

1715. *June 16.* GEORGE HILLOW *against* MAXWEL of Munches.

HILLOW being tenant to Sir George Maxwel of Orchardtoun, who constituted Munches his factor,—at counting, the tenant craved allowance of L300 Scots, advanced and furnished by the factor's verbal orders to third parties; and, upon his refusal to allow the same, commenced a process, (after the factory was ended,) wherein he offered to prove the orders by the defender's oath, and by the third party's writ or oath, that he actually paid and delivered victual, &c. to them.

ALLEGED for Munches,—That the pursuit was not now relevant, the factory being recalled. For, allowing that such orders were given, yet it was only as Sir George, his factor or servant; and therefore he cannot now be liable, more than he had been really his servant or tutor. *2do*, That the libel was not relevant, unless the pursuer offered to prove resting owing by Munches his oath, conform to the 9th Act Parl. 2. Sess. 1. Charles II. the five years therein mentioned being long since expired in the present case.

ANSWERED for the pursuer to the first,—That it was never before pled, that a factor's clearing accounts with his constituent, should liberate the factor of obligations contracted with third parties by him, during the factory. For, although the payments had not been made during the continuance of the factory, yet these payments must still be binding upon him whose faith was followed. And the simile of tutors, &c. does not meet: for many cases may occur where the pupil is free, and yet the tutor bound; as in case of minority and lesion, when money is advanced to tutors, and by them misapplied; for in that case, action will be competent against the tutor, receiver, and misapplier, although it be not demanded within the years of the tutory. To the second, answered,—That there was no necessity of proving resting owing by the defender's oath; for although that took place in the case of merchant-accounts, servants' fees, &c. which, by a special Act of Parliament, prescribe in three years, *quoad modum probandi*; yet, in the case of contracts, (such as a mandate,) the order or mandate is probable *juramento*, during the mandant's lifetime.

The Lords, before answer, ordained Munches, the defender, to depone, Whether he gave the orders libelled, to make the payments founded on by the pursuer. As also, ordained the persons alleged to have received these payments, to depone, Whether they received them from the pursuer, or any, for his behoof.

*Act.* Elphingston. *Alt.* Isla. Sir James Justice, *Clerk.*

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1715. *June 17.* AGNES NICOLSON *against* SIR JAMES SHARP of Stoniehill.

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By interlocutor of the 17th February last, (which is marked among the Decisions of that Session, and there the case is also stated,) the Lords found that the defender must count for such of the debts in the disposition, whereof the instructions came to his father's or his own hands, to extinguish his adjudication.