

ANSWERED,—The auditor will declare how many diets he assigned, and Mr Seaton always tergiversed. And, for the discharge he has impetrated, it evidently shows his *animum grassandi in rebus pupilli* ; and is a sufficient ground of removal, conform to the *tit. de Suspecto Tutore*.

The Lords thought his clandestine counting to his own father and sister, and taking their and the minor's discharge, was a gross palpable act of malversation ; and, therefore, refused to pass his bill of suspension, till he exhibited the minor's whole writs, upon oath, in the clerk's hands, that Hary Dow may have inspection thereof : And suspended his factory in the mean time, that he might have no farther intrusions ; and ordained him to find what caution he could ; and, in supplement thereof, to consign a disposition of his whole estate, heritable and moveable : and, at discussing, they would consider whether to remove him as suspect from the office, or not, the presumptions of his malversations being so very pregnant.

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1709, *February 25.*—Hary Dow, as curator to Cassy of Kirkhouse, having obtained a decret against Mr David Seaton of Northbank, for a considerable sum, (*supra*, 10th July 1708 ;) and he suspending, but not able to find caution, got it passed, on consigning a disposition to his lands and estate. And his affairs turning into disorder, Hary Dow applies to the Lords, craving, That the disposition may be given up to him, to take infettment on it ; else he will be cast behind all the creditors, who will be preferred on the diligence they were carrying on against him.

Though this was the first time that ever this was demanded, yet it seemed necessary, else these consigned dispositions might be elusory, by the summary prevention of other creditors. But the Lords qualified the deliverance, That it should only be effectual for the sum which shall be found due at discussing the suspension ; and, on the payment thereof, should be extinct.

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1709. *February 26.* SIR WILLIAM MENZIES *against* JANET JOHNSTON.

SIR William Menzies, on his remit of Parliament, pursues Janet Johnston, relict of Captain Wood, brewer, for relief of a proportional part of a sum paid by him to the public, for their tack of the excise.

ALLEGED,---You cannot insist for the sum libelled, because I offer to prove that I agreed with you, on certain conditions, for a lesser sum ; and which terms I am willing to fulfil.

ANSWERED,---I am not bound to swear, because, the transaction having been to be perfected in writ, there was *locus pœnitentiæ*, aye till it was extended and delivered.

REPLIED,---That was indeed the rule, but, where the affair was transacted by a *pactum liberatorium*, it was an exception, both in the common law and ours ; as the Lords found, 12th December 1661, *Hepburn*, and 8th February 1666, *Ker*.

The Lords found he was bound to depone in this case, but made it before answer.

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