

S E C T. VI.

Malversation in a Judge.

1711. July 27.

SCOT against FRASER.

No 29.
Consequence
of proceeding
in a cause af-
ter advoca-
tion.

IN a suspension of a decret pronounced by Mr Rig, Sheriff-depute of Mid-Lothian, this point came to debated. A pursuit depending before the said Sheriff, the defender procures an advocation, and intimates it in the court; yet during the vacance the Sheriff decerns, which being extracted, and a charge of horning given thereon, the defender obtains a suspension, and at discussing repeats this reason, that the decret was unwarrantably pronounced by the Judge, and as unwarrantably extracted by the party, after an intimated advocation known to both, and so was *spreto mandato judicis superioris*. As to the Sheriff, his contempt seemed clear, unless he could purge it by some defence, and therefore they ordained him to be cited to answer. But, for the party, it was *contended*, That though *judex litem suam facit*, by giving a sentence contrary to law and the prohibition of a superior Court, yet the party was not concerned nor involved in his guilt, but may lawfully take what the Judge gives him: *Sententia ejus pro veritate habetur*, and he is not to start questions. Some of the LORDS thought him culpable too, in respect of his private knowledge of the advocation. But others proposed, that ere they determined this, the Sheriff should be heard, for this may give rise to cure an abuse practised in some inferior courts. Where they suspect an advocation, they summarily pronounce a decret to prevent it, but afterwards take in bills and defences as if it were a depending process; and when the advocation is offered, they obtrude the decret, and by this anticipating stratagem venture to reject it, which well deserves a severe regulation.

Fountainhall, v. 2. p. 666.

1711. July 27.

LEITCH against FAIRY.

No 30.
A judge found
liable in da-
mages and
expenses, who
had judged in
an adjustment
of marches
where himself
had, as an
heritor, an
interest.

ANDREW LEITCH, provost of Ruglen, pronounces a decret against James Fairy, hammerman there, fining him in L. 30 Scots, for refusing to depone in a cause pursued by one Scot and the Procurator-Fiscal against him, for removing a march-stone bounding their lands, and tilling in the baulk; and having imprisoned Fairy, he procured suspension and a charge to set at liberty; and when the suspension came to be discussed, he insisted on this reason, That Leitch designing to engross the magistracy to himself, and to oppress all who

differed from him; and having some acres in the neighbourhood, he hounded out one Scot, and the Procurator-Fiscal, to raise a calumnious and invidious libel against him, as if he had disturbed the marches, and removed the ancient meiths; contrary both to the laws of God and man; and therefore concluded not only reparation and fining, but incapacity of bearing any public trust, and farther punishment in his person and goods; and offering to prove the libel by his oath, he most justly refused, not that he was unclear, (for the libel was most false) but that it being criminal, *nemo tenetur jurare in propriam turpitudinem*; on which he decerned, and put him in prison, till he obtained liberation by the justice of the Lords; and there could be nothing more iniquitous. For, *1mo*, He sat judge in his own cause, he having acres adjacent to that march; though he made others complain, and yet the libel runs so as to comprehend himself with the rest. *2do*, He refused a sight of the complaint, and precipitated it so as to hold two courts about it in one day. *3tio*, Incapacity being infamy on the matter, no inferior judge is competent to so high a penalty. *Answered*, It were *pessimi exempli* to encourage burgesses to pursue their magistrates for the exercise of that jurisdiction committed to them; and to crave damages off Judges for their sentences, is both unprecedented and unexemplified. And though the Provost be a neighbour heritor, yet he was no complainer for his own private interest, but could not refuse justice to others when demanded: And in criminal cases no sight of the libel is granted, but they must answer summarily; and being restricted to an arbitrary punishment, he was obstinate and contumacious in refusing to depone; and the incapacity was not insisted on, and that he invaded the marches can yet be proved. *Replied*, Judges are not to be overtaken *ex imperitia* where they give wrongous sentence, in cases having doubtfulness and some colour of law; but where a judge commits manifest palpable injustice, in favour of himself, it is intollerable. The common law is plain, tot. tit. C. De poena judicis qui male judicavit: Qui prætio depravatus vel gratia litem suam fecit, dispendio litis mulctetur. And our law is as just, act 45th 1423, He who refuses to do law evenly, but fraud or guile; shall be severely punished to the example of others. And my Lord Stair, Lib. 4. Tit. 1. § 5. makes the same distinction betwixt wilful injustice and mistaking a dubious case. THE LORDS found, if Provost Leitch had lands on the march with Fairy, that he could not sit judge, but should have declined himself; and that being proved, it was a sufficient ground to make him liable for the damages and wrongous imprisonment.

Leitch reclaimed against this interlocutor by a bill. See APPENDIX.

Fal. Dic. v. 2. p. 342. Fountainhall, v. 2. p. 666.