

money is lost; and in the discussing of the suspension, the question arose, Whether the consignation should be upon the peril of the consigner, or of the charger.

No 51.

Whereanent, the LORDS found that it was not upon the peril of the consigner if he consigned warrantably *sine culpa*; and found, that he being charged for the whole articles of the decreet arbitral, and that by the decreet discussing the suspension less was found due than he was charged for, that he was not *in culpa* to consign, albeit he had no reason of suspension against the article for which consignation was made, without necessity to him to have offered what was due as to that article before consignation; because having received one charge for the whole articles, upon six days, he neither should nor could seek the charger to offer the sums due by that article before consignation; and found, that albeit the gilder was now modified by the Lords to 30s., and that the charge was for 40s.; that the consignation of 22s. was not the consigner's fault, seeing it was the order of the Judges for the time who ordained 22s. to be consigned for the gilder, and caution for the rest.

*Fol. Dic. v. 2. p. 60. Stair, v. 2. p. 173.*

1675. July 9.

EARL OF QUEENSBERRY *against* The DUKE OF BUCCLEUCH.

THE EARL of Queensberry, as sheriff of Nithsdale, having charged the Duke of Buccleuch for the cess of his lands, imposed by the convention of estates *in anno* 1665; he suspended and consigned. The question arose, on whose charges the consigned sums should be lifted. Queensberry *alleged*, that he having charged but *ex officio* as Sheriff, ought not to be burdened. It was *answered*, That the party who was in the fault by suspending, should bear the burden; but Queensberry was in the fault, because he charged for more nor was due, as was now found by the event. It was *replied*, That Queensberry had charged for no more than the Duke's proportion, and therefore he ought to have offered what was due, and shown a discharge of what was paid, and upon refusal consigned, otherways he had not warrantably suspended, and therefore should bear the burden, in lifting the consigned sums,

Which the LORDS sustained.

*Fol. Dic. v. 2. p. 60. Stair, v. 2. p. 343.*

No 52.

Sums consigned in a suspension must be taken up and delivered on the suspender's expenses, if he has not warrantably suspended.