session his hand, till a new security were drawn; and, when it is demanded up, the clerk claimed to retain the 20th penny, as the consignation money due to him by his office, which amounted to no less than 1100 merks.

ALLEGED for the Creditors,—There was no law for such a deduction; it was not a custom, but a *corruptela;* and was an exorbitant demand for a few days' custody.

ANSWERED,—Our ancient customs were a part of our law; and this consignation-money had never been controverted, but usually divided betwixt the debtor and creditor, each of them bearing a halfpenny in the pound: and it was but just; for they run the risk of bad money, and of its being stolen.

The Lords found consignation-money due, but to be exacted with discretion, and not to be screwed to the full; and therefore modified the same here, and restricted it to 400 merks. *Vol. II. Page* 734.

1712. *February* 29. CHARLES JACK *against* EDWARD LAING.

CHARLES Jack against Edward Laing, skipper in Leith, his son-in-law; who pursuing for his tocher, Charles ALLEGED,—It was destined to his daughter in liferent, and the heirs of the marriage in fee.

ANSWERED,—My wife consents to the uplifting; and my bairns are only heirs of provision, and I am fiar of the sum.

And the Lords having found he might uplift it, Charles protested; though his daughter had taken herself to her husband's security.

Vol. II. Page 734.

1712. *June* 12. JOHN PATERSON *against* JAMES LESLY.

JAMES Lesly, brewer at Gravesend, having taken a brewery, malt barn, and lofts, from Robertson, for 600 merks of yearly duty; and the lands, by disposition, coming to John Paterson; he, by Walter Murray, his factor, pursues Lesly for the rent, before the commissaries of Edinburgh. Who, craving allowance for some reparations, and for his damages sustained through the said brewery's insufficiency, being neither water nor wind-tight, by which his victual was exceedingly spoiled, and offered to liquidate the same; they refused to admit it in this process, but reserved him action as accords. Of which decreet he craved SUSPENSION, on thir grounds,—That I wanted the use of the houses for which the hire was stipulated to be paid; and, both in equity and common law, you are obliged to keep the brewery in repair. And the Commissaries were injurious in refusing my compensation, and denying me retention for my evident damages: for, *L.* 19, *sec.* 1, *D. Locati*, says well, *Si quis dolia vitiosa licet ignarus locaverit, deinde vinum effluxerit, tenebitur in id quod interest; nec ignorantia ejus erit excusata, nam, sive scisti sive ignorasti, pensionem non petes.* And though compensation be not receivable after sentence, yet here it is most competent; for it was proponed, and most unjustly repelled. Likeas, they have summarily

detained his haircloth, gantries, and brewing looms, which put him to the expense of renewing them.

ANSWERED,—The Commissaries committed no iniquity; for you got them in good repair; and, if they failed, your legal remedy was by requisition of the setter; and, if he had neglected, then to have craved a visitation from the Dean of Guild, and his warrant; in which case you might have repaired yourself, and got deduction and allowance of it in the fore-end of your tack-duty. But you was so far from taking this method, that you paid your rent without seeking retention. *2do*, I am a singular successor; and so not liable for any damages before my right: and these being personal prestations, they can only affect the setter, my author, whom you may pursue to fulfil his part of the tack. And, as to any deteriorations since my right, I am willing to repair them. And, though my right flow from my brother, yet I offer to instruct the adequate onerous cause of my purchase. And, for the hair-cloth, &c. I have offered them back.

REPLIED,—My payment was on your obligement to allow my reparations, when instructed. And, though the tack be expired, yet the bruiking *per tacitam relocationem*, you are as much liable as your author was to perform his mutual obligements: for *tantum operatur consensus tacitus in casu tacito quantum expressus:* and *L.* 13, *sec.* 11, *D. Locati, et L.* 16 *C. Eod.* says, *qui tacuerunt videntur eandem locationem renovasse.* And it were a great discouragement to poor tenants, if their master's selling the land should deprive them of their damages sustained in his time, and not reach singular successors: his voluntary deed should not wrong them. And, in the strictest law, all prestations arising *ex natura rei* follow the thing into whatever hands it comes; and therefore this clause, obliging the setter to keep the house in repair, being both useful and necessary, must affect the singular successor as well as the original setter.

The Lords inclined to think the reparation and damages even followed singular successors; but, the case being new, they remitted it to the Ordinary to be farther heard. *Vol. II. Page* 737.

1712. *June* 17. COLONEL ERSKINE and PRESTON of VALLEYFIELD *against* The EARL of KINCARDINE.

COLONEL Erskine and Preston of Valleyfield pursuing the Earl of Kincardine, for extinguishing, at least restricting, a right he had; and referring it to his oath, and he claiming his privilege as a peer, that he ought only to give his word of honour, refused to depone: the Lords repelled this, and over-ruled him. But then, he still declining, and the Colonel craving a caption to bring him in, the Lords found, by the Articles of the Union, that he had the privilege of an English peer, not to be liable to personal diligence by caption; but considered our law must not be defective in such cases; and, if one compulsitor fail, then another must be introduced to make it effectual; which can be no less than the value and import of the cause, which you make me lose by refusing to depone. But, because that damage cannot be instantly liquidated, therefore the Lords, as an interim remedy, granted letters of diligence to charge the Earl to depone; and that under the penalty of £50 sterling in case of his contumacy; but prejudice to the Colonel to constitute and liquidate his farther damage as