the deliverance signed before presenting; and the presumption being that it was signed the same day, it follows it was signed after presenting.

The Lords found it unwarrantable in the Sheriff to have refused the sist of advocation, though it was presented only in the afternoon of the last day of his sitting, the Sheriff and his clerk being then officiating; but sustained the answer, that the sist expired before subscribing the sentence, sufficient to free the Sheriff from any farther penalty than the expense of the complaint.

Act. Graham. *Alt.* Fleming. *Vol. I. page* 43.

1715. *Jan.* 25. Mr. ALEXANDER SETON, Chirurgeon, *against* SIR ALEXANDER SETON of Pitmedden, his Father.

JOHN HAMILTON, as assignee on trust by John Seton, pursues Mr. Alexander Auchmoutie for L10,000 Scots, for which Auchmoutie had obtained a wadset of part of the estate of Fyvie in his own name: Hamilton, by his back-bond, was obliged to denude in favours of John Seton and the heirs of his body, which failing, to Pitmedden and the heirs of his body. Thereafter, by a contract betwixt the said John Seton, with consent of Pitmedden, for any right he had by being substituted heir, on the one part, and Auchmoutie on the other part; Auchmoutie obliges himself to dispone the wadset in favours of John Seton, and the heirs of his body; which failing, in favours of any of Pitmedden's children Pitmedden himself should nominate; and failing of such a nomination, to Pitmedden and his nearest heirs whatsomever; with a clause, restricting the L10,000 to 10,000 merks, in case Pitmedden or his children should succeed. In prosecution of this agreement, Pitmedden nominates the said Alexander Seton, his third son, with these reservations: 1*mo*, That the annualrent during Alexander's minority should belong to the father. 2*do*, That the father should have power, without the son, to transact the wadset. And the son, by virtue of the nomination, was served heir of provision to John Seton; but the retour carries to be with the burden of the clauses and conditions contained in the designation whereupon it proceeded. Pitmedden thereafter enters into a submission concerning the said debt, with the Duke of Gordon, to the Lord Fountainhall; who by his decreet-arbitral, decerns Pitmedden and his son to dispone to the Duke the said right on Dumfermling's estate, and the Duke to grant security for L1000 Sterling to Pitmedden in liferent, and his said son Alexander in fee, in so far as extended to 10,000 merks; and the rest payable to such other of Pitmedden's children as he should condescend on, with what qualities and restrictions he should think fit. And both father and son accordingly grant a disposition of the right, and Alexander, after majority, ratifies the same. The question arising, whether Pitmedden, by the nature of his grant, as having such an interest himself, might not only name such of his sons as he pleased, but under such qualities and restrictions as he thought fit.

It was ALLEGED for the son, the pursuer,—That by the contract betwixt John Seton and Auchmoutie, Pitmedden had no real interest in the sum itself, but only the faculty of nomination or choice of one of his children: so that any of the children whom he should name, were immediately substituted to the failing of heirs

of John Seton's body. *2do.* By the retour, the pursuer is simply served heir of provision to John Seton, both as to principal, annualrent, and penalty, which was procured by Pitmedden himself. *3tio.* Whatever way he did qualify his nomination, which was a deed of his own, yet he could not do the same contrary to John Seton's destination.

ANSWERED for the defender,—That the *peculium* was not *adventitium*, but *profectitium*, because procured from John Seton by the father, for good services done; besides, that he had educated his son, which he was not obliged to do to a son who had 10,000 merks. To the second and third, answered, *1mo*, That the decreet-arbitral is homologated by the pursuer's implementing it. *2do*, The retour bears to be at the burden of the conditions in the designation whereon it proceeded; and the designation containing the above clauses is narrated in the disposition made by the pursuer and his father to the Duke: which conditions so narrated in the homologated disposition, and in the retour relating thereto, can never hereafter be quarrelled, for not being contained in the contract with Achmoutie. Besides, that John Hamilton had John Seton's right standing in his person, when he denuded himself of the trust; and, therefore, might very well affect the right whereby he denuded with a reservation of the annualrents to Pitmedden.

The Lords found that the Lord Pitmedden had not only a power to make the nomination of any of his sons he pleased, but likewise that he had sufficient right and interest to qualify that nomination.

Act. Sir Walter Pringle. *Alt.* Horn. Mackenzie, *Clerk.*

Vol. I. page 54.

1715. *January* 26. BROWN of Mollance *against* The VISCOUNTESS of KENMURE, and Others.

THE Viscountess of Kenmure being infeft in liferent in the lands of Greenlaw, alleged by Mollance to be within his barony of Corsepatrick; and having begun to build a corn-mill on the said lands, which might be prejudicial to Mollance's barron-mill there; he raises a suspension for stopping the said building, which was duly intimated to her Ladyship, the workmen, overseers, &c. The Viscountess having nevertheless proceeded to complete the mill, Mollance gives in a complaint against her Ladyship, for contempt of the Lords' authority; concluding the demolition or stopping of the mill, damage, interest, &c.

ANSWERED,—*1mo*, That it was not proven she did transgress the Lords' authority; the probation only being, that she agreed for the building of the mill, and that part of the mill was finished after the time of the suspension; but it was not proven that she did order the continuance of the building; and it was very possible the servants might continue the work without her knowledge. *2do*, *Esto*, she had known of the continuance, yet she cannot be liable to Mollance for any penalty, because he yet had proven no interest he had to quarrel the building. And least of all could he crave the demolition of the fabric, or stopping the mill's going; because the heritor, who has now a right to what is built on his ground, is