

that, by such a consignation, *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 consignation; 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 consignation.

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 consignation 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

was incompatible with his duty as a soldier, seeing he could not attend both ; and, though he had enrolled his name, yet he neither wore the habit of the dragoons of that regiment, nor got their pay, but merely listed to shun diligence and defraud his creditors : and a distinct garb was rationally introduced, that, soldiers not being the best debtors in the world, men might not be ensnared to trust them, by their disguising and concealing their trade. And, though that privilege and exemption may be a great inducement for men to enlist themselves in the queen's service, and recruit her army, yet it is not nominal soldiers will do the business, but real ones, who are ready to go beyond seas, and serve in the armies there. And such sham soldiers have no more right to privileges than honorary burgesses to the liberties and profitable offices within a burgh : and, to put such a gloss upon it, is *fraudem legi facere, et salvis verbis mentem circumvenire*, seeing none can think the Queen and Parliament intended, by these acts, to protect and patronize bankrupts, against the law, and to defraud the other part of her good subjects, who pay her cess, without which she cannot pay her armies : and this is nothing but to encourage false musters, and to give her the empty name of soldiers, when truly she has none. And the Romans, who understood military discipline beyond all the nations in Europe, *l. 15 et 16, C. and l. 1, D. de Re Militari*, have discharged their soldiers to engage in any other employments, *ut armorum quotidiano exercitio se preparent ad bella* : and no others had the *beneficium competentiae* but such, *l. 6, D. de Re Judicata* ; and, when they had furloughs, their privilege ceased,—*l. 34, D. ex Quib. Caus. Major. Commeatu recepto, si domi est, reipublicae causa abesse non videtur*.

REPLIED,—This would downrightly frustrate and annihilate the privilege ; for it is denied that they list only to save and screen themselves, without doing the duties incumbent on soldiers : for they are ready, if her majesty requires it, to go and serve in the confederate army in Flanders. And their having other trades can be no incapacity, seeing many of the English soldiers are wrights, tailors, shoemakers, &c. and work in their respective trades when they have leisure.

The Lords found the case new, and the point delicate ; to be handled with great niceness and circumspection, not to discourage the recruits on the one hand, nor to defraud the monied men, who must bear the burden, on the other ; therefore they ordained it to be heard in their own presence, before they passed so great a precedent and preparative.

On the 23d February, the Lords advised this point, and found this soldier not in the case of the Act of Parliament, and so had no claim to the privilege.

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1709. February 15. The EARL of HYNDFORD *against* The HAMMERMEN of EDINBURGH.

THE Earl of Hyndford against the Corporation of Hammermen of Magdalen's Chapel, in Edinburgh. When episcopacy was suppressed, in 1641, King Charles I. mortified a part of the bishops' rents to schools and colleges, and other pious and public uses ; and, among other donations, he gave the deaconry of the hammermen in Edinburgh £100 sterling yearly out of the feu and teind-duties belonging to the bishopric of Dunkeld, for maintaining some beadmen. This