

infers a presumptive title, yet it admits of pregnant presumptions to elide it,—as that they were in the woman's possession about the time of her death; and as donation is never presumed, and at most is but *donatio mortis causa*, which cannot subsist above £100 Scots; and this gifting, being *factum alienum*, must be proven by witnesses: else we open a door to wives and servants about defuncts, when they are expiring, to put to their hands to moveables; and when they are pursued, to defend and discharge themselves, by saying they were gifted; which encourages both theft and perjury to cover it: And as *nemo præsumitur donare*, and that *semel dominus* is presumed to continue so, till it be proven *quo modo desiit possidere*; and that he who depones *super facto alieno*, must prove it, by Dirleton's Observe, 16th November 1672, *Fife* against *Daw*; so here their oath can never exoner them.

ANSWERED,—Possession in moveables must presume property, else all commerce would be at a stand; and if you refer it to the party's oath, and he depone anent the cause and title of his possession, that it was by gift, sale, excambion, or the like, the same is probative and intrinsic, and cannot be divided; as the Lords found, 3d February 1672, *Scot* against *Elliot*.

The Lords found the qualities adjected to the oath intrinsic, and required no other probation; but, in regard it was insinuated that the woman was imposed upon, and her sickness concealed from her nearest relations, who lived within four or five miles of the place, they allowed them to condescend on any relevant qualifications of fraud or circumvention, seeing it is fit dying persons should be free of all importunity, solicitations, and impressions.

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1710. January 7. The REVEREND MR WEBSTER and OTHERS against MICHAEL ALLAN.

MICHAEL Allan, late Bailie of Edinburgh, being proprietor of a house in Miln's Court, at the head of the West-bow, and having a vault or cellar under the passage and entry leading into the said court, and the head of it coming to fail, by the loads and heavy carriages brought over it for the use of the back tenements of that land, he applies to Dean of Guild Neilson, and craves a visitation; who calls some wrights and masons, who declare that the roof of his cellar was damaged by the carriages brought into that court; and, upon citation of the adjacent heritors, he decerns them to bear a proportional part of the expense in repairing it, extending to £100 Scots, or thereby. Mr Webster the minister, and others, raise a suspension of this sentence as iniquous, on thir reasons,—That they had bought their houses from Mr Miln the builder, with a clause in their dispositions, of free ish and entry, and so can no more be liable for repairing his cellar than any other of the lieges whose business leads them to resort to that court; and it is as ridiculous to burden them as to require the neighbouring heritors in the Parliament Close, or at the heads of wynds and streets, to uphold and repair the cellars and *fossata* digged under the ground of these passages, over which all the lieges walk; and this being a *via publica*, it was free to them as well as any other of the lieges, to pass and repass, and to bring their loads and burdens that way.

ANSWERED,—He that has the *commodum* must not grudge the *incommodum* annexed thereto; ye have the benefit of passing over the pavement of my cellar, which both weakens and corrupts it, and so in justice are obliged to uphold it; and I affording you this servitude, it is enough that I grant you a passage over it, without being obliged to uphold it, which is against the nature of servitudes,—*l. 15, sect. 1, D. de Servitut. Non est servitutum natura ut aliquid quis faciat, sed ut aliquid patiat et non faciat in suo*; and where there is *jus viæ ad ædes privatas*, the *onus refectionis* belongs to him *qui servitutem sibi asserit, l. 11, princ. D. Commun. Prædior.* And again, we cannot compel our neighbour *aggeres suos munire, sed nos in ejus agro munimenta sternemus.*

The Lords thought the Dean of Guild had committed iniquity in two several particulars: *1mo*, In allowing him to cover his cellar only with joists and pavement-stone, whereas it should have been by a stone pend, the trees in a few years rotting with the sapping *humoris, urinæ, aquæ, et ponderum*, and so endangering the lives and limbs of passengers, if it sink. And the *2d* was, to discern the heritors to contribute to uphold the cellar; for they, having right to their houses with free ish and entry, could no more be burdened than any others passing that way.

This interlocutor encouraged the defenders to give in a bill to the Lords craving expenses, seeing malicious pursuers, by the late Act of Parliament, are as well finable as calumnious defenders. But the Lords refused the desire of the bill; seeing what he did was *authore prætore*, and *res judicata pro veritate habetur.* And the law says, though the *prætor inique decernit, jus tamen dicere quodammodo videtur*; which is sufficient to excuse from expenses.

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1710. *January 10.* The DUKE of MONTROSE *against* CLAUD HAMILTON of BARNs and the other FEUARS of KILPATRICK.

KING Robert the Bruce, according to the devotion used in those times, mortifies and dotes the lordship of Kilpatrick, (*cella sancti Patricii*,) to the monks of the abbacy of Paisley, but reserves a feu-duty of five chalders, and half a boll of oatmeal, to be paid out of it to the castle of Dumbarton, which some alleged was meal for the dogs then kept in that place for hunting the wolves which infested that part of the country; but others more probably conjecture, from its name given it by Skeen, *voce* Pension, and others, of the watch-meal of Kilpatrick, that it was for the sustenance of the garrison of Dumbarton. This feu-duty coming by progress to the Dukes of Lennox, and from them to Montrose, he pursues the feuars liable in payment, and obtains a decret *in foro* against them; and some controversies arising betwixt them, the vassals suspend on thir reasons:—*1mo*, That, by the decret, we are allowed deduction of the cess effeiring to the said five chalders of victual, and yet the Duke refuses allowance thereof. *2do*, That they offered to pay him conform to the Linlithgow measure, or at the rate of eight stone per boll by the 6th Act 1696; but the Duke will have it by a greater measure, which he calls that of the shire of Dumbarton, which exceeds the Linlithgow measure in four or five pints; the Linlithgow firloft containing twenty-one pints and a mutchkin, and the Dumbarton being