

rent, with deduction of the retention : The Magistrates contending, they being but *consignatarii*, and noways *in mora*, they could be no farther liable than in the terms of the said Act ; and not for ordinary annualrent, seeing *per eos non stetit*, that they did not pay at Whitsunday ; for these previous questions behoved to be cleared : which is but done this session.

ANSWERED,—After the charge of horning, ye were constituted *in mora* ; and it had no qualities, but was simple ; and ye should have at least offered to consign the money, which ye did not, but made use of it ; which differences the case from a consignment in the Clerk of the Bills' hands.

The Lords found the Town liable for the full annualrent after Whitsunday last.

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1700. *January 2.* MELL *against* JAMES GRAHAM.

MR Mell, the French merchant, gave in his protestation for remeid of law to the Parliament, for absolving James Graham, merchant, from his reduction of the decreet-arbitral pronounced betwixt them ; which he quarrelled on this ground, That the arbiters had not cognosced nor noticed his claim : which, being a reason of iniquity, the Lords found themselves not empowered to sustain ; because, by the late regulations 1695, no decreet-arbitral may be reduced, save on the head of corruption, bribery, or falsehood : and he contended it was falsehood in the decreet, to bear they had considered his claim, when they had refused to take it in : which is not the falsehood meant by that article of the regulations now turned into a law : which will not exclude nullities, such as the decreet is *ultra vires compromissi*, and the like ; for these may be still proponed as formerly.

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1700. *January 4.* SIR ANDREW RAMSAY of WAUGHTON *against* DAVID OGILVIE of POPILHALL.

THERE being mutual declarators of property, as to a piece of ground in Popill, between Sir Andrew Ramsay of Waughton and Mr David Ogilvie of Popilhall, who founded on a decreet-arbitral, by which that ground controverted was, in 1647, adjudged to belong to the said Mr David's father :

ALLEGED for Sir Andrew, *Imo*. A decreet-arbitral, being only a personal right, can never be obligatory against him, who is a singular successor to John Hepburn of Waughton, the submitter, especially being infest. *2do*. The said decreet is prescribed ; nothing following on it by the space of forty years.

ANSWERED,—Waughton never claimed more, save a commony and servitude of pasturage ; and therefore his apprisers from him can never be in a better condition, nor crave the property. *2do*. The prescription was interrupted by the pursuer's minority.

REPLIED,—He having renounced to be heir to his father, and only bruiking

by an adjudication led against him as lawfully charged, he cannot found on his minority, unless he represented.

DUPLIED,—The adjudication carried the privilege of founding on the minority to interrupt, as well as the minor himself had.

Though the cause was small, yet the point being somewhat intricate, the Lords ordained it to be heard in presence.

It was ALLEGED, That a liferentrix having possessed the lands for many years, the fiar could not interrupt during her life; and so, not being *valens agere*, the prescription could not run against him. *Vol. II. Page 77.*

1700. *January 5.* LORD PITMEDDEN and ALEXANDER SETON *against* The COUNTESS of DUMFERLINE and ALEXANDER AUCHINDACHY.

ARNISTON reported the Lord Pitmedden, and Alexander Seton his son, against the Countess of Dumferline, and Alexander Auchindachy, her chamberlain, for repetition of the rents uplifted by her since 1694; in regard, by a decret *in foro*, the Lords have preferred him to these rents.

ALLEGED for the said Alexander,—That he being the Countess's servant, any intromission he had was by her order, and he has counted to her, and obtained her discharge; which is sufficient to exoner him, whatever it may operate to make the lady restore; and, by law, *velle non creditur qui obsequitur imperio patris et domini*, l. 4. *D. de Reg. Jur.*; *et quoad ea quæ not habent atrocitatem facinoris ignoscitur servis qui dominis obtemperaverunt*, l. 157. *eod.*; *et damnum dat qui jubet dare, sed ejus nulla est culpa cui parere necesse fuit*, l. 169. *eod.* And, with us, servants acting by their master's command, *in civilibus*, obliges him, but not themselves; as was found, 17th November 1665, *Howison*; where a servant, giving a ticket for ware taken off for his master, was free of the price, unless he proved the servant applied it to some other use than his master's.

ANSWERED,—The Lords having put a factor on this estate, which was known both to the lady and Auchindachy her servant, they were *in mala fide*, the one to give, and the other to accept, of a contrary factory, in contempt of the Lords' authority: and it is offered to be proven, that he knew of the Lords putting in a factor, and threatened him that he might not intromit, and that the tenants might not pay him; which was a kind of *delictum*, in which he should not have obeyed his mistress. And the laws cited relate to Roman slaves, who had no will of their own; and, though obedience and obsequiousness be required of Christian servants, yet they must not obey in things contrary to the law.

The Lords considered, if creditors, at their own hands, might put in factors where they had already named for the behoof of the hail creditors, there should be nothing but confusion; therefore they found the factor in this case liable, from the time of intimation of the Lords' factory to him, or of his getting knowledge thereof any other manner of way; to be proven *scripto vel juramento*.

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