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 decreet 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 allegeance, 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 decreet-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

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 1*mo*, 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. 2*do*, 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. 3*tio*, 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 advocation; which this pursuer neglected, and would satisfy himself with nothing else than pannelling the judge; whereas, *ubi competit remedium ordinarium, non est recurrendum ad extraordinaria.* 4*to*, *Esto* he had sustained damage by the judge's iniquous decreet, yet he has received full satisfaction thereof by the sum he got on the decreet-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 1*st* case, though *ignorantia in judice culpæ annumeratur*, yet it is not so criminal as in the 2*d*: 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 compense the half of his damages.

The Lords, by a scrimp plurality, found there was no such iniquity in the decreet quarrelled, though unjust, as could found an action against the judge for damages; and therefore assoilyied. See the 2*d of January* 1667, *the Earl of Murray* against *Home*; where compensation was admitted to stop a decreet of removing. *Ergo* payment should do it *multo magis.* See, also, 3*d 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. *Vol. II. Page* 733.

1712. *February* 29. Lady Kinfauns and her Son *against* Mr John Mackenzie.

My 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