

cers of state, and not executed against the commissioners of the treasury, who, in what relates to the King's revenue, are the most proper contradictors and defenders; yet,—it being now ALLEGED that this might cast and annul the diligences of many creditors, who had conceived it sufficient for them to cite the officers of state, and that the one was as usual as the other,—the Lords allowed either party, this day, to adduce what evidences they could, what was the custom in this case, and which was most pregnant and prevailing.

By a former interlocutor, the Lords had also found, that Pitmedden could not now insist against Turnbull, the factor on Dunfermling's estate, to pay, or assign to Rothemay's money, for which the factor had obtained a decret, because, the factor being now exauctorate, and another in his place, no execution could pass against him. Against this Pitmedden reclaimed, ALLEGING, He had done all that was in his power; he had not only presented his precept to the factor, but raised a pursuit against him to pay, which was only stopped by the concurrence of the competing creditors and arresters, otherwise he would have obtained a decret against him before he was removed; that the changing of the factor was imputed by his antagonists, and no deed of his, and so he must not suffer by it, contrary to all the rules of law; that *mandatum non potest revocari ubi res non est integra*; that his *jus quesitum* could not be annulled by that revocation of the factory; *quod nostrum est sine facto nostro ad alterum transferri non potest*.—*Vid. l. 11. et 39. D. de Reg. Juris, l. 3. C. Mandat.*

ANSWERED,—The factor being only convened *ratione officii*, so soon as he is out of the office, his interest ceaseth, and the next factor must be pursued: (though at this rate creditors may be much postponed; for what if he die, or a third factor come in?) Even as magistrates of burghs, when they go out of place, their successors become liable for their bonds and debts.

The Lords, after much struggle, found Pitmedden's diligence and precept a *habile* title, whereon the factor might be decerned to assign; but forbore to decide the whole, in regard the competition on the arrestment was not fully determined yet, till the custom of citing the Commissioners of the Treasury were first tried; and that the new factor could not be brought into the field, unless he were cited *incidenter* on a diligence in this process. *Vol. I. Page 746.*

1696. December 24. GEORGE SUITY and his CURATORS against COLIN CAMPBELL.

LAUDERDALE reported George Suity and his Curators against Colin Campbell, as representing his grandfather, for implementing a back-bond granted by him in 1657, declaring he had received in trust a debt due to Suity by Mr Thomas Lumsdin, factor at Campvere; and that, after payment of what Lumsdin owed to himself, he should be countable to Suity for what he should farther receive from Lumsdin; and contended, that, by accepting this trust, he was liable in diligence, and ought either to instruct what he has done, in order to the recovery of it, or else pay the debt; seeing it was *mandatum mixtum, partim mandantis et partim mandatarii gratia*; the trustee being preferred *quoad* his own proper debt, he ought, *ex natura contractus*, to have acted faithfully in his trust.

ALLEGED,—The back-bond neither expressed nor imported any obligation

upon him to do any diligence ; and at most *tenebatur tantum de dolo et lata culpa*, seeing you never interpellated, nor required me to do diligence ; likeas, it would have been frustraneous, the common debtor being broken : and the Lords have often found the acceptation of such commissions did not bind to diligence, 17th July, 1672, *Earl of Wemyss* against *Sir William Thomson* ; 18th July, 1672, *Watson* against *Bruce*.

The Lords thought it hard to oblige the grand-child now, after thirty-eight years' time, to condescend or instruct whether there was diligence done or not ; and therefore assoilyed him, unless they could instruct he had got payment both of his own and theirs ; but withal ordained him to denude, and retrocess the pursuer in his own place, though the reposition would be now ineffectual by the debtor's insolvency. But the taciturnity for so long a time, and posterior transactions, without noticing this, and the never interpellating him either to do diligence, or denude, determined the Lords much in this decision.

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1696. December 25. ROBERT MURDOCH against HYSLOP.

IN the mutual declarators pursued betwixt Robert Murdoch, writer, and one Hyslop, a wright, of the property of a piece void ground, lying beneath the piazzas, on the High Street of Edinburgh ; the one claiming it as pertaining to his shop, and the other claiming it in right of his adjacent cellar ; the Lords, after balancing the pretences of both parties, found neither of them had a right of property in this inconsiderable controverted piece of ground, but that it was *usus communis*, being a *locus publicus*, and a highway, and passage to all the lieges, as much as the High Street and causeway is ; and appointed for people retiring to shelter under them in time of rain, as the ground under fore stairs is, and ought not to be enhanced or built up to the prejudice of the public convenience. So both the contenders lost the cause, and the Town, who were not competing, gained it.

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1696. December 30. SIR ALEXANDER MONRO of BEARCROFTS against GRIZEL BRUCE, &c.

MERSINGTON reported Sir Alexander Monro of Bearcrofts against Grizel Bruce, one of the heirs-portioners of Reddoch, and her mother and servants ; being a charge, upon a decret of the Justices of the Peace, for breaking, tearing up, and destroying ninety-two trees he had planted on a ditch, in the march betwixt them, at £20 Scots each tree, conform to the 41st Act of Parliament, 1661. The reasons of suspension were, 1mo. The decret was null by the 28th Act of that same Parliament : among the instructions given to the Justices of the Peace, and their constables, they are not to meddle with heritors above ten chalders of victual of yearly rent. This was REPELLED, in respect the Act does not restrain their cognoscing on such, but only that they may not imprison