

unlawful, and which ought only to regulate *pro futuro*. *Vide supra, No. 284, [Duff against Forbes, 5th December, 1671.]* But the other must be much more dubious, if a landlord may give over his tenant, it having been less practised, and scarce laid claim to by any; yet, if the first stood on solid foundations, the same parity of reason would also seem to militate here; for, why should the master be in a worse condition than the tenant? Why should the law be more a step-mother to him, she being equally confident and indulgent of all who stand *in pari casu*?

In this action it fell incidentally to be talked, if a pursuer, finding himself delayed or otherwise lesed and injured in an inferior court, might advocate his cause to the Lords, as well as a defender. I never saw any of them attempted, and I think them scarce regular: for a pursuer, any time before liti-contestation, is master of his own process; and if he please not the measure of justice he is like to get there, he may take up his process and intent a new pursuit before the Lords, which is a more natural way than to bring it in by way of advocacy: though I cannot see it could be refused, if a pursuer should desire to advocate an action to the Lords, he declaring he passed from that instance he was pursuing before the inferior court. I hear the Lords have lately permitted a pursuer to advocate upon inequity done him. *Advocates' MS. No. 370, folio 149.*

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1672. *July.*

ABOUT the same time there arising a competition betwixt an executor creditor, and the landlord of the house wherein the defunct died, and who was owing him two terms' mail: the landlord claiming the household plenishing *jure hypothecæ*, which the law gives him in the utensils and domicils, the same was opposed by the executor creditor, because he offered him to prove that the greatest part of that household furniture which he had confirmed, and which the landlord acclaimed, though it was standing in the house, yet it never belonged to the last defunct, who stood personally obliged for the mail to the said landlord, she having taken the house off him; but it properly and truly belonged to her husband, who had died some two years before; *et jure quodam familiaritatis*, she had retained and continued the possession of those goods, which formerly she had conjunct with her husband; and that she never had any right to them established in her person any manner of way; but they solely appertained to her husband, who being debtor to him in a certain sum of money, he had confirmed the said goods, as executor creditor to the husband. It may be also urged, that *in generali rerum obligatione, præcipue tacita, nunquam continenter ea quæ verisimile est quemquam specialiter obligaturum non fuisse; l. 6 D. de pignoribus. Vide Harprecht ad par. 7. Inst. de actionibus, No. 18, et seq.* But it may be said, that in pointing of the ground, any goods, though not belonging to the debtor and heritor of the ground, if found thereon, may be taken and pointed; *ergo*, here the landlord may take any goods he finds in his house.

To which it was ANSWERED,—That the law was absolute, and distinguished not, *et ubi lex non distinguit, nec nos*; that it had positively adjudged a tacit hypothec

to the landlord, *omnium mobilium quæ induxit inquilinus in domum conductam*, and to the master *in prædiis rusticis in omnia invecta et illata a colono; item omnia bona in navi hypothecantur pro nauulo*. And it were a very unreasonable faschery and vexation, yea, both impertinent and distasteful, to put landlords to inquire or try if the goods that are in their tenants' houses be theirs, yea or no, seeing the finding of them in their possession presumes and induces the property.

REPLIED,—It is extremely absurd to think that if I should lend or depositate and set by any of my household stuff beside a friend, that his landlord should have a right of detention of my goods, albeit I prove to him that they are mine, which takes off that weak presumption of being found in his possession.

And this privilege of tacit hypothecation ought not to be stretched beyond the true limits of law and material justice, or to give him an interest in the goods within the house, any farther than the same belongs to his tenant; and I think it would be so found by the Lords: yet the present case seems to be clothed with some more favourable circumstances; as, that she was the wife, and only continued her former possession, and had used them as her own *jure familiaritatis* two whole years; which in moveables may be enough to prescription, if not of the property against the true owner, yet at least *ad hunc effectum* to give the landlord a hypothec in them for the mail addebted by her who had so peaceably possessed them, though without a title. But whatever be in this, there is no doubt but the landlord's hypothec will stand good in them *quoad* a third: because, as relict, the law appoints her a third; and though she had not legally claimed it in her lifetime, nor established the right thereof formally in her person, yet the landlord, as creditor to her, may now seize upon it. *L. 41 D. de acquirenda possessione. Vide omnino Matthæum de Afflictis, decisione Concilii Neapolitani 184.*

*Advocates' MS. No. 371, folio 150.*

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1672. *June, July, and November.* LORD HALTON, Treasurer-depute *against* The EARL OF NORTHESK and other creditors of the EARL OF DUNDIE.

1672. *June 22.*—THIS following point went to interlocutor: whether or no a *de novo damus* from his majesty does not import to the vassal receiver, discharge, liberation, and, exoneration of ward, marriage, feu-duties, and all other casualties due furth of those lands preceding the date of the said charter. Though this was looked upon as a principle wherein there could be no controversy, yet it was alleged by some, that unless it were superscribed by his majesty's own hand, he could not be prejudged by such gifts, and that the sloth or negligence of his officers of state could infer no wrong to him. *Vide* the 14th act of the Parliament 1600.

This is a miserable and pitiful way of venting our wit, by shaking the very foundations of law, and leaving nothing certain. But the true source of all is from the woful divisions in the house, especially between the president and the advocate; each of them raking, though from hell, all that may any way conduce to