

The Lords, after they had nominated two of their number to visit the ground, they found by their report no such prejudice, and therefore adhered to the act of council, and found their opposition ill grounded.

Robert Lermonth lived but about eight days after the gaining of his cause.

*Advocates' MS. No. 408, folio 221.*

1673. July 3. Mr ALEXANDER SEATON of Pitmedden *against* Sir JO. FORBES of Craigievar.

PITMEDDEN, as *executor ad omissa* to his goodsire, pursues the Laird of Craigievar, as heir, and upon the other passive titles, as representing his father, to pay to him the sum of 500 merks, and the annualrents thereof, because old Craigievar was bound to his goodsire to cause one Burnet assign him to a bond of 500 merks owing by Seaton of Disblair to him.

ANSWERED,—He was content to fulfill the obligation in the terms of his father's bond, and to assign the pursuer to that bond.

REPLIED,—He could not be heard to purge his *mora*, and make that offer now, because Craigievar's father was bound to cause him assign betwixt and such a day, which he had never done, and the debtors, in the interim, had become bankrupt and irresponsal; so that an assignation was altogether unprofitable now, *et res non erat integra*: and therefore he behoved to pay the sum, *loco rei imprestabilis et interesse, nomine damni et moræ*; likeas, this defender has acquired the debtor's estate, and sold it, and so may the more fairly pay his debt. *Vide L. 4, p. ult. D. ad legem commissariam*; l. 12, *C. de contrahenda et committ. stipulatione*; which gives an excellent reason for it.

DUPLIED,—Craigievar was not *in mora*, because never *interpellatus* and required to ant the same. *2do*, The very obligation bears, that the bonds and other writs appointed to be assigned to, were delivered up to old Pitmedden at that time; and so, the writs being in his own hand, *sibi imputet*, and he was *in culpa* not to offer them, that an assignation might be drawn thereby: and the impossibility of granting an assignation now, or the ineffectualness of it, was through the pursuer's and his goodsire's own fault, in not *debite* seeking it, or giving the papers, &c.

TRIPLIED,—The obligation being *ad diem, dies interpellabat pro homine*, and there needed no other interpellation. *2do*, Having given up the writs where to he was to procure an assignation, the law presumes he retained a double of them to draw and form them by; at least, having bound himself to obtain an assignation to them, notwithstanding of the upgiving of them, the law binds him to have required the same to frame the writs by; and which having neglected, find him *in mora*, and therefore liable in the sum. *Argumentum desumi potest ex l. 53, D. de fidei commissariis libertatibus.*

The Lords found, notwithstanding of the delivery of the writs, Craigievar was *in mora* through not granting or obtaining of the said assignation, and that Pitmedden was not bound to interpell him for the same. *Vide supra, numeris 47 et 58.*

*Advocates' MS. No. 409, folio 222.*