

1700. *January 5.* JAMES OGILVIE of CLUNY *against* CHARLES STUART.

MR James Ogilvie of Cluny pursues Charles Stuart, merchant in Perth, for delivery of twenty dozen of pairs of stockings, conform to a sample produced, and a bargain betwixt them in presence of sundry famous witnesses. ALLEGED,---The whole affair was mere sport, being *inter pocula*, and noways designed to oblige either party, but only *verba jocantia et jactantia*; which may appear from this, That the price agreed on, of fourteen pence the pair, was impossible to be afforded at near the double. ANSWERED,---The thing was serious, and earnest given upon it; and Cluny twice loosed him from the bargain; but the defender cried the third time for the dollar of arles, and would stand to the bargain.

The Lords found, he having taken the earnest three times, he behoved now to be in earnest; and found the bargain obligatory. Some doubted, the value arising to more than £100 Scots, if it could be proven by witnesses; but it was found, a bargain of such moveables was not, *quoad modum probandi*, confined to that sum.

Then it was ALLEGED, that it was expressly communed the bargain should be redacted into writing; and, before that was done, there was always *locus pœnitentiæ*; and he actually resiled the next day.

The Lords sustained this reply,---that it was agreed to be put in writ; and found it probable in the same manner by the witnesses present.

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1700. *January 9.* MARGARET HAMILTON *against* MARGARET LOCKHART and WILLIAM MARTIN.

WHITELAW reported Margaret Hamilton, relict of Lockhart of Harwood, against Margaret Lockhart, heiress of Harwood, and William Martin her husband. There being no contract of marriage betwixt the said Margaret, daughter to Monkland, and Harwood, he grants an obligation on death-bed, at least holograph, whereby he obliges to infest himself and her in an annuity of 600 merks *per annum* out of his lands; and, in case he die before that be done, then he burdens his heir with that and sundry other conditions, and discharges them to intromit till she be paid. He dying, without recovering or obtaining himself infest, his relict intents a declarator against his sister and heiress, and her husband, bearing, that she is a creditor on the foresaid obligation: and, by the late Act of Parliament 1695, where one has possessed three years, his next apparent heir must fulfil and pay all his debts and obligations; and that Harwood was more than seven years in possession before his death, and therefore his sister and heir must implement his obligation; and the least they will be liable in is for a terce of the estate; to which she restricts herself.

ALLEGED,---The Act of Parliament was never intended for extending women's liferent-provisions, or the legal obligation of terce, but for conventional debts, else the contracts of marriage of apparent heirs, and all their engagements, may fall upon their apparent heirs; which will occasion an infinite disorder, and pleas. *2do*. It is now turned to a fixed principle in the Scots law, that a wife can claim