metster, measure it, who reported it to be 46 acres, 2 roods, and 13 falls; on the faith of which he sets it to one Lorn, a tenant; but afterwards, having some jealousy, he employs other two to remeasure it; who declare it to be 51 acres. And Oswald himself being allowed to make a second trial, he acknowledged it was 48 acres, though the sea had washen away some of the ground that was at first measured. Hook thinking himself prejudged by Oswald's false report, he raises a summons against him for damages, libelling that he set these lands for two bolls the acre; and he having measured the ground five acres short, he, by his gross ignorance, fraud, omission, or fault, had lost ten bolls every year of the nineteen of the tack, amounting to 2000 merks of damages, which he is bound to refund and make up, by the title of the Roman law,—*si mensor falsum modum dixerit.*

ALLEGED,—*Esto* there were an error and mistake in the mensuration, it can never make the defender liable, unless dole and fraud were libelled and proven, that he did it to get a cheaper bargain to the tenant, who was to take it by aiker-dale, and only to pay according to the number of the acres: For *l.* 1, *sect.* 1, of that same title says,—*Si agri mensor imperite et negligenter versatus est, sibi imputare debet qui talem adhibuit.* Neither is there any error; for, in the first report, he forbade him to measure the ends of riggs lying towards the sea, but only the arable ground; whereas, in the following mensurations, all is taken in: which makes the difference and the number of acres to swell beyond the former account. And no man could serve in any employment whatsoever, if, for every error and mistake, without fraud or guile, they should be liable in pretended damages.

ANSWERED,—That the defender being a professed metster, and taking money and hire for his work, he must be liable; seeing *imperitia in artifice*, professing skill of his trade, *culpæ annumeratur*, *L.* 132, *de Reg. Jur.* And the laws in the same title determine that he is liable *ob culpam, quia scit prætor eos ob mercedem intervenire.* And it is false that more land is contained in the second report than the first; for even the ditches, grass, and lee ground was included in measuring, both first and last. And he offers to subject it yet to a new trial, and it will be found to be no less than 50 acres, deducing what the sea has covered; so his damage is evident, solely occasioned by the said Oswald the metster's fault.

The Lords finding that the first report was not in the process, but some way amissing, which was the whole foundation of the process, they superseded to give answer, though Kincaid offered to supply it by his oath.

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1709. *July* 26. The EARL of SEAFIELD *against* SIR PATRICK OGILVY of BOYNE.

THE Earl of Seafield, as a real creditor of Sir Patrick Ogilvy of Boyne, pursues a roup and sale of his estate on the statute of bankrupt; in which he led a probation: And it being this day advised, the Lords found the rental and deductions from it proven, and, by the debts and incumbrances produced, he was

bankrupt, as far exceeding the value of his lands; and that his lands held part blench, part ward, and feu, some of them of the crown, and others of the Duke of Gordon, instructed partly by charters, and partly by the records of Chancery produced. And the rate such lands give in the shire of Banff, commonly, in buying and selling, was proven by neighbour gentlemen to be eighteen years' purchase, as to lands holden of the Queen, and sixteen for ward-lands, and fourteen years for lands holding black-ward of a subject. There did occur only two difficulties: the one, what value should be put on the marble quarry found in these lands. And though it appeared, by the witnesses' depositions, that he had bestowed above £5000 sterling on that project, in making two journeys to France, and bringing workmen to Scotland skilled in that affair, yet they likewise declared, that they knew no profit could be made by it; but, on the contrary, it had spoiled as much ground as would have paid several bolls of corn: which moved the Lords to put no estimate on it at all.

The next was to value two patronages. It was CONTENDED,—The Act of Parliament in 1690 had put a liquid price on them, at which they might be compelled to sell, *viz.* 600 merks.

ANSWERED,—In this computation the patron's own lands must be deduced; on which account the Lords put only 300 merks on each of them, as a sufficient price, with regard to his own interest in the parish. They were likewise ordained to produce what right they had to the teinds, in so far as they were not exhausted by ministers' stipends, or other burdens affecting them; whether they bruiked them by heritable rights, decreets of valuation, tacks, or the like, that the Lords might order how many years' purchase shall be put upon the same. And, as to mill-rent and fish-boats being casual, they thought they could not be valued at that same rate with other property. Then the Lords appointed letters of intimation and publication to be issued out at the several market-crosses and parish-kirks, for all bidders and creditors to be present, and exemed a part of the lands, disponed to Boyne's grandchild by Major Grant, from the sale, but with the burden of the infeftments lying upon that land.

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1709. *July* 30. PROTESTS for REMEID of LAW.

THERE were three protests for remeid of law to the British Parliament given in. One by Sir Alexander Brand against Sir William Binny and Sir George Hamilton, about the account of the price due by the public for the 5000 stand of arms. The *second*, By the Marquis of Annandale against Sir David Dalrymple, for repelling the defence of prescription proponed against his process of Reduction and Improbation, against the Vassals of the Barony of Hails. The *third* was, by Mr Alexander Brown of Thorniedykes and his Creditors against Brown of Bassindean, his son; because the Lords had ordained him to cede the possession of these lands on a summary complaint.—[*See this last Case in Dictionary, p.* 16,101.]

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