

access to allocate any part of it to Mr Gregory. *2do*, This decret contained no dividend what should be every one's proportion in repaying Mr Gregory's claim; and, therefore, till that were constituted, his decret was lame, imperfect, and null. *3tio*, To give him L.50 sterling out of the first and readiest of the lands, was to give him a preference *tanquam præcipuum* on the fund and subject; which would be very unreasonable: for that were to secure him in that salary *in omnem eventum*; and to cast dead, waste, and poor, on the other masters: So that if the rent, by any casualty or accident, fell short in bad years, they ran the hazard, and he reaped the whole profit.

The Lords, before they would open a decret *in foro*, where all the reasons now alleged were either proponed and repelled, or else were competent and omitted, desired to see how Mr Fenton's gift and Act of Council ran, if it was out of the first and readiest: and, for clearing thereof, George Dallas his printed style-book was produced; who, at p. 173, has recorded Mr James Fenton's gift, patent, and presentation; whereby he is appointed to be paid out of the first and readiest of that fund. And having read the decret, which decerns them all promiscuously to pay him, without mentioning whether *in solidum* or *pro rata*; and finding the division made in 1695 was *sede vacante*, when there was no professor of the mathematics; therefore, the Lords sustained his gift, and refused the bill of suspension; the charger always, under his hand, restricting the charge *quoad* the masters of the University for the crop 1707, which they had intromitted with, and passing from them in time coming, and betaking him to the tenants of the lands out of which his payment is allocated by his gift and Act of Council.

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1708. November 13. JOHN GORDON of ROSECARREL *against* M'LELLAN.

THE Commissary of Kirkcudbright decerns John Gordon of Rosecarrel to stand at the market-cross with a paper on his breast, bearing it was for defaming and slandering of Helen Maxwell, spouse to Charles M'LeLLan of Colline, as guilty of adultery: and also, to stand bareheaded at the church door, and acknowledge, that he had fasely lied on her, and then to pay 500 merks to Samuel Cairmont, his procurator-fiscal, as a pecuniary mulct for his defamation, and repairing her honour.

Of this sentence he craves a suspension, on this reason,---That all proven against him was, that he had come to the minister and some of the elders, and told he had heard a *fama clamosa* in the country, of her being guilty, and asked them what they knew about it: the occasion whereof was neither an affected curiosity nor a malicious design to reproach her; but having got a citation in August last, when the clerks to the circuit courts were taking up dittays for the Porteous-roll, to compear and depone what delinquents or criminals he knew in his bounds; having oft heard a flagrant report and suspicion of her being an adulteress, he, for clearing his own conscience, *ad exonerandam animam*, went to the minister and kirk-session to be informed if there were any grounds for that report, before he should give his oath; which was no more than the duty of every good man: and yet this is aggravated by the commissary as a crime, and the foresaid unjust sentence pronounced thereon. And that the

rumour was not wholly groundless, appears from thir circumstances :—that Coline, the husband, deserted her company for some time on this same report ; and that she is presently before the Presbytery, where things very indecent are already sworn against her.

The Lords remembered that *veritas convitii non excusat a convitio* where it is done *animo injuriandi* : But this proceeded neither from petulancy or malice, but only to inform himself when, *necessitate juris*, he was called to depone what crimes he knew in his parish : and so the Lords thought the commissary had committed gross iniquity ; and therefore passed the suspension, and reserved, to the conclusion and discussing of the cause, what such particularity deserved.

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1708. *November 23.* DRUMMOND of INVERMAY *against* The MARQUIS of ANNANDALE.

DRUMMOND of Invermay pursues the Marquis of Annandale for £2400 owing by his predecessors to Stewart of Rosyth, whereunto he has right ; and the Marquis having instructed that they were only cautioners for the Earls of Home, and alleged that the debt, in whole or in part, was paid by the principal debtor ; and having got a diligence for recovery of discharges, he produced some for several years' annualrents ; and these having been allowed, decret was extracted for the remainder. But having suspended, that his case was most favourable, being the heir of a cautioner, and that there were many more discharges lying in the Earl of Home's charter-chest, if he had the persons condescended upon examined ; which was granted : and a further compulsitor being craved against the Earl of Home, for searching his papers more exactly :—The Lords found, That our law knew no other compulsory but first and second diligence by horning and caption ; both which he had got often.

Then it was ALLEGED for the Marquis,—That the cause must sist ; because he was absent *reipublicæ causa* ; in so far as, in the election of the sixteen peers, in June last, he had protested against the hability and capacity of sundry of the voters ; and, if his objections be sustained by the House of Peers, then he will be found to have the most votes ; and so, being a member, will not be obliged to answer in any process during the sitting of the Parliament.

ANSWERED,—This was a plain stretch ; for the privilege was personal, and due only to actual members of Parliament, and not to potential ones ; for, if such possibilities were sufficient to stop the course of justice, then it were easy for peers to procure a double election, and thereby postpone their true and lawful creditors : and barons and burgesses might do the like, in the forty-five to be sent to the House of Commons ; which would be a scorning of justice : and *Magna Charta* provides, *nec differemus nec unquam denegabimus justitiam* : for the discussing of objections may depend long by the intervention of greater matters of state ; and it is strange that should be a protection during the dependance, especially seeing civil causes require not the party's presence, as criminal cases do : so there is no need of my Lord Marquis's attendance, seeing he either has, or may yet instruct his lawyers in all that is necessary for defence of his cause.