

accomplishing her voyage ; and, by the admiral's order, the goods are roused, and the ship disposed of. Baggot and his factor raised reduction of the admiral's decret, and insist on thir reasons, That he committed iniquity in repelling this defence, That Tanqui, the owner of the ship, did not obtemper the charter-party in sailing *en droiture*, in a straight course to Amsterdam, but touched first at Cadiz, and then at Brest ; by which diverting of the voyage the ship came, by unseasonable weather, to be driven and broke on the north of Scotland.

ANSWERED,—When you, Baggot, freighted my ship, you saw 102 tuns of Provence wine stowed in it for the use of the French king's cellars, to be unloaded at Brest ; so my going there was neither a surprise to you nor a diverting of the voyage.

The Lords repelled this reason of reduction ; and found their unloading at Cadiz and Brest no diverting of the voyage, nor contravening the charter-party.

The *second* reason of reduction was, That the Admiral had found the merchants, owners of the cargo, liable for the damage that happened to the ship at Inverness ; which was unjust, seeing it was occasioned by the fault of Tanqui and Andry, for whom they were noway liable.

ANSWERED,—You gave a commission to Jean Swart to oversee the ship, and to bring your goods safe to land at Amsterdam, either in that ship when it should be refitted, or in another ; and by his negligence the ship came to be lost, and so you must be liable for his deeds.

REPLIED,—All the power he had from the merchants was to preserve the cargo, they having no right to give him directions about the ship, which belonged to Tanqui and Algiari, the proprietors ; and therefore they can never be reached for the damage that happened to the ship.

The Lords, by a scrimp plurality, found the merchants not liable for the prejudice the ship sustained ; but reduced the admiral's decret as to that point, and turned it into a libel.

Swart did likewise allege, That the damage was not by his fault ; because it appeared, by the depositions of the witnesses taken at Inverness, the seamen refused to obey him : and this was said, by the maritime laws, to be a sufficient ground to assoilyie the skipper from the seamen's process, craving their wages from him.

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1709. February 10. ALEXANDER GORDON of AUCHINTOUL against DUFF of BRACCO.

THE deceased Duff of Bracco being debtor to Alexander Gordon of Auchintoul in £1000 Scots by bond, Bracco's son, after his father's decease, sends his servant with the haille money, principal and bygone annualrents, to Auchintoul's house ; and, in presence of the said creditor, on the 21st February 1707, offers him the money, and counts it down on the table, in specie current at the time ; and, upon his refusal, he consigns it in the hands of one Grant of Ruddy, to lie there, to be forthcoming to his use ; and takes instruments on the offer and consignment, and protests he may be free of annualrent in time coming ; and if

any damage emerge, that it may be on Auchintoul the creditor's risk. What made him decline to accept of it was, that he thought the offer unseasonable, being between terms, and surprised with the suddenness of it, without any previous advertisement, he knew not how to dispose of it; besides, there was a rumour then dispersed, and which accordingly fell out, that the money was to be called in, and made conform to that of England, in the terms of the Union; and he apprehended that Bracco was taking advantage to palm that loss upon him.

Auchintoul having raised a process for payment, it was ANSWERED,—The money lies consigned, you may take it up when you please. And, accordingly, the consigned money being ordained to be transmitted to the clerk of the process, it was ALLEGED for Auchintoul,—I am not obliged to accept of it; and so incur not only the loss of my annualrent since that time, but likewise the downfall of the species of money then offered, and now prohibited, and no better than bullion to be taken by weight, which will amount to 400 or 500 merks of clear loss. And the consignation can never sustain, for thir reasons:—*1mo*, It was *oblatio in-tempestiva*, twenty days after Candlemas, which in Aberdeenshire is no known term for paying money, but only Whitsunday and Martinmas; and, being included within terms, I was not bound to receive it. *2do*, If I refused, your remedy was to have suspended, and consigned the money, and not to have made a voluntary consignation in your own tenant's hands; all legal consignations being to be made *authore prætoris*, by an intervention of a judge; or, in the case of wadsets, in the hands of the magistrates of such a town: which method Bracco not having followed, his consignation was not to be regarded, they being *strictissimi juris*; and, failing in the least punctilio and solemnity, they cannot subsist: *liberatio non continget nisi solemniter facta, et consignatione totius pecuniæ debitæ*,—*l. 9, C. de Solutione*; for *solutio per partes non minima habet incommoda*. And this Menochius explains,—*De Arbitrariis Judicium Quæst.*—that it must be *oblatio et consignatio totius quantitatis debitæ, adeo ut ne unus nummus deficiat*. *3tio*, The consignor so far disposed of the consigned money, that he sent it to Captain Grant of Elchies his house, who was Bracco's factor; and so was all one as if it had been delivered to himself. *4to*, It was but a simulated consignation; for, by comparing the species then offered with what is now produced at the bar, there is a diversity betwixt them, which could not be had it remained constantly sealed. *5to*, It was but a captious offer, being at a juncture when the money was to be cried down, viz. the English crowns, passing then at £3:5s. Scots, were shortly after reduced to £3; and the ducatoons, dollars, &c. were totally discharged to pass; and some of it consisted of the French threepenny pieces: and the same Menochius is clear, that *nec offerri nec deponi potest pecunia quæ adhuc non est quidem reprobata, sed est de proximo reprobanda*.

ANSWERED for Bracco to the *first*,—He opposed his bond, bearing monthly, termly, and proportionally; so I may pay my creditor any time after the term of payment is past, providing I pay him up his annualrent to the day. To the *second*,---No law obliged me, upon your refusal, to put myself to the trouble and expense of a suspension and consignation in the clerk of the bills' hands, where I must pay so much consigned money ere I can lift it; but if I find my creditor at his own house, I may offer him his money, and, on his refusal, consign it in any responsal man's hand, as Craig and Stair, p. 333 and 148, say, in conventional consignations; but, if the creditor be not present, then law requires *ut interpellatur magistratus*; whereupon Perezius, *ad tit. C. de Usuris*, concludes,

that, by such a consignment, *omne periculum à debitore amovetur*. To the *third*, ---*Esto* the consignator, Ruddry, thinking his own house not secure, had carried it to Elchies, as a more safe and fencible place, that can never alter or infringe the consignment; for what if he had flitted, might he not remove the bags with himself? To the *fourth*, *Esto* there were any difference of the species, (which is very small, not exceeding £4 or £5 Scots,) yet that was occasioned by Bracco's putting £40 Scots more in the bag than paid the sum, in case any of the money had chanced to be cast; and the taking that out occasioned the alteration. To the *fifth* it was answered, that the calling in of the money was not for some months after, so that he had time enough to have got it exchanged with current money, if he had not refused it.

The Lords were all clear, That, if Bracco had either taken up the money after it was consigned, or any way meddled with it, he would be liable both in the annualrent and the downfall of the specie; but this was not categorically alleged.

Then it was argued if this was a legal consignment.

Some thought, where a debtor comes short-hand to his creditor, and in an unmannerly way presently offers him his money, and, if he be not at leisure, shall instantly consign it, this ought not to be allowed; but there should be a previous intimation some days before, that he may be in readiness both to receive and to know how to dispose of it. Others said, the thing may be legal, though indiscreet; and the plurality of the Lords found Auchintoul was bound to have accepted of the money, and the consignment was legal; and so the loss fell upon him.

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1709. *February 11.* WILLIAM ROLLAND *against* JAMES CATTANACH.

MR William Rolland being debtor by bond to James Cattanach, merchant in Aberdeen, in £725 Scots, he causes apprehend him with caption, by Archibald Paterson, messenger, and incarcerate him in the tolbooth of Edinburgh. Rolland gives in a complaint to the Lords, with concurrence of Sir John Johnston of Westraw, lieutenant-colonel to my Lord Polwart's dragoons, representing, that, by the late Act of the British Parliament, made last winter, entitled, Act for the better Recruiting her Majesty's Land Forces and Marines, it is declared, no person voluntarily enlisted in her Majesty's service, as a soldier, can be taken out of the service and imprisoned, except for some criminal matter; and that the said Mr Rolland had actually listed himself a dragoon in that regiment, as his testificate and furlough bears; yet they had imprisoned him, though his engaging in the Queen's service was intimated to them; and therefore craved that they might be punished for their contempt, and he set at liberty.

ANSWERED,—By a posterior Act of the British Parliament, made within these two months, the said privilege, as inconvenient, was restricted, and a method prescribed in taking them on, which he had not observed; and, even by the Act cited, the justices of the peace were to return the names of all such to the secretary of war's office, by which the muster rolls were to be made up, and the deserters known; so he was noways in the terms of the said act. Likeas, he was a collector in the excise-office, which afforded him £50 sterling per annum, and