

registrated in the book. *Answered*, Parties who inhibit, or do any other diligence or security, such as hornings, sasines, &c. can do no more but take out their inhibition marked by the clerk; and no law obliges them to see it actually put in the books; and the 19th act of Parliament 1686, has fully cleared this case, by declaring it shall be sufficient, if parties shew their rights marked by the clerk as recorded; and if it be not, the party prejudiced is to have reparation of his damage against the clerk and his cautioners. And, though the said act mentions only sasines and reversions, yet it bears also the general word of "any other writs," so these have been only named for examples; and though it seems statutory, yet in other parts it looks like a declaratory law, and so ought to have a retrospect, as the act anent debtor and creditor had 1661, and the new act for obviating the fraud of apparent heirs in 1695. And it arose on a debate, in a case between Sir Daniel Carmichael and Sir John Whitford of Milton, see APPENDIX. THE LORDS considered this as a most inconvenient law in securing all buyers and purchasers, who can do no more but search the registers for inhibitions and other incumbrances; and finding none, think themselves *in tuto* to proceed in their bargains; whereas, if it shall be sufficient to produce an inhibition or sasine marked by a clerk, (though not inserted in the register books) then we shall be as much exposed to fraud as England is in their purchases, for want of registers; and seeing this seems to be the greater inconvenience, it may concern the wisdom of the Parliament to re-consider that act; but the LORDS abstracting from the general point in this case, ordained the clerk, or his representatives, to be summarily and *incidenter* cited in this process, to answer why he should not be decerned to make up the parties' damage and loss, occasioned by his negligence or malversation, in giving a false attest of its being registrated, when it is not truly done.

*Fol. Dic. v. 2. p. 342. Fountainhall, v. 1. p. 695.*

1709. December 9. SIR JOHN JOHNSTON *against* JOHN PEDER.

SIR John Johnston of Caskieben, pursues sundry debtors before the Commissary of Aberdeen, and amongst the rest, one Isobel Drum, for the sum of L. 111 Scots, and takes out from John Peder Commissary clerk depute there, a precept of poinding against her; whereupon she being charged suspends; and Sir John finding the precept would not instruct his charge, when he came to discuss her suspension, he goes to Peder, the clerk, and craves an extract of the decret. He answers, I have searched the warrants of that process, and find no decret nor signature against her, and confesses his inadvertency and rashness in giving out the precept, which now he finds wanted a warrant. Sir John upon this requires him by way of instrument; which he refusing, there is a process raised against him for payment of the foresaid sum of L. 111, and all his damages and expenses occasioned by his fault, the mean of proba-

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An inferior commissary-clerk gave out a precept of poinding against one of many defenders, although there was no decerniture against him. This being suspended, and the suspender dying in the meantime, the debt was lost. The clerk was found liable.

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tion being now perished by the said Isobel Drum's death. *Answered*, The giving out of the extract was a mere mistake, upon the apprehension, that there was a decerniture against her, as well as the other defenders called, and the multitude of them put him to that confusion; and to have given an extract against her would have been a real crime and malversation, whereas the giving out the precept was a mere oversight *et culpa levis* at most; whereas Sir John truly lost his debt by not insisting against her, and taking her oath before she died, especially having discovered the mistake, and so had time enough to put her to her oath. *Replied*, It was impossible he could have brought her to depone, for if he had insisted to discuss the suspension, her answer was, you have no decret against me; and if he had insisted in the commissariot or other inferior courts, her defence was unanswerable,—the cause is suspended, and tabled before the Lords, and so I am not bound to answer here; so by your default I have lost the debt. THE LORDS were generally clear that the clerk was liable; but in regard it might alarm all the clerks of the several judicatories, they laid hold on a circumstance informed on, that Peder, at her suspending, had become cautioner for her in the suspension, which if true, is a clear evidence of his dole to obstruct the discussing, which *in eventu* would have terminated on himself; and therefore ordained that matter of fact to be first tried; and if true, all agreed to find him guilty to refund the sum, and repair the damage *cum omni causa*.

*Fol. Dic. v. 2. p. 342. Fountainball, v. 2. p. 539.*

1710. November 28. JAMES WOOD *against* ROBERT FULLARTON.

No 47.

A writer was employed to raise horning and caption. The messenger denounced before the elapse of six days. The debtor incarcerated on this erroneous charge recovered damages from the creditor, who was found entitled to relief from the writer.

JAMES WOOD having given to Mr Robert Fullarton, his agent, an executed horning at his instance, against William Mackie, in order to cause denounce him and raise a caption; Mr Fullarton put the horning and charge in the hands of Thomas Breakenrig, messenger, to denounce William Mackie, who did denounce before expiring of the days of the charge; and upon that denunciation, when registered, Mr Fullarton raised and signed a caption. James Wood being fined by the Lords in L. 20 Sterling, for imprisoning Mackie upon that unwarrantable caption; he complained to their Lordships, and craved that Mr Fullarton might be found liable to reimburse him of the fine.

*Answered* for Mr Fullarton; The law of nature and the civil law obligeth indeed to restitution where damage is occasioned *dolo malo* or by design; but here no dole or fault can be charged upon him. And albeit artificers *affectare non debent quod non intelligunt*; this is not to be extended to liberal sciences; otherwise a lawyer failing to propone a good defence that might have occurred to another, should be liable to make up the client's damages sustained through the omission; and Judges might be reached for damages, when their sentences fall to be reviewed and reduced; *2do*, That which gave rise to Mr Wood's