

## DAMAGE AND INTEREST.

1583. *July.*CUMING *against* RUTHVENS.

**T**HERE was a supplication given in be Mr Archibald Cuming, making mention, how that he and Cuming of Condie, his brother, became cautioners for the young Laird of Ruthvens, to Margaret Erskine, sometime spouse to the said young Laird, that he should not molest nor trouble her, nor her tenants of the lands that appertained to her by right of her conjunct-fee, but that she should peaceably bruik and possess the same; and, if he did in the contrary or contravened, that she have it referred to her oath, the cost, skaith, and damage that was done to her, but any farther process, *nam ita cavebat contractus*. The said Mr Archibald being chargit and put to the horn, fled to the girth of the Canongait and Abbey and Halyrudhouse; and being there, Mr John Graham, justice-depute, be letters of caption, tuik him furth of the girth and wairdit him in the Castill of Edinburgh, and thairfor the said Mr Archibald compleint into his bill and desyrit to be put at libertie, unto the time that liquidation was maid of the cost, skaith, damage and interest, whilk was done to her be molestation of her umquhil husband, and the same being liquidate, offered sufficient caution for payment of the same. The question being reasonit *pomeridianis horis inter dominos*, some was of the opinion, that the desire of the supplication ought to be granted be reason of the daily practic, that when any person is obliged to another, either principal or cautioner, if the matter is not liquidate, or yet is *factum præstabile* be the party, there will ay suspension be grantit unto the time the liquidation be made, upon sufficient caution, as the compleiner offerit the same; for utherways, the party and compleiner might ay be halden in waird and perpetual prison for the not fulfilling of the thing whilk was uncertain, and not in his power to do. To this was *answered* be others of the Lords, that in the present case the *interesse* was referred to the party's oath, but any farther process, as it was conteinit into the said contract; and therefore, that remeid might be fund to the compleiner that she being called in judiciarie before the Lords to give her oath, was ready to give the same, as she had given

**No 1.**  
No probation of a real *interesse* was allowed, where a conventional one was stipulated.

No 1.

her bill thereupon, and so be present payment or consignment of the said soume, quantity deliverit be her oath and conscience, he might be put to libertie. To this was *answerit* again, that, or the quantity be referred to her oath, she behoved to prove the molestation; for, there was no other probabilitie of the molestation, but the narrative of her supplication. To this was *answerit*, That the matter was here *in executione parata* upon ane contract registrate and execution raised thereupon, and for not fulfilling of the whilk, the cautioner had passed to the horne, and where that the party is obliged to prove molestation that *in nova actione inchoata*, and also after the meaning of the law *ut expresse fact. in L. in actio. ff. de in lit. juran. et Alex. consil. 214. lib. sept. quod contra dolosum juramentum probatur interesse*, and the said L. of Ruthvens who had committed so many spoliations and depredations, and also his cautioner, who had gone to the horn for the same, could not be esteemed others but *dolosi committendi contra quos ex sententia predict. jurament. partis probatur interesse*. The matter being reasoned and dissented among the Lords, *pomeridianis horis magna contentione domini maxima ex parte* refused the desire of the said Mr Archibald, albeit the day before it was granted, *nam coram dominis consilii unusquisque sua habet fatalia*.

*Fol. Dic. v. 1. p. 207. Colvil, MS. p. 377.*

No 2.

A carrier's horse, hired to carry 16 stone, dying by being overloaded, the merchant having put 20 stone on his back, the Lords sustained process for the price, but not for the profits that might have been made of the horse.

1610. July 10.

STRATON against —.

A CARRIER having agreed to carry a merchant's packs to Wigton, pursued the merchant for the price and profits of his horse, because he died and was bursen in default of the merchant, who promised only to make the packs of 16 stone weight, and yet made them of 20 stone weight;—THE LORDS sustained the summons (albeit the owner of the horse laid on the packs and drove the horse,) for the price of the horse, but not the profit; it being verified by the merchant's oath, that he promised to make the packs only of 16 stone weight, and no heavier, and that in contrary thereof he made them of greater weight.

*Fol. Dic. v. 1. p. 208. Haddington, MS. v. 2. No 1947.*

1670. February 19. LAUCLAN LESLY against GUTHRIE.

No 3.

A cargo of wheat being damaged by the shipmaster's fault; yet as the victual remained *in specie*, and was not

LAUCLAN LESLY having fraughted a ship belonging to Bailie Guthrie in Dundee, to carry a loading of wheat and oats from Athole to Leith, the skipper did put in by the way at Dundee, and there the ship received a crush by another ship, whereby the salt-water entered amongst the victual; and thereupon the owners and skipper caused disloaden the victual, and put it up in lofts; and Bailie Guthrie, the next day after the crush, gave notice to Robert Lesly in Dundee, Lauchlan's correspondent, and who made the bargain with him, to