

No 38.

bravery of the mariners, and the arms in their hands, which are the means of preserving the whole.

It was likewise mentioned for the owner of the cargo, that the ship had been advertised as carrying arms for defence; but as no additional freight was stipulated on that account, this circumstance did not seem to have any weight.

THE LORD ORDINARY found, agreeably to the opinion of the London merchants, that no contribution was due; which judgment was adhered to by the Court, after advising a reclaiming petition and answers. A second reclaiming petition was presented, and refused without answers.

Lord Ordinary, *Braxfield.* For John Robertson, *Lord Advocate, H. Erskine.*
For Robert Brown, *Maclaurin.* Clerk, *Menzies.*

C.

Fol. Dic. v. 4. p. 218. Fac. Col. No 225. p. 351.

S E C T. VII.

Recompence claimed by a Surgeon.—Tutor.—Sheriff-substitute.—
Commissioner for taking Oaths.—Political Agent.—Recompence
claimed from a Trustee.

1709. July 6. CAMPBELL of Ashfield *contra* MUNGO CAMPBELL of Netherplace.

No 39.
The Court assumed the power of naming the gratuity to a surgeon for cutting for the stone, where they judged of his skill.

DUNGAN CAMPBELL of Ashfield, giving himself out to be the best lithotomist and cutter for the stone, pursues Mungo Campbell of Netherplace, that he being under the unsupportable agony of the gravel, that he was kept down in his bed by two servants, sent for the said Duncan to cure him, who, leaving the great employment he had, came and waited on him for several weeks; and, by an emacerating diet, fited him for the operation, and then cut him, and brought away a big stone of five ounces weight, and since that time he has enjoyed better health, for which extraordinary cure all he got in hand was seventeen guineas, whereas, by his attendance and diversion from other patients, and his *lucrum cessans* he has lost more than L. 50 Sterling, and craves that sum as his fee and recompence of his damage. *Alleged*, That the gratification given of seventeen guineas was enough though the cure had been performed; but it was so far from it, that he wholly spoiled and mangled the defender, by his unskillfully cutting the *intestinum rectum* and his bladder, so that the excrements pass not by their natural channels, but come through the wound, which has so debilitated him that he can neither walk nor ride, but as he is carried. *Replied*, That the cure was according to all the rules of art; and if he be not so vigorous as he was, it is to be ascribed to the bigness of the stone, and his old age, being past 60, and to his own mal-regimen and misgovernment, and corpulency. THE LORDS thought the gratuity given sufficient, and refused any farther modification.

Fountainhall, v. 2, p. 510.