

solemn than our registers; and yet if any such donation had been made, a posterior creditor had power to quarrel the same: and so their registration hindered not the natural equity of this remeid. *3tio*, As for that pretence, that to give posterior creditors an interest there must be not only *animus fraudandi* in the granter, but the receiver also must be *consciens fraudis*; the same is a false, ignorant, and ridiculous assertion: for any who has read the Paratitles on that place will find, that the law uses a most rational distinction, *videlicet*, if the alienation be *ex causa onerosa*, then it cannot be questioned, unless the receiver was also *particeps fraudis*; but where it is *ex causa mere lucrativa*, (as this was,) then *fraus in eventu sufficit* without *animus fraudandi*: and which is agreeable to our practique.

*Vide l. 6, p. 11, D. et l. 5, C. Quæ in fraudem creditorum, &c.* See the full debate in the Informations beside me.

The Lords found the pursuers to be in the case of anterior creditors, in the interpretation of law; and, therefore, reduced the right made to the son, upon the act of Parliament 1621, and found it fraudulent, and to fall under the compass thereof; and in regard of the unhandsome conveyance made by the father, conform to the said act 1621, (though it was not craved by the pursuers,) they declared him a bankrupt, infamous, and incapable of all office of trust, &c.

This decision was mightily applauded as equitable by all, for discouraging cheats: only it seemed to be a very licentious discession from the letter of the act of Parliament. Street was so overjoyed with it, that he vowed he would have the whole fifteen Lords canonized, and that nothing pleased him so in their sentence as that they had declared him infamous. Thus, the son's right being annulled and taken out of the way, the pursuers and my Lord Torphichen will fall next to debate upon their own several interests.

*Advocates' MS. No. 407, folio 220.*

1673. *June.* Bailie ROBERT LERMONT *against* WILLIAM BROWN, The INCORPORATION of the SKINNERS of Edinburgh, and Others.

THE said Robert Lermont, being to rebuild a waste tenement he had acquired in Skinner's Close, obtained from the Council of Edinburgh, after a visitation appointed by them, and a report thereon, an act giving him liberty to oversailye the close, having both sides thereof, and cast a transe over it for communicating with both his houses, as also, for building fore-stairs amongst the said close; and after he had proceeded a pretty length in his building, a suspension was put in by William Andersone, William Brown, the Skinners, and the other neighbours in the close, of the said act and warrant, and for stopping his building. And the Lords having ordained them to be heard upon the bill, they ALLEGED, *1mo*, The said act behoved to be suspended, because only the Dean of Guild Court, and not the Council of Edinburgh, were competent judges to such questions, *in prima instantia*. *2do*, The neighbours were not heard nor cited, as uses and ought to be. *3tio*, The ground whereupon the council granted him the said liberty, was frivolous and unjust, *videlicet*, that none of thir complainers had any servitude upon his tenement, and, therefore, he might raise it *ad cælum* if he pleased, though it should damnify their lights: because the passage of the close is common to all the heritors there;

and as he could not encroach or build upon the street of the close, so neither can he oversailye; seeing that is directly to appropriate to himself that void which is common, and whereby the houses of the close receive their light, and will diminish all their rents upon that account. And for stopping such encroachment there needs no servitude: but in that case that just maxim of the law takes place, *in re communi potior est conditio prohibentis*, and every neighbour who is prejudged may stop and oppose. (*Per l. 9, 11, 14, et 24, D. de Servitutibus urbanorum; L. 8, p. aristo; 5, D. Si servitus vindicetur; L. 8, C. de Servitutibus.*)

ANSWERED,—What he has done is *authore prætore*; (*vide l. 28, D. De communi dividendo*;) and what they crave is invidious, and only *in emulationem vicini*. They have no prejudice, but the town is decored. As to the first, the council, if not more, are every quite as competent as the dean of guild, and their power is cumulative. (*Vide Hayning and the Town of Berwick's pleading.*) To the second, though they needed not call the neighbours, yet they were cited, and were present. To the third, it is a mistake to say, a simple interest in a common passage in a close is sufficient to hinder an oversailye; seeing all it can import is, that the passage be preserved as convenient as before, and which is done by the height of this trance and oversailye; and without they can condescend upon some eminent prejudice, or a servitude they have, they cannot stop it; and the axiom *In re communi* is not applicable here, seeing the *res communis, videlicet*, the common passage, is not wronged nor encroached on, and for inconsiderable prejudices to light, the council has power to gratify a neighbour, notwithstanding thereof; and as for the gable lights, they are never allowed in Edinburgh to interrupt a building.

REPLIED,—Their inconveniencies and prejudices are very great and palpable; for not only does he stop their lights, and make their houses both unwholesome and unpleasant, taking away that benefit of the sun which God hath given both to the just and unjust, and deforms the beauty and regular symmetry of the city, but also closes up William Brown's gable lights, and would introduce, without any right, a servitude *tigni immittendi* upon him; and all, forsooth, that is objected to palliate thir enormities is, that there is a liberty and faculty allowed by the law to all persons to build upon their own ground *ad libitum et arbitrium*, he owing no servitude; whereas, the lawyers do state that *servitus altius tollendi* rather to be *naturalis libertas quam servitus*, yet all do understand that natural privilege and faculty *cum mica salis, videlicet*, that *licet prædio dominanti meliorem facere conditionem prædii servientis, non autem deteriozem*. And so in Hayning's case with the town of Berwick, your Lordships, without considering that illimited and universal liberty *re sua utendi et abutendi*, inclined to the legal, just, and natural restrictions put thereupon; and therefore ordained the material prejudices done by letting out the said loch, to be condescended on, and would have accordingly determined. And this unbridled licence of building and heightening, in all well regulated commonwealths and cities, is retrenched, without any need of a servitude. And so it was used in Rome, where, by law and consuetude, they had a general gage of height appointed for all houses within burgh, and a reciprocal and mutual servitude amongst all the inhabitants, *ne altius tollatur*; both that there might be an uniformity in houses, and no deformity in the city, by the superbity of some edifices and lowness of others; as also, that no man might prejudice his neighbours, by building higher than was appointed by the law. See vestiges of this in *L. 11, D. de servit. urbanorum; l. pen. p. 1, C. de ædificiis privatis*. See *Vinnius ad par. 1, Instit. de Servit. et p. 3, de actionibus*.

The Lords, after they had nominated two of their number to visit the ground, they found by their report no such prejudice, and therefore adhered to the act of council, and found their opposition ill grounded.

Robert Lermonth lived but about eight days after the gaining of his cause.

*Advocates' MS. No. 408, folio 221.*

1673. July 3. Mr ALEXANDER SEATON of Pitmedden *against* Sir JO. FORBES of Craigievar.

PITMEDDEN, as *executor ad omissa* to his goodsire, pursues the Laird of Craigievar, as heir, and upon the other passive titles, as representing his father, to pay to him the sum of 500 merks, and the annualrents thereof, because old Craigievar was bound to his goodsire to cause one Burnet assign him to a bond of 500 merks owing by Seaton of Disblair to him.

ANSWERED,—He was content to fulfill the obligation in the terms of his father's bond, and to assign the pursuer to that bond.

REPLIED,—He could not be heard to purge his *mora*, and make that offer now, because Craigievar's father was bound to cause him assign betwixt and such a day, which he had never done, and the debtors, in the interim, had become bankrupt and irresponsal; so that an assignation was altogether unprofitable now, *et res non erat integra*: and therefore he behoved to pay the sum, *loco rei imprestabilis et interesse, nomine damni et moræ*; likeas, this defender has acquired the debtor's estate, and sold it, and so may the more fairly pay his debt. *Vide L. 4, p. ult. D. ad legem commissariam; l. 12, C. de contrahenda et committ. stipulatione*; which gives an excellent reason for it.

DUPLIED,—Craigievar was not *in mora*, because never *interpellatus* and required to ant the same. *2do*, The very obligation bears, that the bonds and other writs appointed to be assigned to, were delivered up to old Pitmedden at that time; and so, the writs being in his own hand, *sibi imputet*, and he was *in culpa* not to offer them, that an assignation might be drawn thereby: and the impossibility of granting an assignation now, or the ineffectualness of it, was through the pursuer's and his goodsire's own fault, in not *debite* seeking it, or giving the papers, &c.

TRIPLIED,—The obligation being *ad diem, dies interpellabat pro homine*, and there needed no other interpellation. *2do*, Having given up the writs where to he was to procure an assignation, the law presumes he retained a double of them to draw and form them by; at least, having bound himself to obtain an assignation to them, notwithstanding of the upgiving of them, the law binds him to have required the same to frame the writs by; and which having neglected, find him *in mora*, and therefore liable in the sum. *Argumentum desumi potest ex l. 53, D. de fidei commissariis libertatibus.*

The Lords found, notwithstanding of the delivery of the writs, Craigievar was *in mora* through not granting or obtaining of the said assignation, and that Pitmedden was not bound to interpell him for the same. *Vide supra, numeris 47 et 58.*

*Advocates' MS. No. 409, folio 222.*