

rule of counting must be uniformly the same, till an alteration of the rent be made appear.

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1711. *February 13.* The MAGISTRATES of Paisley *against* their VASSALS.

IN the process at the instance of the town of Paisley against their vassals, the Lords, *July 20, 1710*, having found the defenders liable for their proportion of the cess in time coming, did now find them liable also for their proportion of the cess for the year 1705, and since then; and that the cess must be subdivided and proportioned among the heritors, by the commissioners of supply of the shire in manner following; viz. by leading before them a probation of the real rent of the whole lands in property and superiority liable in cess, and imposing and proportioning the said cess upon the lands in property and superiority, according to the real rent thereof.

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1711. *February 16.* ANDREW CUTLER, late Apprentice to the deceased HOMER GRIERSON, Chirurgeon in Dumfries, *against* MARGARET LITTLETON, Homer's relict.

IN the action at the instance of Andrew Cutler against Margaret Littleton, as representing Homer Grierson, for repayment of the half of L20 Sterling, paid in name of prentice-fee by the pursuer to Homer Grierson, with annual-rents thereof since the payment; upon the ground of law, *causa data non secuta*, the master having died while the half of the time of the prenticeship was to run: *Stair, Instit. Tit. Restitution, §. 17* :—

ALLEGED for the Defender,—No part of the prentice fee can be repeted: because the defender, after her husband's death, kept open shop and a young man capable to teach the pursuer, all the time contracted. And *July 24, 1707*, representatives of *Rule contra those of Reid*, one of three persons to whom a bond for 600 merks was granted for their overseeing the granter's interment, and children during their minority; having died before he was at any trouble or expense in overseeing the children; his representative was found, notwithstanding, to have right to the third part of the sum. Therefore, much more ought the defender to be asoilyied in this case; where the money was paid, and the prentice educated more than two years. The citations out of my Lord Stair's Institutions come not home to the case: for things given *intuitu matrimonii*, if marriage do not follow, or be dissolved within year and day, return to the giver, because in that case marriage is reputed not to have been.

REPLIED for the pursuer,—Since indentures, that are mutual obligements, continue till the expiration of the prenticeship, *eo momento* that the master died

within the time, the obligation upon his part failed, and was not suppliable by another, without consent of the apprentice, the other party contracter; unless it had been otherwise provided by the indentures. For the choice of a master depends upon his personal qualifications, industry, and good humour, which induceth one to bind himself apprentice to such a person: and the pursuer's choice was as free after his master's death as it was at first. *L. 31. ff. De solution.* By the custom of this and other nations, any apprentice, upon the death of his master, before the years in the indentures expire, has his choice of any master of that calling; whom his former master's representatives are bound to satisfy and agree with: and if that be not done, the apprentice may repete a proportionable part of his prentice-fee. 2. In all mutual contracts, the one party must perform his part before he can require performance from the other. So, where *operæ sunt locatæ*, the hire is not due till these be performed: and if a part remain unperformed, *locator operarum* can claim hire only in proportion to his work. *L. 38. ff. Locati.* 3. The case betwixt the representatives of Rule and the representatives of Reid, differs from this: for there the process was founded on a gratuitous bond, containing no obligation upon the creditors therein; whereas here both parties stand obliged by contract to mutual performances.

DUPLIED for the defender,—The *L. 31. ff. De solutionibus* hath no relation to this case: seeing there it was expressly pactioned that the artificer should perfect the work himself; whereas, by a common indenture, it is not understood that the master himself should always instruct and entertain his prentice: at which rate a master could not be absent two days together without breach of indentures. Do not masons or wrights, undertaking to build houses, satisfy their obligation by the service of journeymen, prentices, or others, though little or no part of the work be done by their own hand? In all places abroad, the prentice-fee is due notwithstanding the death of master or prentice within the time, except where so much is to be paid yearly for each year in name of prentice-fee; in which case it is only due conform to the number of years it continued, *annus inceptus* being always held *pro completo*: whereas, here the term of payment of the whole prentice-fee was long elapsed before the master's death. 2. The *L. 38. ff. Locati*, doth as little concern the present case, where the prentice was to serve without any reward from his master; who was to get some honorary or gratification, for the apprentice's entertainment and instruction.

The Lords sustained it relevant, That the pursuer's master died within the time of the prenticeship after it was more as half run, to give the pursuer a recompense by repetition of a third of the whole prentice-fee for that loss. But found it relevant to elide this recompense, that the defender kept open shop after her husband's death, and kept a person in the shop capable to instruct the pursuer, and also offered to keep the pursuer in the shop, and at bed and board during the rest of the time of his prenticeship, as her husband had done while he lived; to be proved *prout de jure*.