

on men's fortunes ; but this process is of an universal concern ; for, once lay down that position,—Judges must answer in their goods and estates for all their mistakes in law and form, no wise or honest man will undertake such a dangerous post ; which my Lord Stair, *book 4. tit. 1.* expresses very well. If this were to be their fate, no man would embrace and accept the office of a judge but a beggar, a fool, or a knave. But this specious topic is not applicable here ; the Sheriff's character of integrity is established beyond suspicion. And *1mo*, in this case he did no wrong in refusing the oath of calumny ; for it behoved to be an oath of verity for the reason foresaid. *2do*, His offer to prove paid was justly rejected ; for, being bankrupt, his design was to entangle his master in a tedious count and reckoning, to stop a summary removing. *3tio*, If he thought himself wronged, the wisdom of the nation has provided an easier and a readier method to redress either the unskilfulness, negligence, or partiality of judges, than those old acts did, *viz.* by suspension or advocacion ; which this pursuer neglected, and would satisfy himself with nothing else than panneling the judge ; whereas, *ubi competit remedium ordinarium, non est recurrendum ad extraordinaria.* *4to*, *Esto* he had sustained damage by the judge's iniquous decret, yet he has received full satisfaction thereof by the sum he got on the decret-arbitral, proceeding on his own submission. So this process is an ill-founded novelty in all its branches.

REPLIED,—There cannot be a more wholesome remedy to stop the rapacity of judges, than to let them know they must be liable and answerable for their actings. As Aulus Gellius says, *Acerbitas ulciscendi fit medicina bene vivendi.* The doctors in law do indeed make two cases here, one *si judex per imperitiam male judicaverit*, and the other *si per sordes et dolo malo*. In the *1st* case, though *ignorantia in judice culpæ annumeratur*, yet it is not so criminal as in the *2d* : wilful gross iniquity is not to be covered with the soft names of error and mistake ; and *supra*, *27th July 1711*, in the cases of *Scot and Fraser*, and of *Leitch and Fairy*, the judge was put to make up the damage. And here the Sheriff's inveterate malice is more palpable ; for he wrote a letter to the Queen's Advocate, craving his warrant to seize Lewars, and make him a recruit, as a thief and an ill man. And any reparation he got from Mausley did not compensate the half of his damages.

The Lords, by a scrimp plurality, found there was no such iniquity in the decret quarrelled, though unjust, as could found an action against the judge for damages ; and therefore assoilyied. See the *2d of January 1667*, the *Earl of Murray* against *Home* ; where compensation was admitted to stop a decret of removing. *Ergo* payment should do it *multo magis*. See, also, *3d January 1672*, the *Lady Binny* against *Sinclair*. Judges are set up by God and their country to protect the lieges from oppression, but do not always answer their trust.

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1712. February 29. LADY KINFAUNS and her SON against MR JOHN MACKENZIE.

Mr Lord Nairn owing 22,000 merks to the Lady Kinfauns and her son, and resolving to pay it, the same was consigned in Mr John Mackenzie the clerk of

session his hand, till a new security were drawn ; and, when it is demanded up, the clerk claimed to retain the 20th penny, as the consignation money due to him by his office, which amounted to no less than 1100 merks.

ALLEGED for the Creditors,—There was no law for such a deduction ; it was not a custom, but a *corruptela* ; and was an exorbitant demand for a few days' custody.

ANSWERED,—Our ancient customs were a part of our law ; and this consignation-money had never been controverted, but usually divided betwixt the debtor and creditor, each of them bearing a halfpenny in the pound : and it was but just ; for they run the risk of bad money, and of its being stolen.

The Lords found consignation-money due, but to be exacted with discretion, and not to be screwed to the full ; and therefore modified the same here, and restricted it to 400 merks.

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1712. February 29. CHARLES JACK *against* EDWARD LAING.

CHARLES Jack against Edward Laing, skipper in Leith, his son-in-law ; who pursuing for his tocher, Charles ALLEGED,—It was destined to his daughter in liferent, and the heirs of the marriage in fee.

ANSWERED,—My wife consents to the uplifting ; and my bairns are only heirs of provision, and I am fiar of the sum.

And the Lords having found he might uplift it, Charles protested ; though his daughter had taken herself to her husband's security.

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1712. June 12. JOHN PATERSON *against* JAMES LESLY.

JAMES Lesly, brewer at Gravesend, having taken a brewery, malt barn, and lofts, from Robertson, for 600 merks of yearly duty ; and the lands, by disposition, coming to John Paterson ; he, by Walter Murray, his factor, pursues Lesly for the rent, before the commissaries of Edinburgh. Who, craving allowance for some reparations, and for his damages sustained through the said brewery's insufficiency, being neither water nor wind-tight, by which his victual was exceedingly spoiled, and offered to liquidate the same ; they refused to admit it in this process, but reserved him action as accords. Of which decret he craved SUSPENSION, on thir grounds,—That I wanted the use of the houses for which the hire was stipulated to be paid ; and, both in equity and common law, you are obliged to keep the brewery in repair. And the Commissaries were injurious in refusing my compensation, and denying me retention for my evident damages : for, *L. 19, sec. 1, D. Locati*, says well, *Sî quis dolia vitiosa licet ignarus locaverit, deinde vinum effluerit, tenebitur in id quod interest ; nec ignorantia ejus erit excusata, nam, sive scisti sive ignorasti, pensionem non petes*. And though compensation be not receivable after sentence, yet here it is most competent ; for it was proponed, and most unjustly repelled. Likeas, they have summarily