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

not called. And the civil law had such regard to the preservation of any building, (much more to a mill,) that it did not so much as allow *solvere tignum furtivum ædibus aut vineis junctum, neque vindicare: quod providenter lex effecit; ne vel ædificia sub hoc prætextu diruantur, vel vinearum cultura turbetur.*

REPLIED for the complainer,—As to the defence of not ordering the continuance, that the allegeance was irrelevant; it being proven that my Lady caused build the mill, agreed with the workmen, carried on the work in her own name, &c. and that the suspension was duly intimated both to her and them; who answered the notary, that they were but servants, and what they did was by her Ladyship's command: all which, (in answer to the allegeance anent the heritors not being called,) is more than sufficient to infer the conclusion of the complaint, though others had right to the property of the mill: since they were at no expenses in the building; nor in any worse case by demolishing that part of the mill built after the intimation, than they would have been in had the suspension not been intimated: however, an intimation to the workmen was sufficient, as appears from L. 11. ff. *de oper. nov. nunt.* which bears *cuilibet enim intelligenti veluti fabro nuntiatum, infantem et furiosum tenet.* And L. 10. ff. *eod. operis novi nunciatio in rem fit, non in personam.* And Voet, *upon the foresaid title,* § 6. says, *Nec precise ei ipsi qui novum opus fieri curat nuntiatio facienda est; verum etiam, absente domino et nuntiationis ignaro, alteri cuivis fieri potest qui nomine domini est in re presenti; sive servus sit, sive faber vel opifex, sive puer aut puella.* So that, whoever had an interest in the mill, the foresaid intimation was sufficient for them all. However the interest of a third party is *jus tertii* to the Viscountess, and cannot be a defence for her contempt. To the second allegeance, that the complainer had not instructed his interest,—Replied, 1*mo*, That this being a complaint for contempt of authority, the complainer is not obliged here to debate what right he has to the mill; it being sufficient for him to say, that the building was continued *spreto mandato,* which is the only point now under consideration. For, were it otherwise, the same might be said in defence of a charger in case of a suspension, or of an inferior judge in case of an advocation intimate; so that every person who had ill nature and power enough, would be judge of suspensions and advocations raised against themselves, and proceed, if they thought the reasons not relevant. 2*do*, This is expressly contrary also to the civil law; for so it is, in L. 20. § 1. ff. *De nov. op. nunt. Edicto expressum est, ne post novi operis nuntiationem quicquam operis fiat, antequam vel nunciatio missa fiat, vel vice nunciationis missæ, satisdatio de opere restituendo fuerit interposita: qui igitur facit etsi jus faciendi habuit, tamen contra interdictum prætoris facere videtur, et ideo hoc destruere cogitur.* And Voet, upon that title, § 7. says,—*Nec interest utrum jus nuntiandi ambiguum sit, an manifeste injusta dicatur esse nunciatio, eo quod is cui nunciatum est, debuisset jus suum apud prætorem docere, aut satisdare; atque ita impetrare nunciationis remissionem, non ipse sibi judicium de causæ propriæ justitia vindicare: Unde, licet jus faciendi habuerit, tamen quia contra interdictum fecit, pro eo habendum est, ac si nullo jure fecisset.* And afterwards, on the same paragraph, he says, that it makes no defence, albeit he who builds contrary to the interdict of the judge, has intented an action of his right, and has litiscontestated the same; and he compares the proceeding in that work to a spulyie; and says, that *attentata ante omnia reparanda, quemadmodum spoliatus ante omnia restitu-*

endus est. And doubtless, the Lords' suspension here, has the same effect with the *novi operis nunciatio* among the Romans.

The Lords fined the Viscountess in L100, for contempt of authority, and the pursuer's expenses; and stopped the going of the mill till the first day of March then next, but refused to demolish the mill. And allowed both parties to proceed to have the point of right determined in the meantime.

Act. Isla. *Alt.* Boswel. Mackenzie, *Clerk.* *Vol. I. page 55.*

1715. *February.* 1. THOMAS HOPE of Rankeillor, Advocate, *against* JAMES CULBERTSON and PATRICK GOODALE, Baxters.

THERE being a contract in 1712, betwixt Rankeillor and these Baxters, whereby he sells them seventy bolls of wheat, to be delivered yearly for five years, on the 1st of July, at Leith, they being at the expense of freight, shore-dues, &c. and they paying Merchinston's price, with abatement of one shilling per boll; containing penalties, &c. The first two crops went over without any debate; the Baxters themselves having gone over, even after the first of July, and hired their own boat, and came along with the victual. But Rankeillor, expecting they would do the like the third year, waited their conveniency; but finding they delayed, he instrumented them upon the 24th of July to receive the victual: and it having arrived upon the 29th, he again instumented them to receive it at the shore; and they absenting themselves, the same was, by order of the Bailie of Leith, put up in a loft. And this case coming to be debated in a suspension:

It was ALLEGED for the suspenders,—That they could not be liable to receive the victual, because the charger had not observed his part of the contract to them, by delivering the victual at Leith upon the first of July, as was stipulated.

ANSWERED for the charger,—That that was owing to the suspenders themselves, who had taken a method different from the precise rule in the contract for their own conveniency. 1*mo.* In not requiring it, precisely at the time, but both the years receiving it several days after. 2*do*, In not allowing the charger to freight, but going over themselves. Therefore, though *dies interpellat*, yet their former practice having both altered the day and method of transportation, this certainly excuses the not precise performance; unless they had given some intimation, that whatever they had done formerly, the charger this year was to perform *in terminis specificis.* 3*tio*, They could not subsume that they sustained any loss by this small delay: so that it is always a good answer in such cases, *nihil tibi deest.*

The Lords repelled the reason of suspension, and found the letters orderly proceeded for the principal sum as liquidated by Merchinston's declaration: but suspended for the penalty.

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

Vol. I. page 63.