for most onerous causes, and a discharge of his intromissions in 1694; but likewise has an undoubted right to the lands by legal diligence of adjudications, far above the value,—yet they conclude against him for payment of more than 200,000 merks they say he is debtor in, after all his acclaimed debts are paid; which is so ridiculous a libel that no judicatory in Europe would allow inhibition to pass for such a sum. And there is nothing more ordinary than for the Lords, in such random demands, either to stop the inhibition *in totum*, or to restrict it to what has some shadow of probability: whereof many instances can be given; as in the *late Duke of Hamilton's case* against *Hamilton of Wishaw;* and the *late Earl of Home* against *Sir John Hall of Dunglasse;* and *Patrick and Sir John Houstons* against *Sir Robert Dickson of Inveresk.* And Stair, *lib.* 4, *tit.* 50, tells,—If any represent a just cause to stop inhibitions, the Lords use to do it; and particularly in the following cases:—If it be sought on remote grounds against a merchant, which may weaken his credit; if by a wife against her husband, or children against their parents; or against persons of great estate and dignity, on small and obscure claims, where their quality and solvency excludes all suspicion; or where it is sought on bare assertions, without probable documents. And there was never less reason for inhibiting than here.

ANSWERED,—It is calumnious to obtrude malice; for *qui jure suo utitur nemini injuriam facit;* and Sir Patrick's procrastinating this plea, these thirty years bygone, sufficiently justifies their procedure; for *damnum quod quis culpa sua sentit sentire non videtur.* And, as to his onerous causes, all they crave is to have them brought to light; for, laying by Sir Patrick's ill-instructed schemes and wrong arithmetic, he'll be found greatly debtor in the event of the count and reckoning. And, where can be the prejudice to inhibit you, who have been my trustee and administrator, and you refuse to count? If I were pursuing a tutor or curator, or my factor, and inhibited him on the dependence, with what countenance would he seek to stop it, because they have made their accounts intricate and involved, and seek to cover their effects and estate into third hands, and oppose the count to the last extremity?

It was started by one of the Lords, that there having been an appeal in this cause, that stopped all procedure, till it were shown to the Lords that it was discussed; and therefore it was unwarrantable in Sir Robert to raise inhibition, till he had produced the order of the House of Peers dismissing the appeal. Others argued, that these protests for remeid of law, when tabled, stopt execution, as poinding, horning, &c. but not legal diligences by inhibition or arrestment. But the Lords not having yet named a new auditor in place of Blairhall deceased, they stopped the booking the inhibition (for it was registrate,) for eight days, till an auditor shall be named: to whom probably they would remit the complaint and answers about the inhibition, whether it should be recalled, restricted, or not; and how far it was legal or unwarrantable; or to report.

Vol. II. Page 745.

1712. *July* 5. A. BYRES *against* MAJOR DOUGLAS of MORTON.

ALEXANDER Byres having a wadset on Major Douglas of Morton's estate, for

3243 merks, annualrents were paid as the Major could spare it, by receipts to account of annualrents in general, without clearing termly; so, by this indistinct way, neither of them knew well what was resting and what was paid. Alexander dying, Anna Byres, his daughter and heir, succeeds, and the same indefinite payments continue, till, the Major stopping, she pursues a poinding of the ground, before the Sheriffs of Edinburgh, for the wadset sum of 3243 merks. Wherein the Major contending there was not so much owing; her procurator, without any warrant that appears, restricts her claim to 1600 merks, and takes out decreet for that sum; and she, without adverting, arrests upon it, and pursues forthcomings; but, discovering her error, she requires the Major to produce all his instructions of payment; otherways she insists for the whole extended sum.

ALLEGED for Major Douglas,—That, besides the decreet, both her father and herself, by their letters produced, had restricted the sum to £1677 Scots; and, in regard of partial payments subsequent to thir letters, it is restricted by the Sheriffs' decreet to 1600 merks; and which she has clearly homologated, by arresting for that restricted sum allenarly, and pursuing forthcomings thereon: so she falls under the *pœna pluris petitionis* in demanding more.

ANSWERED,—1*mo*, One who is creditor in 1000 merks may pursue for 500, and is not thereby cut off from seeking the remaining 500 when he pleases. 2*do*, All this procedure was plainly *per errorem;* she being minor knew not what was owing her; and the confused conception of the receipts made her father as ignorant; so the letters prove nothing. And, as to the restricted decreet, the procurator of an inferior court, without a special mandate, can no more prejudge his client, by restricting, than they can defer to oath. And, as to her deeds of homologation, she pursued only as factrix for Alexander Reid, her husband, now abroad; and whatever she did, in managing this affair by mistake, cannot prejudge her constituent. And it is certain, that neither *error calculi* nor *error advocati* can hurt the parties; as appears from *tit. C. Advocatorum error litigatoribus non noceat; et calculatio pluries facta arguit, quidem, deliberationem, sed non tollit errorem.* And seeing she demands nothing but fair count and reckoning, her own or her procurator's miscounting cannot hinder her to seek redress from sovereign judges vested both with law and equity.

REPLIED,—The letters and the restricted decreet homologated must be the only rule of counting: and it is plainly captious to take advantage of a soldier, who has not kept his receipts so well as he ought to have done; and a tract of concessions, limiting the sum, can never be varnished over with the specious name of a mistake, as a single act might. And though you were factrix to your husband, yet the subject in controversy being, *quoad* the principal sum, heritable, he had no pretence thereto *jure mariti.* And, where lawyers mistake, there is no place to reclaim or reduce on that ground, if either the party be present, or do not *palam, ex incontinenti, id est, intra triduum,* contradict. Now this pursuer, Anna Byres, cannot subsume, in these terms, that she reclaimed for many months; and her warrant is presumed, especially having charged for the restricted sum.

The Lords thought there were no great weight in the other qualifications; but stuck at the homologation. However, to clear the point, they ordained Major Douglas, upon oath, to produce all the receipts and discharges he had relating to this debt. *Vol. II. Page* 750.