

1676. *July.* ANENT THE MARRIAGE OF RELATIONS.

JOHN SUEIDIVIN, in his commentary *ad tit. Institut. de Nuptiis, ubi tractat de gradibus cognationum, in 3tia regula, pag. mihi 79, 80, et 81*, maintains, from *Cardinalis Hostiensis, &c.* that collaterals, distant in the fifth degree, may marry lawfully together; *ex gratia*, my good-son's brother might marry my daughter. And it is not enough to say, that cannot fall out through the brevity of men's age, that one can scarce see the fourth or fifth generation, either direct or collateral; or, *2do*, if he did see it, it were a most unequal disparage for years; because this is but tergiversation, and, if it did exist, we behoved to answer from some rule and principle in law. My objection against the lawfulness of such a marriage is, that, *jure civili*, not only *ascendentes et descendentes in recta linea* are prohibited to marry together *in infinitum*, but likewise *ii qui vicem locumque parentum et liberorum inter se obtinent*; *parag. 1, Institut. de Nuptiis, l. 53. D. de Ritu Nuptiarum*; now a great-grand-uncle is in room of a parent to his abniece. See Vinnius, *ad dictum par. 1, et par. 3 et 5, Instit. de Nuptiis*; and moral honesty seems to avoid such a congress. *Vide Constitutionem 2. Alexii Commeni, et Constitutionem 2. Isaaci Angeli. Vide supra, November, 1671, No. 257.*

Advocates' MS. No. 492, § 8, folio 258.

1671 and 1676. RICHARD MAITLAND of Pitreichy *against* GORDON of Geicht.

1671, *June 13th.*—RICHARD MAITLAND of Pitreichy having, in December, 1669, obtained a declarator of recognition against Gordon of Geicht of the lands of Geicht, thereafter, *ex gratia*, he enters into a minute with him, by which he obliged himself to dispoise to Geicht, at the sight of men of law, the said recognition, and to secure his lands from all possible hazard that might result therefrom; on the other hand, Geicht was bound to ratify some unquarrellable wadsets that Pitreichy had upon these lands, as also to pay him in a certain sum of money for the foresaid communication of his right. Thir articles, it seems, Geicht was unwilling to fulfill, and being required, refused; whereupon Pitreichy raises a summons of declarator of the nullity of the said articles, in respect Geicht has failyied to fulfill his part thereof; in respect whereof, he craves to be liberated thereof, and so reponed to his own place, as if such articles had never been condescended on.

It was ALLEGED,—The summons was most irrelevant, unless they could say, (which was not,) that the said articles contained an irritant resolute clause in case of not performance; but they containing no such irritancy, there is no man in law or reason will maintain, that such articles will afford any more save an action for implement: and if Pitreichy will turn his libel into an action craving performance, then Geicht *pari passu* as the pursuer fulfills to him his part of the said obligation, so shall he perform to him, (neither was he ever unwilling;) and what day he takes to produce a valid disposition, he will take the same to pay him his money. *Vide infra, No. 209.*

The Lord Halkerton inclined to convert it into an action for implement; reserving always to the Lords their consideration of the pursuer's damage and prejudice,

and charges he has been at, through the defender's delay of fulfilling the said articles, to be modified by them as they shall find cause. Yet he was to give them the Lords' answer thereon.

Advocates' MS. No. 166, folio 97.

1671. *July 5th.*—In this cause, (which *vide supra, ad num.* 166,) it falling to be debated, whether or no Pitreichy might not change and convert his action of declarator of nullity of the minute passed betwixt him and Geicht, into an action for maills and duties against the tenants of the lands of Geicht, as being his own property, he being donatar to the recognition, my Lord Craigie was pleased to give them the Lords' answer thereon: who found, it could not be turned; especially considering that there was none called in the declarator of nullity save Geicht himself; whereas, in an action for maills and duties, the tenants mainly must be called. Yet in regard my Lord Halkerton had never reported the dispute in the said declarator of nullity, therefore the Lords ordained him to hear them over again on these points.

Advocates' MS. No. 198, folio 101.

1671. *July 8th.*—In the foresaid cause of Pitreichy and Geicht, (which, at the No. 198, was referred to my Lord Craigie to hear,) it was ALLEGED for Pitreichy, That albeit the articles could not be declared null, in regard they contained no irritancy, yet his declarator behoved to stand good, *ad hunc effectum*, that the whole maills and duties of the barony of Geicht must pertain to the pursuer, from the date of the minute, for all the terms that have intervencen since, and in all time coming, so long as Geicht shall be *in mora* of not fulfilling his part of the said articles.

My Lord Craigie offered to decern the articles to be fulfilled *hinc inde, ad hunc effectum*, that, since they wanted a clause of registration, they might charge upon his decret; and, in case of not obedience, denounce and registrate at the horn; which being done, will have the same force for annulling the minute that a clause irritant would have: or he would ordain Geicht to pay the sum he stands obliged in to the pursuer, *cum omni causa*; that is, not only with its annualrent since the date of the minute, but also all cost, scaith, damage, and interest sustained by the pursuer, in default of the defender his delay to perform the obligations lying upon him. Anent the question, whether, in a mutual contract, the failyie of the one to fulfil his part after he is required thereto, operates so much as to liberate the other wholly of the said contract, (which was the case betwixt my Lord Ramsay and my father;) *Vide l. 14 and 17, C. de Transactionibus Ferrariens. in pract. 36, Ut pacta serventur, et ibi doctores.*

See 15th February, 1681, Wood and Shanks. *Vide l. 14, ibique Gothofredum, D. Pro Socio. Vide Nicollawm Mozziuum, de Societatis Contractu, p. 633, and the laws there cited.*

Advocates' MS. No. 209, folio 103.

1671. *July 13th.*—In the point taken to interlocutor at No. 209, betwixt Pitreichy and Geicht, the Lords found Pitreichy had right to the hail maills and duties since the date of the minute, and in all time coming, aye and while Geicht pay the sum contained in the said articles; and assign the first of December to fulfil *hinc inde* each one to other: and, in case Geicht perform not betwixt and then, the Lords will receive Pitreichy to allege the nullity of the articles; and if he fulfil,

then the Lords, at that same time, will modify what they truly find to be Pitreichy's damage through the delay.

Advocates' MS. No. 219, folio 104.

1676. *July.*—In the decret of declarator of nullity of the minute, passed betwixt my Lord Pitreichy and Gordon of Geicht, about the recognition of Geicht's lands gifted to Pitreichy, in regard of failyie in performance, and which was assigned to the Earl of Aboyne, (*Vide supra*, July, 1671, Nos. 166, 198, and 209, between the same parties,) the Lords reponed Geicht, notwithstanding the decret upon the commission of the failyie, and admitted him to the benefit of the said contract, he performing the heads and contents thereof. Which was *bene judicatum*.

Advocates' MS. No. 492, § 4, folio 257.

1676. *July.* SIR DAVID CARNEGIE of Pittarrow *against* _____

SIR DAVID CARNEGIE of Pittarrow having charged on a decret, and being ready, after the days of the charge elapsed, to poind; a stop from the Ordinary on the Bills, is presented, superseding execution till Saturday. Saturday comes; and Pittarrow sends to see if they either had procured a suspension or prorogation of the stop; none of which they having, he caused poind. Upon this he is pursued before for a pretended riot, since he should have suffered that whole day which was expressed in favours of the debtor, (and *in casu dubio favorabiliores rei quam actores, et respondendum potius pro reo*;) as the law says, *totus ille dies ex æquitate et humanitate est debitori relinquendus; par. 2, ibique Vinnius, Institut. de Verborum Obligationibus, par. penult. et ult. Institut. de Inutilibus Stipulationibus.*

Pittarrow ANSWERS,—That a stop till Saturday, in congruity of all language, can never include Saturday within the stop, but is exclusive thereof. *Dies termini ad quem non computatur in termino*, (*vide supra*, November, 1673, Somervell and Beg, No. 424;) that *esto* it were included, yet a probable cause of doubting *excusatus a spolio*, and the most it can infer is restitution.

REPLIED,—That *dies adjectus semper refertur in tempus finitum, non in tempus inchoatum*; l. 13, 41, 42, 56. *par. 5, 138. D. de Verborum Obligation.*; Vinnius, *ubi supra*: That the Latin words *donec et usquam ad*, are not so much *particulæ illativæ futuri*, as *affirmativæ vel negativæ præteriti*; as the learned *Fredericus Spanhemius* shews in his *Dubia Evangelica*, tomo 1^{mo}, *dubio 28, pag. 230*. in his explication of these words of the Evangelist Matthew, that “Joseph did not know Mary till she had born her first begotten son;” which words he elegantly proves, by twenty parallel instances drawn from other scriptures, against the Helvidians, that they do not denote, nor import that she continued not a virgin, and that Joseph knew her after; and that such words do not signify *finem sed continuationem actus*.

In this cause it was queried at Sir G. Lockhart, If Arbutnot's servants, who were apprisers of the goods, can be in any hazard as accessory to a spuilie, though the poinding were illegal, because of a stop upon a deliverance of the Lords of Session only intimated to Pittarrow. He answered, That in law there could be no