

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

the lands of Drumsheugh adjudged by the general words, though neither united nor contiguous with the lands of Murrows.

The Lords found Carpow's apprising a sufficient title to carry the whole teinds of the Lordship of Dunfermline. But it would not be so clear, if it had been an apprising of a reversion; for that might go no farther than reversions of the lands *nominatim* appraised, but not of those which were only inserted *designative*. And the Act of the Meeting of Estates, in 1689, with the Act of Parliament following thereon in 1690, mitigate the rigour of our former laws about forfeitures, and favour real creditors *quoad* their just debts.

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1702. December 10. DANIEL HAMILTON *against* HUGH CUNINGHAME.

THE Duke of Lennox, as heritable Admiral of Scotland, takes the oaths before the Queen at London, in presence of the Duke of Queensberry, and other Scots privy councillors, and then gives a commission to Mr James Graham, advocate, to be his admiral-depute, and to Daniel Hamilton, the Lord Belhaven's brother, to be his clerk; which they intimated to Mr Robert Forbes, present admiral-depute, and to Hugh Cuninghame, present admiral-clerk; and craving they might forbear the exercise of these offices, as having no farther right; which they refused, in regard they were in possession by virtue of their gifts from the late King William. On this Mr Graham held a court, and caused cite Hugh Cuninghame to deliver up the records to Daniel his clerk; and he being absent, decret is given against him; whereon he craving horning to charge, the clerk of the bills scrupled to write thereon, in regard he knew there were others in the actual possession of these offices, both as admiral-depute and clerk: which made Daniel give in a bill to the Lords, complaining, that the clerk refused to give him horning against Hugh Cuninghame, and craving a warrant to command him so to do.

To which it was ANSWERED,—That King William, *jure coronæ*, had given commissions to Mr Forbes as judge, and Mr Cuninghame as clerk, and they have been in possession, and cannot be summarily turned out; but, if the Duke of Lennox have any right, they may pursue them in a declarator, where they shall get an answer: And the Lords, in the competition between *Sir Patrick Aikenhead* and *Sir Walter Seton*, for the commissary-clerkship of Edinburgh, put them to a declarator.

It was REPLIED,—That nothing debarred the Duke of Lennox's right but his not being qualified; and that Charles II. had given it to the Duke of York during his lifetime; so that King William had no right to dispose of these offices, but only *supplendo vices*, and as *caducum* by King James's abdication: so that both these impediments being removed, the one by King James the liferenter's death, and the other by the Duke of Lennox's taking the oaths before the Queen herself, there can remain no more doubt or question of his right; just as, in other heritable offices of sheriffs or regalities, when the heritable sheriffs, &c. did not qualify themselves, the King and his Privy Council did nominate deputies, clerks, and others, *supplere vicem* for the *interim*, that there be no defect nor