

1704. July 8. INNES and STEWART *against* DR CHALMERS.

INNES and Stewart pursue Mr Chalmers, Doctor of Medicine at Aberdeen, for payment of two legacies left to them by Robert Irving, their near relation, by his testament, wherein the said Doctor is named executor and universal legatar; and, after long debate, they having obtained decret against him, they gave in a bill to the Lords, craving 550 merks of expenses which he had, by his calumnious contention, most unnecessarily put them to.

ANSWERED,—He never refused to pay; but was not *in tuto*, the same being arrested in his hands; and that he offered to assign them to the inventory, on their loosing this arrestment, and paying what was owing to himself, for furnishing drugs and attending the defunct, and the expense of the confirmation.

REPLIED,—He had procured that arrestment of purpose to detain their money; and had advocated the cause from the Commissary of Aberdeen; and made all the shifts imaginable, though they offered to let him keep as much as would purge the arrestment.

The Lords remitted to the Ordinary in the cause, to hear the parties on the modification of the expenses. And they were the more inclined to it in this case, that they remembered, some years ago, this same Doctor Chalmers was pursued for having foisted himself in to be executor in a dying man's testament; and thought it a dangerous preparative, if physicians were allowed to impose on their sick diseased patients, either to extort legacies, or to procure themselves named executors. And, though there was no law making them incapable of receiving donatives from dying people, yet it were fit such a practice were prevented; and, that the common law takes notice of it, (*Vid. Accurs. ad l. 3. D. de Extr. Cognit. et. l. 6. C. de Postul. et Vinn. ad l. 9. C. de Medic.*) that a physician ought not to make any bargains or contracts of sale with his patients whom he has under cure, *ob timorem ne omnia concedant*; which prohibition extended also to governors of provinces, to prevent their extortion and concussion. The wise historian, Philip de Comines, in his life of Lewis XI. of France, tells how miserably he was overawed, in his last sickness, by his principal physician; who threatening to desert him, and that he should not live twenty-four hours after, he advanced his friends to many great offices, and gave himself vast sums of money.

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1704. July 12. ISABEL BROWN, Lady Hartside, *against* BORTHWICK of HARTSIDE.

THE Lord Anstruther reported Isabel Brown against Borthwick of Hartside, her son. The Lady Hartside, being infest in a liferent annuity of 500 merks, pursues a poinding of the ground. ALLEGED, *1mo*, Her bond of provision was granted on deathbed, when he could not burthen his heir. *2do*, He bruiked the lands by a strict tailyie, containing irritancies; and, consequently, he could give no liferent out of it, there being no clause empowering him to provide his wife.

ANSWERED to the *first*,—Denying death-bed, the allegiance is not receivable by way of exception, but only by reduction; as was found, *12th January 1666*,