to annul the indentures, that the compliment to the wife was contracted or agreed for at or before signing the indentures; and also found it relevant, that the compliment was given with the master's knowledge after signing the indentures, and before tendering the duty, though not previously bargained for.

*Fol. Dic. v. 1. p. 48.*

No 3.

Found relevant to annul indentures upon the statute, 8th of Q. Anne, imposing a duty on the sums stipulated, that a present had been, before tendering the duty, given to the master's wife, with his knowledge, whether bargained for or not.

1738. *January 10.*

MACLEOD of Cadboll *against* WILLIAM SINCLAIR, Saddler in Edinburgh.

CADBOLL bound David Ross an apprentice to the said William Sinclair, paid L. 25 of apprentice-fee with him, and likewise became cautioner in the indenture; of which (upon Ross's deserting his master's service) Cadboll brought a reduction on the act *octavo Annæ*, entitled, 'An act for laying certain duties on 'candle, &c.' specifying, That, over and above the apprentice-fee, the defender covenanted the additional sum of a guinea to be paid to his wife, which accordingly was paid some time thereafter, and which, not being inserted in the indentures, inferred a forfeiture of double the apprentice-fee, besides voiding the inden-

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No 4.

A present of one guinea had been given to the master's wife, half a year after the date of the indenture. Found that the forfeiture by the statute is double the sum so re-