

pressing of some writs. And ordered the magistrates of Edinburgh to see it executed ; and fined him in 200 merks to be paid to Leckie. His poverty made the fine so small. Some proposed farther marks of disgrace ; but they were waved.

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1712. February 26. ISOBEL ELEIS, Lady Innergelly, against SIR ALEXANDER ANSTRUTHER OF NEWARK.

Lady Innergelly against Sir Alexander Anstruther of Newark. Isobel Eleis, Lady Innergelly, having a considerable land-estate from Eleiston, her father, she was persuaded to make over the right of it to Sir Alexander in 1698, as fitter to seek out merchants for it : and he grants a backbond to be countable to her for the price ; and to pay her an annuity of £100 sterling, in the mean time, deducing always 10,000 merks, as a premium for his pains. The seeds of discord being afterwards laid betwixt Colonel Lumisden of Innergelly, her husband, and her, Sir Alexander sells her lands of Shawfield to Daniel Campbell, and makes sundry transactions with others, but shifts to count to her ; and, instead of paying the annuity aforesaid, gives her suspensions yearly. So finding herself over-reached, she pursues an aliment, and obtains £50 sterling modified to her per annum, and the rest declared to accresce to her husband. While she was struggling under difficulties, Sir Alexander raises a declarator of exoneration of his trust against her ; and, in absence, obtains a decret Absolvitor ; whereof she now raises a reduction.

ALLEGED,—No process ; because *vestita viro*, and he does not concur : and, though his backbond declares her discharge of the annuity shall be sufficient without her husband, yet this clause, derogating *a jure communi*, can never be extended to judicial acts and pursuing of processes without her husband's consent.

ANSWERED,—There be few rules without some exceptions. Though a wife be *sub curatela mariti*, yet if he, after requisition, unreasonably refuse his concurrence, or be legally dishabilitate, she may proceed ; for, this being a privilege introduced in their favours, *non debet in earum perniciem trahi* ; and he having renounced his *jus mariti*, she may remove this clancular decret out of the way of claiming her full annuity ; for, *concesso aliquo jure, omnia creduntur concessa sine quibus illud expediri nequit*,—l. 2 D. de Jurisdict. And, if I can discharge alone, then *a majore*, I may take this decret out of my way alone, without my husband's consent.

REPLIED,—The Lords have never sustained such pursuits ; seeing she is not *integra persona* without him ; and so a wife was not allowed to reduce a horn-ing ; as Dury observes, 27th July 1631, *Hay* against *Rollo*. And Haddington, 9th January 1623, *Marshall* against *Zuill*, shows the Lords again refused it : but tells, the Parliament of Paris, in such cases, authorises one to be their *curator ad lites*.

And the Lords remembered they had done the same lately to the Lady Penkill, who, being separated from Dunbar, her husband (as the Laird and Lady Innergelly likewise are,) they having divided the jointure betwixt them ; they

would not sustain process till they first authorised her procurator to concur with her.

Then Sir Alexander ALLEGED,—She could never recur to the £100 sterling; because, by her decret of aliment, she had accepted of the £50 sterling, and consented the rest should go to her husband. ANSWERED,—It bore an express salvo, that it should be no homologation of the transactions betwixt Sir Alexander and her husband.

The Lords repelled the allegiance, in respect of the answer.

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1712. *February 28.* JOHN LEWARS *against* MR ANDREW HAY of CRAIGNETHAM, Sheriff-depute of Lanerk.

LEWARS *against* Hay. John Lewars being tenant to Carmichael of Mausley; and he suspecting his solvency, he pursues him before Mr Andrew Hay of Craignetham, Sheriff-depute of Lanerk, to remove, or else find caution for his rent. Against which the tenant craved, *1mo*, His master's oath of calumny, if he had reason to deny but he had intromitted with as many of his goods and effects as paid him. *2do*, That no such conclusion could be sustained in this process, unless there were two terms' rent run in the third unpaid; and this he could not subsume on.

ANSWERED to the *1st*, He was not obliged to give an oath of calumny; because the point being *in facto proprio et recenti*, by the Act of Sederunt it resolved into an oath of verity. And, as to the *2d*, it is not proven; but, on the contrary, he had made a disposition *omnium bonorum* in defraud of his master, and was *vergens ad inopiam*, and the ground likely to be cast waste for want of due labouring and of seed-corn.

The Sheriff refused the oath of calumny; and repelled the defence that the master had more in his hands than would pay him; and decerned in the removing.

The difference betwixt Lewars and his master was, after this, submitted, and a decret-arbitral followed, determining a sum to be paid by Mausley to his tenant; but reserving still the poor tenant's complaint against the Sheriff-depute. Whereon he raised a process against Mr Andrew Hay for repairing his damages, founded both on the common law, where *judex litem suam facit, tit. Instit. Obligat. quæ ex quasi delicto nasc.* and likewise on our municipal law and acts of Parliament; as Act 45, 1524; Act 26 and 27, 1469; where judges proceeding partially, wilfully, and maliciously, are not only to make up the party lesed their damages, but likewise to be punished otherwise. It is acknowledged, every wrong and erroneous sentence will not make a judge liable, where the point is *in apicibus juris*, and so dubious that wise and intelligent men have different sentiments; for which allowance must be given, since *humanum est errare*. But that is not Lewars's case: the judge has run in the very eye of the law, and contradicted its sense, words, and meaning, as clear as the sun; for I referred to Mausley's oath, that he owed me £197 Scots, and he refused it; by which partiality I lost the sum, he dying shortly after it; so my mean of probation perished.

ANSWERED,—It is true judges are not to be permitted to be arbitrary disposers