

liable to pay the Scots duty, which the judge refused to insert; whereas, the price he decerns, deducing the duty, is cheaper than the prime cost it stands at the Plantations.

ANSWERED,—Mr Lutwidge being a stranger, who might retire where he pleased, it was just and necessary to arrest him, and make him answer, though in vacance time: and, seeing he found not caution *judicio sisti et judicatum solvi*, the sheriff might very well put him to deponé anent the bargain. And he mentioning John Murray as a partner, why might not the judge decern for him as well as James, it resulting from his own oath? And that the bargain was cheap, was never sustained in Scotland to reponé any. And the tie of an oath is so inviolable and sacred, that he ought not to be heard to impugn it *postquam juratum est*.

The Lords thought this case stronger than that of the 18th February 1680, *Burnet* against *Ewing*; where one being arrested at London, and giving a bond to be free, the bond was reduced; therefore, the Lords here turned the decret to a libel, and reponed the stranger thereagainst. *Vol. II. Page 345.*

1706. July 23. WILLIAM BLACK, &c. Tenants of Gogar, against HUGH MACGILL and ALEXANDER MALCOLM.

LORD Minto reported Black against Macgill and Alexander Malcolm. Alexander, being infeft by Meldrum of Tillybodie, in an annualrent of £1000 out of the lands of Gogar, pursues a poiding of the ground against William Black, and other tenants thereof, before Hugh Macgill, bailie of the regality of Culross, within which jurisdiction the lands lie.

The tenants ALLEGED,—No poiding against us; because our master, the granter of the infeftment, nor his heirs, are not called to defend us, as they ought to be. The bailie having repelled this, the decret goes out, and the poor tenants are poided, and they broke; whereupon they not only raised suspension, but likewise a reduction and declarator, wherein they call the judge and clerk to be decerned to refund and pay the hail skaith and damage they have sustained through the palpable gross iniquity committed by him in the foresaid decret, and likewise to be deprived of his office, conform to the certification of some old Acts of Parliament.

When this was called, the Lords were very clear to annul the decret, and reponé the tenants against it: But the debate arose on the conclusion against the judge and clerk. And as to the clerk, he being a passive-obedience man, there was no difficulty in assoilyeing him, who must write as he is directed.

And, *quoad* the bailie, it was ALLEGED,—The error here committed was only in a punctilio of form, and the heritor's heir was unknown, the land having been so long in the hands of the creditors; and such a pursuit was wholly new and unprecedented: and the Acts of Parliament founded on were either in desuetude or only struck against judges who, by bribery and corruption, determined unjustly. And how many decreets of inferior judges are every day annulled and reduced on informalities; yea, even on natural iniquity and injustice, as directly contrary to law and Acts of Parliament! yet the judges are never made liable for the parties' damages. And, if this were once sustained, there would be in-

finite pursuits. And when *the Lords Forret, Newtown, and other criminal Lords*, were pursued by *the Earl of Argyle, in Parliament 1609, for their sentence of forfeiture against his father*, the same was dropt and let fall.

ANSWERED,—The Acts are very clear, viz. Act 45, 1424 ; Act 77, 1457 ; Act 26, 1469. And Act 104, 1540, declares, That judges must have sufficiency of their own, wherein they may be punished, and make up the parties' damages, in case they trespass : and if they do not justice evenly, they are to be rigorously punished at the King's sight, and be deprived totally, or for a time. And there could not be a more gross and palpable injustice than to sustain process and to refuse to call the heritors of the ground : and if a private man, wronging another, is bound to repair, much more a judge, seeing *corruptio optimi est pessima*. The common law indeed says, *Si judex litem suam fecerit male judicando, tenetur parti in damno et interesse* ; but the doctors distinguish whether it be *per imprudentiam* or *dolo malo*. If it be by corruption or gross favour, it is certainly punishable : But, if it be an error *in apicibus juris*, in some nice debateable points, it were a dangerous office to be a judge, if such mistakes should make them liable. It is certain, that ignorance in judges is a very great fault ; but there are two sorts of it, viz. *ignorantia puræ negationis, et prævæ dispositionis* ; and the last is the worst.

The Lords assoilyied the judge from this process for damages.

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1706. July 27. ANNA MACMORRAN against CAMPBELL and LORD CESNOCK.

DAME Anna Macmorran, relict of Sir George Campbell of Cesnock, pursues her daughter and my Lord Cesnock, her husband, for paying her 4000 merks for her mournings and habiliments, conform to her quality, at his death ; having put a room or two in black, covered her street-chair, and clothed two servants, a page, &c. and craved as much for entertaining the family till the next term, being near six months, he having died in the end of November 1703.

ALLEGED,—My lady had a separate estate of her own in Fife, and the moveables, out of which she might reimburse herself ; and though, by a clause in her contract of marriage, she claimed a third of the plenishing, yet the moveable debts far exceeding the value of the whole, she could have no retention of any part of them till the debts were paid. And, as for the aliment of the family, there were provisions of coals and meal, &c. in the house, and so there needed the less.

The Lords remembered, that, about four years ago, in a pursuit of this nature by the Laird of Prestongrange, as assignee by Dame Jean Morrison, Lady Dirleton, his sister, they modified only £1500 Scots for mournings, and £50 sterling for the family's aliment, though my Lord Dirleton's estate was far beyond Cesnock's ; and that luxury in thir cases was not to be encouraged, therefore they only allowed 1000 merks for her mournings, and the like sum for the family's maintenance till the next term, though she instructed by her accounts that she had expended much more on both. Some were for giving her 2500 merks for all ; but the plurality carried for 2000 merks as aforesaid.

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