or a clause dispensing; seeing it is not so much the *traditio de manu in manum*, that makes the delivery, as a rational act of the will, declaring our purpose, design, and resolution.

ANSWERED,---This could never amount to delivery, because, *esto* Sir James had returned to Edinburgh, he could have cancelled that assignation; so it was still an incomplete deed, till something like an act of present tradition had intervened. If one should send an assignation in a letter, and die before the letter come to hand, yet it would be reputed a sufficient delivery, because he had done the ultimate act which his death cannot recal; but here it was revocable and alterable at will.

The Lords thought this a too nice and metaphysical tradition, and found it an undelivered evident; and preferred the creditors who had confirmed the subject in controversy; which James Scot neglected to do, relying on his assignation. *Vol. I. Page* 746.

1696. *Feb. July, and Dec.* LORD PITMEDDEN *against* JAMES ELPHINGSTON and The EARL of WIGTON.

February 20.---THE competition upon the estate of Dunfermline, betwixt my Lord Pitmedden, Commissary Elphingston, and the Earl of Wigton, was reported. The Lords demurred on thir two points: 1*mo*. The debate running not for the rents of the lands, but anent an extrinsic sum of 6000 merks in Rothemay's hands, due to James, last Earl of Dunfermline, whether the preference given to Pitmedden's 10,000 merks, by the minute of contract betwixt him and Mr A. Auchmouty, (in whose place Commissary Elphingston had come,) that he should be paid out of the first and readiest, would extend to this extrinsic sum. For payment to Mr James Elphingston, out of such sums, would extinguish the wadset *pro tanto*, and so diminish Pitmedden's security, which was a *jus transcendentale* over the whole; and, like a servitude, *unaquæque gleba* was liable to him: And, on the other hand, it seemed hard that Mr Elphingston could receive payment of no part till Pitmedden were first satisfied.

The second point was anent the legal way and habile diligence to affect debts owing to forfeited persons. Pitmedden had a precept, on the King's Chamberlain, of the estate of Dunfermline, from the Lords of the Treasury, and first intimated. Mr James Elphingston and the Earl of Wigton had arrested in Rothemay's hands; against which it was ALLEGED,---That Dunfermline being *civiliter mortuus* by the doom of forfeiture, the money could not be arrested in Rothemay's hands as belonging to him; the dominion being translated from him to the King.

ANSWERED,---The arrestment is laid on upon a process raised at their instance against the officers of state.

REPLIED,---It was never heard, that debts fallen to the King could be arrested, as appears where he is *ultimus hæres*, &c.; but the method is to apply to the Exchequer. Against which it was OBJECTED,—That all went there by gratification and favour; so poor people would be neglected, and others would get pre-

cepts; and the more ways allowed to the creditors of forfeited persons to affect his means, was the better.

The Lords declared they would hear thir points in presence.

Vol. I. Page 713.

July 23.---In the debate, mentioned 20th February 1696, between Lord Pitmedden and the Earl of Wigton, it was now farther ALLEGED,---That Pitmedden's right was null and incomplete, because he and his son coming in by way of substitution, in a tailyie to John Seton, they behoved to be heir of provision to him; and, this essential step being omitted, all his diligence by adjudication, &c. fell to the ground as null.

ANSWERED,---The 10,000 merks being disponed, failing heirs of John Seton's body, John was only the liferenter, and his heirs fiars; and they never having existed, but he dying without heirs of his own body, Pitmedden's son was clearly fiar without the necessity of any service; for to whom could he serve? not to John Seton, for he was only liferenter; not to the heirs of his body, for he had none.

REPLIED,---The designing him "liferenter" did not divest him of the fee so long as he wanted heirs of his own body, unless it had bore to him in liferent allenarly.

The Lords found, He behoved to be served heir of provision to John Seton; but that it was sufficient to sustain his title as if it were produced *cum processu;* and allowed it to be so taken in, and not to be a present nullity.

Vol. I. Page 729.

December 3.---In the case, mentioned 23d July 1696, between the Lord Pitmedden and the Earl of Wigton, anent the competition between a precept from the Exchequer, on the factor of Dunfermling's forfeited estate, and an arrestment; it being objected against Pitmedden's diligence, that his title being a wadset, affected with a back-tack, and the irritancy declared, he became a proprietor, and ceased to be a personal creditor of Dunfermling's, and could not compete:

ANSWERED,---The last Earl still intromitted, notwithstanding the declarator, and so became debtor, and personally liable.

The Lords inclined to think this sufficient to sustain his title, yet forbore to decide it, because there was a nullity objected against Wigton's arrestment,---that it was upon a depending summons raised against the last Earl of Dunfermling's daughter, as heir to her father; which could not be, he standing forfeited before his death.

ANSWERED,---It was likewise against the officers of state for the King's interest, and an execution against them.

REPLIED,---No regard to the execution, because it wanted a warrant, the summons being blank, and naming no defender but the Earl's daughter, who would have been his heir, if he had not been forfeited.

The Lords found this arrestment null, and preferred Pitmedden to Wigton, reserving the competition betwixt Mr James Elphingston and him to be farther heard.

Vol. I. Page 739.

December 23.---The Lords having advised the bill and answers between my Lord Pitmedden and Mr James Elphingston, mentioned 3d current, they had found Mr James's arrestment null, because it was only in the hands of the offi-

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 decreet, 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 concourse of the competing creditors and arresters, otherwise he would have obtained a decreet against him before he was removed; that the changing of the factor was impetrated 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 quæsitum* 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