1784. *February* 12.

HUGH LAWSON and Others *against* ALEXANDER MAXWELL.

No 32.
Medicines furnished by a surgeon in London to a Scotsman, sent thither for his health, and returning afterwards to Scotland, where he died, though they would have been considered as a privileged debt, if furnished in Scotland, were not held so by the Court, in an action at the instance of the English surgeon.

A PERSON affected with a violent paralytic disorder, having been carried from his house in Scotland to London, was put under the care of Mr Maxwell, a surgeon in that city; who continued his attendance upon him during ten months, while he remained there. He never convalesced, his disease having thrown him into a state of insanity; though he did not die for six months after his return to Scotland, where he received the assistance of another surgeon.

In a competition of his creditors, Mr Maxwell claimed a preference for his account of medicines and attendance during those ten months, as being a priviledged debt. The other creditors objected to this demand, and

Pleaded; The privilege claimed is due to medicines furnished to persons on death-bed only. The legal interpretation of that term limits it to sixty days preceding death. It is during that period alone that physicians fees are to be presumed not paid; 7th February 1717, Dr Russel *contra* Sir James Dunbar, *voce* PRESUMPTION; 7th February 1755, Dr Park *contra* Langlands, IBIDEM; and in practice surgeons do not require their privilege to be extended farther. If indeed it were not so defined, the funds of persons consumptive, paralytic, or insane, and others afflicted with diseases of the duration of years, would often be wholly exhausted by the demands of their surgeons.

Answered; That persons afflicted with disease may not want any possible means of relief, is, in all civilized society, a natural object of the law. Hence, to encourage those by whom medicines are administered, to give their aid to the sick, it assures them of a recompence out of the moveable effects of their patients, even though they should not live to be in a capacity of bestowing the reward. Happily the continuance of such incapacity is seldom so long as 60 days. Nor is it the claimant who pleads that mankind should, in behalf of his profession, be presumed, *præsumptione juris et de jure*, to have been in that state during the whole last two months of their lives, though a doctrine which, if admitted, might prove highly beneficial to the medical practitioners. This curious argument comes from the other side; and the temptation which led to it seems to have been a notion that the *præsumptio juris et de jure* of incapacity or deathbed-sickness during that period, implied a like presumption of sufficient capacity or perfect health prior to it. So strange an idea needs not to be refuted; and as this claim is founded even on the admitted incapacity of the patient in question, it ought to be sustained. The practice of surgeons in making their demands, corresponds to the principle by which these are authorised. To limit them to sixty days, would be to indicate blame for permitting their patients to live so long. As for diseases of very long continuance, insanity excepted, it is rare that they should be accompanied with incapacity; but it is cer-

No 32. tainly just that in them, as well as in more acute distempers, the sick should enjoy the benignity of the law.

The Lord Ordinary sustained the above mentioned claim of preference; and

The Lords adhered to the interlocutor of the Lord Ordinary.

In a reclaiming petition Mr Lawson farther *argued*, That the debt having been contracted in England, it ought to be judged of by the law of that country; and as there it was no wise privileged, so neither was any preference due to it here. To this plea Mr Maxwell *answered*, that it was difficult to conceive why a person should have forfeited the protection of the law of this country, merely by going into our neighbouring one, and for the most necessary of all causes too, the recovery of his health; and yet that this consequence seemed to be implied in depriving him, on that account alone, of so very important a privilege.

On advising that reclaiming petition with the answers, in which the foregoing arguments were likewise repeated,

The Court, without paying more regard than before to the above argument about death-bed, seemed to alter their opinion of the point formerly determined. All the Judges now considered that, besides what results from the incapacity of the patient, there should be some other limitation of the period during which surgeons' accounts are to be deemed privileged. Some of them, however, thought it might be allowed to extend to many months; others mentioned three or four months; and some viewed even 60 days as a proper period, though not from its having any relation to the law of death-bed.

The argument founded on the *lex loci contractus* seemed to be unanimously adopted by the Court.

The Lords therefore altered their former interlocutor, and rejected the claim of preference. *See* Privileged Debt.

Lord Ordinary, *Ankerville.* For Lawson, *Corbet.* Alt. *Dalzell.* Clerk, *Orme.*

Fol. Dic. v. 3. *p.* 221. *Fac. Col. No* 146. *p.* 227.

1789. *December* 1. Creditors of Alexander Gray *against* Robert Grant.

No 33.
In a process before the Court of Session, respecting a debt contracted in England, parole proof was found inadmissible, tho', by the law of England, it is admissible in all cases.

Alexander Gray having succeeded as heir to his brother John Gray, a claim was made in the ranking of Alexander's Creditors after his death, for Robert Grant, on account of certain sums of money paid by him in London to John Grant, brother to William Grant of Quebec. The payments were made, it was said, in consequence of a letter of guarantee by John Gray, in which he engaged himself as surety for repayment of the money which Robert should advance 'for fitting out John Grant to India, and as the price of goods which the 'latter had carried out to Quebec in the preceding year.'

In a process of constitution against the Representatives of Alexander Gray, Robert Grant, in proof of his account of the money so advanced in London,