

ALLEGED,—That he offered to prove, by Stephen Denis, merchant in Bourdeaux, their constituent's oath, that he had got payment of that sum from Mr Galt the drawer. And a commission being directed for taking his oath at Bourdeaux, the same was disappointed by Monsieur Mercie, the commissioner named, his refusing to accept; and being now craved to be renewed, the difficulty occurring to the Lords was, That the war being now declared with France, no commission could be directed to Bourdeaux; for that were corresponding with the Queen's enemies, contrary to the Act of Parliament. For obviating whereof, the Lords ordained them to condescend upon a place where the commission should be executed, either lying within the Queen's dominions, or the countries belonging to some of her allies, such as Germany, Holland, and the like.

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1702. November 21. The EARL OF SUTHERLAND *against* ARBUTHNOT OF KNOX and SIR THOMAS BURNET OF LEYES.

THE Earl of Sutherland pursued Arbuthnot of Knox, as tutor to the Viscount his nephew, and Sir Thomas Burnet of Leyes, his cautioner, for some debts. Compensation was craved, in respect it was offered to be proven, That the Earl had intromitted with sundry lock-fast trunks and bundles of goods out of the house of Arbuthnot, and carried them away. The Earl acknowledged the taking the Viscountess his daughter's *paraphernalia*, and habiliments of her body. But they alleging farther intromission, the Earl took instruments thereon, and protested, seeing the allegiance was defamatory, if they succumbed, they should be liable to him in reparation of his honour. And they having failed in the probation, he circumduced the term, and extracted this decretet thereon some years ago; and now gives in a bill to the Lords, complaining, That, by such a base allegiance, they had done what in them lay to wound his reputation, if it had not been above all attack; and therefore craved they might be fined in a thousand pounds sterling, and what further censure the Lords should inflict upon them, as having incurred the *præmunire* of *scandalum magnatum*.

ANSWERED,—They were ready to purge themselves upon oath, that they did not propone it *animo injuriandi*, but only for preservation of their pupil's right. *2do*. They were not obliged now to answer on a bill, there being no more process depending, but terminated by an extracted decretet; and, where *lis est finita*, parties cannot be drawn in without a new citation. *3tio*, There can be no just exception taken at a legal allegiance, such as vitious intromission is; and as our law has introduced that passive title, *Qui sapit delictum*, and is the same with the *crimen expilatæ hæreditatis* in the Roman law, so no man can be censured for proponing it, though he succumb, if he was willing to give his oath of calumny, that he had reason to propone it. And there is neither law nor statute in this kingdom defining what shall be esteemed and reputed *scandalum magnatum*, or determining its punishment, though these cases might well be pursued before the Privy Council, who, no doubt, would give a suitable redress; lesser scandals and private verbal injuries belonging to the cognition of the commissaries.

The Lords, finding the decret was extracted, refused to take in the Earl's bill of complaint *hoc ordine*, reserving action as accords.

The English have such a statute : and, besides many other instances, I remember, that, in November 1682, the Duke of York, afterwards King James, caused his attorney pursue Sheriff Pilkington on this *scandalum magnatum*, For calling him a Papist, and that he knew of the burning of the city of London in 1666 by the Papists ; and he got him fined in £100,000 sterling of damages, for reparation of the foresaid slander. Vol. II. Page 160.

1702. December 8. The OFFICERS of STATE against The VISCOUNT of TEVIOT.

IN the competition betwixt the Officers of State and the Viscount of Teviot, as donatar to the late Earl of Dunfermline's forfeiture on the one part, and the creditors on the other, the Lords had formerly found the creditors, by their apprisings and adjudications, had right to the tack which the late Earl had of the teinds of Dunfermline, not only for the years preceding 1695, when it run out and expired, but also for subsequent years, *per tacitam relocationem*, aye and while they were legally interrupted by the Officers of State : And it being now contended, by the Queen's Advocate, that the creditors had not apprised the teinds of the lordship of Dunfermline ; and particularly, *Oliphant of Carpow's* apprising in 1665, mentions indeed the lordships of Fyvie and Urquhart, (which is *nomen universitatis* ; ) but when it comes to the lordship and regality of Dunfermline, it only expresses some particular rouns and lands ; and then adds, " with the tacks and teinds of the same : " which being relative words, can go no farther than the lands immediately above designed ; especially seeing it noways apprises the said lordship itself, and that comprisings carrying away whole estates are *strictissime* to be interpreted.

ANSWERED,—Creditors doing diligence are not like voluntary purchasers and buyers, who have access to see the writs, which are abstracted from creditors and adjudgers, who are left to fish as they best can ; and Carpow has apprised all other right, title, and interest, competent to the debtor, with all tacks of teinds, &c. which certainly comprehends all ; which is not only consonant to the analogy of the common law, *l. ult. C. de Annali Exceptione*, that *actor videtur omne jus suum in judicium deduxisse ; et l. 134. sec. 1. D. de Verb. Obligat. Etiam ea quæ præfationibus concipiuntur, in stipulationibus repetita creduntur* ; but also to the rules of interpretation of dubious and ambiguous clauses ; as Stair lays them down, *lib. 4. tit. 42. num. 21.* that they must be understood according to the meaning of parties, and the matter expressed, especially if it be *in materia favorabili* ; and none can doubt but the creditor designed to apprise all rights standing in his debtor's person. And in Dury,—*23d March 1622, Scot of Galloreshiels against the Lord Borthwick*,—some lands being erected into a tenantry, and a part of them apprised, and the lands of Houlatston omitted, yet the Lords extended the apprising to these lands ; and, *19th June 1635, Rule against Rome*, an apprising of lands was found to carry a tack, seeing the debtor had no other right but a tack ; for *minus comprehenditur sub majore* ; and lately, in 1696, in the competition among *the Creditors of Hunter of Muirhouse*, the Lords found