

sonal attendance before them, as the great inquest of the nation, for inspection and trial; otherwise a patched-up report might be procured by designing persons, in executing a commission, bearing the man's recovery where it is not true.

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1701. *December 31.* DAVID FRENCH, &C. CREDITORS of EDMONSTON of CARDEN, *against* ARCHIBALD ROBERTSON, Factor of Carden.

DAVID French, and other Creditors of Edmonston of Carden, against Archibald Robertson, factor thereof. They craved he might be liable in annualrent, within a year after the rents fell due, which was allowed for ingetting of them, conform to the Act of Sederunt in July 1690.

ANSWERED,—He was ignorant of that Act, it never being intimated to him; and the Act itself has never been in observance, and was only calculated where there were great balances in factors' hands, and not for small rests; and which he could not lend out upon annualrent, because he knew not how soon creditors might get precepts and warrants upon him; and so he behoved to keep it to answer their payments.

REPLIED,—The Act cannot be in desuetude in so short a time; neither has it ever been proponed upon and repelled; and the Act is most just, that they should not *lucrari* to the damage of the Creditors; and the Act *non distinguit* whether the balance be great or small.

The Lords found the Factor liable in annualrent, in terms of the Act of Sederunt; and so confirmed it by a decision.

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1701. *December 31.* WILLIAM CUTHBERTSON *against* ISABEL REID and JAMES BAR.

WILLIAM Cuthbertson, merchant in Tranent, pursues Isabel Reid and James Bar, Albany herald, her husband, for £219, as the price of goods delivered by him to the said Isabel Reid's father, before the Sheriff of Edinburgh; and adducing two witnesses to prove the delivery of the goods, Bar OBJECTED against them, That they could not be received, because they had appeared partial, and too zealously concerned, in having come from Dunse, where they dwell, to Edinburgh, on a letter wrote to them by Cuthbertson, the pursuer, desiring them to come, to the effect that he, finding them in town, might give them a citation to be witnesses in his action against Reid; and so, being ultroneous, were not receivable; and though they acknowledged, upon oath, that he had invited them in, and accordingly they had come and got their copies to appear as witnesses, yet the Sheriff had received them as habile and competent. Bar raises advocacy, in respect the Sheriff had committed iniquity in sustaining them.

ANSWERED,—All he did was legal,—to write to them, to know when their other business would call them in to Edinburgh, that, on their incoming, he might cite them; seeing they lived without the Sheriff's territory, and so could not be cited without a supplement.

The Lords considered, If they sustained the reason of advocation on iniquity, then it rejected the witnesses ; therefore they caused the Ordinary try if they would advocate of consent ; in which case they would ordain them to be reëx-aminated, and to produce the letter inviting them in, if so be they had it.

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1702. *January 2.* The DUCHESS of BUCCLEUCH *against* SIR JOHN SCOT of ANCRUM.

THE Duchess of Buccleuch and Monmouth against Sir John Scot of Ancrum. The deceased Patrick Scot of Langshaw, father to the said Sir John, having had an exuberant trust from the Duchess's curators and commissioners, as head chamberlain, factor, general receiver, solicitor, and agent, for which he had a fee and pension of 2500 merks *per annum* ; the sub-chamberlains, in making their accounts in December 1665 for the crop 1664, discharge themselves of £1500 sterling, received by them from the tenants, and paid in to Langshaw, conform to his receipts for the same : And the friends, having revised these accounts, write on the margin, " Allowed and instructed to us per Langshaw's receipts:" But he not coming to make his accounts with the Duchess's commissioners till 1673, he then gets a discharge *cum elogio* ; but these articles of the £1500 sterling are not particularly stated nor brought into the account. Some time after this, Langshaw dying, and the Duke of Monmouth falling into troubles and mistakes, this omission was not adverted to ; but, at last, being discovered, there is a process raised at the Duchess's instance against Sir John Scot, as representing Langshaw, his father, for refunding the said £1500 sterling, *cum omni causa*, on the foresaid grounds, That the sub-chamberlains state it as given to him upon his receipts, and the respondents acknowledge they have seen his receipts, and therefore allow it ; that, to palliate and conceal the embezzlement, he inverted the order of counting used in the management of that estate, which was, that the sub-chamberlains counted first, and then the general receiver made his ; whereas, in the year 1665, wherein this omission happens, Langshaw counts before the under-chamberlains : Likeas, by the title of the account in 1673, he imposes on the Duchess's commissioners by the generality of its conception, and yet thir articles are nowise brought into the account ; and, being general receiver, he either had the instructions in his hands, or access to the place where they lay, by which it was easy for him to withdraw his own receipts ; whereas, of all the instructions of these accounts, there are none wanting but only this of the £18,000 Scots : Likeas, being factor and agent, he, by the nature of his office, was liable in exact diligence, and ought not to have suffered this money to perish to the Duchess ; or else his son must tell what way it went and how it was employed.

ALLEGED for Sir John,—That neither the assertion of the sub-chamberlains, nor the allowance and declaration of the friends, can bind and constitute a debt against him, unless his father's receipts were produced. *2do*, After all this, Langshaw had made his accounts with the commissioners, and obtained a full discharge and exoneration ; and which containing some exceptions, these *fir-*