

ANSWERED for the Defender,—That such processes against inferior judges for determining wrongously in a point of form are unprecedented, and cannot be sustained : For it is well known that their decreets are daily reduced by the Lords, not only for escapes in some formalities, but also for material iniquity. And the Acts of Parliament concerning the punishment of unjust judges, as the Act 45. Par. 2. J. 1. Act 17. *ibid.* Act 76. P. 14. J. 2. Act 26. Par. 5. J. 3. and Act 104. Par. 7. J. 5. relate only to such as trespass wilfully and deceitfully, or by refusing to administer justice *animo protelandi litem*, or by giving partial counsel ; none of which can be applied to the defender, who is a man of known probity and integrity, and therefore should not be brought upon the stage for an innocent mistake in such a point of form as is libelled against him.

The Lords assoilyied the Judge.

Page 127.

1706. July 24. JOHN DONALDSON factor for the Earl of Panmure, *against* the MAGISTRATES and TOWN of Brechin.

JOHN DONALDSON, factor for the Earl of Panmure, having charged the Magistrates of Brechin, for 1200 merks due to him by the town per bond, they suspended upon this reason, That the charger is guilty of usury for exacting more annual-rent than is allowed by law ; and therefore the half of the sum belongs to the Magistrates as discoverers ; for which they repeated a declarator. And for instructing the reason of suspension and declarator, produced a discharge granted by the charger for L.45 Scots, as one year's interest of the debt. And to evince that the undue exaction was not through mistake, but of design, they pointed at a note written by the charger on the back of the discharge, bearing, that he allowed three quarters retention only.

ANSWERED for the charger,—That he opposed the discharge, which bore, that retention was allowed conform to Act of Parliament, and the superplus more than the due annual-rent was only 20 shillings Scots, an inconsiderable fourty-fifth part of what was truly due : and the Lords are not to cognosce *de minimis*. And the taking thereof can only be imputed to an error or mistake in the calcul ; for if he had had an usurary design, he would never have made his discharge so particular as to principal and annual-rent, but would have worded it so as the usury behoved to be otherwise proved than by the writ itself. Again, what is minuted on the back of the discharge is so far from inferring a presumption of usury, that it evinceth the contrary, *viz.* that how soon the charger was sensible of his mistake, he minuted on the back of the discharge that three quarters retention was only allowed, to the end the suspenders might be redressed at the next payment.

REPLIED for the suspenders.—In crimes of this sort, the *animus delinquendi* is to be noticed, which is certainly as great in small matters as in affairs of higher importance, if not greater ; as it is the sign of the greater baseness and depravedness of spirit to commit usury for a small matter, than for a considerable sum, where the power of the temptation might in some measure alleviate the crime. But then *majus et minus non variant speciem* : and our law sustained a criminal

dittay of usury, for taking the Martinmas interest of fifty merks upon the 18th of July, in the case of Purdie, anno 1666; and the like, November 28, 1668, in the case of Hugh Roxburgh; as appears from the books of adjournal.

DUPLIED for the charger,—The two cases urged from the books of adjournal do not meet; for there annual-rent due at Martinmas was exacted in the preceding July, which could not receive a favourable construction, or be imputed to the creditor's mistake: whereas, to infer usury from such a minute escape *in calculo* as the charger's is, might pave the way for catching the most exact and honestest men.

The Lords found the charger not guilty of usury, and that there was only error *in calculo*.

Page 128.

1707. *Feb. 20.* JOHN CALLENDER of Craigforth, *against* the Laird of Lundin.

JOHN CALLENDER having pursued the Earl of Melfort to pay a debt, which he referred to his oath; for taking whereof a commission was granted to the English consul at Genoa, where the Earl resided at the time, to be reported the first day of July, 1695; the Earl was forfeited on the second day of the said month of July, and in February thereafter, John Callender obtained the term to be circumduced, for not reporting the commission.

The Lords found, That the decreet of circumduction in February, 1696, holding the late Earl of Melfort as confest after he had been forfeited, cannot constitute a debt to prejudice the Laird of Lundin, donator to the forfeiture. Because a circumduction after the forfeiture could no more infer a debt against the king or his donator, than the rebel's confession, or giving bond could do.

Page 133.

1707. *March 13.* JOHN IRVINE of Kincaussie, *against* ALEXANDER DEUCHARS, Writer in Edinburgh.

IN the competition of the creditors of Streichan, John Irvine of Kincaussie, having arrested in the Earl of Murray's hands, at his dwelling-houe of Dunnibirsle, July 12, 1706; and Alexander Deuchars, writer in Edinburgh, having arrested on the 20th of the said month, in the Earl's hands personally, at his house of Tarnaway: Mr. Deuchars claimed to be preferred, because his arrestment, though posterior to Kincaussie's, was executed at the Earl's principal dwelling-house of Tarnaway, where the bulk of his estate lies, and seasin by his charters is expressly ordained to be taken, and where he was residing at the time: whereas Kincaussie's arrestment was executed only at Dunnibirsle, a private seat for a summer retirement, that is ordinarily allocated to the ladies of that family for a jointure house;