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 decreet 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. *Vol. II. Page* 236.

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 infeft in a liferent annuity of 500 merks, pursues a poinding of the ground. ALLEGED, 1*mo*, Her bond of provision was granted on deathbed, when he could not burthen his heir. 2*do*, 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 allegeance is not receivable by way of exception, but only by reduction; as was found, 12*th January* 1666,

Seton of Touch against *Dundas*. *2do*, As it is incompetent, so it is irrelevant; for a husband may provide his wife *in lecto*, if it be not exorbitant; 23d *February* 1665, *Rutherford and Pollock* against *Jack*; and 21*st January* 1668, *Shaw* against *Calderwood*. And my provision is very moderate and small; and, in remuneration of a greater, I renounced. To the *second*, No tailyie can be interpreted to bind up a man from giving a suitable provision to his wife, it being a natural duty, where marriage is not prohibited. *2do*, This tailyie being posterior to the Act of Parliament, 1685, introducing them, and ordaining them to be registered in a particular register, and this not being so registrate, it could lay no impediment on her husband to give her this moderate jointure.

REPLIED,—That the tailyie was under the strictest and severest irritancies; and, though it was posterior to the Act of Parliament, yet it related to one before it; and tailyies were allowed by our law prior to that Act, as in the case of the Viscount of Stormont and Creditors of Annandale; and the not registration is not declared a nullity.

The Lords thought the whole weight of this debate lay on the tailyie; for, to loose them, may endanger the best estates in the kingdom; and if it had been a locality, and not an annuity, there would have been less debate; but found, The tailyie not being registrate, it did not hinder him to give her a moderate jointure. Others thought this a dangerous decision, and inclined to have it heard debated in presence. And, upon a bill given in by Hartside, offering to pay her the annuity *medio tempore*, the Lords stopped the extracting of the decreet till November, that it might be farther heard and considered, as being of moment and importance.

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1704. *November* 4. WILLIAM FOULIS *against* HEPBURN.

MR William Foulis exhibited a complaint against one Hepburn, a servant in his office, that he had forged his subscription to the registration of one Kenneth Mackenzie his seasine, only for the benefit of the dues; and, being challenged, he acknowledged the falsehood.

The Lords granted warrant, in respect of his absconding, both to cite and apprehend him; and ordered the Queen's advocate to insist against him; and, in case of not compearance, to denounce him fugitive; and appointed the seasine to lie in their clerk's hands. It was started, this registration being null, and the sixty days expired, Who should be liable to the party's damage, who must take a new seasine, and, if there be a competition, may fall to be postponed in his diligence without his own default; seeing the delinquent was both absent and unable to refund; and if the keeper can be liable, who *malorum ministrorum opera utebatur*, for whom he should be answerable. But the party, taker of the seasine, not having yet applied, this inspection was laid aside at present.

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