1781. *June* 15.

Doctor James Hamilton, Physician, *against* Margaret and Barbara Gibson.

No 92.
Physicians fees not always presumed paid.

It is presumed in law, that physicians' fees, like all honoraries, are instantly paid without receipt; and, therefore, action is not competent for the payment of them, against the representatives of a deceased patient.—The Lords, however, found, that particular circumstances may make an exception; and, in the present case, *inter alia*, repelled the defence founded upon this general rule.

The attendance for which the fees in this case were due, was not during the last illness; for, as to that, the point has been formerly decided.

Lord Ordinary, *Elliock.* Act. *N. Fergusson.* Alt. *Elphingston.*

D. *Fol. Dic. v.* 4. *p.* 121. *Fac. Col. No* 60. *p.* 98.

1795. *June* 17.

Doctor James Flint *against* The Trustees of David Alexander.

No 93.
The presumption, that the fees of physicians are instantly paid, does not hold where it is not the practice of the place to pay them immediately, and where the physician supplies the patient with medicines, an account for which is due at his death.

James Flint, a regularly graduated physician, attended David Alexander, of St Andrew's, and supplied him with medicines, during an illness, which lasted two years, and which terminated in his death.

Dr Flint afterwards brought an action before the Commissary of the district, against the Trustees of the deceased, in which he claimed, not only payment of his account for medicines, but fees for his attendance during the whole of that period.

The pursuer stated, and it was not denied by the defenders, that it is the uniform practice in St Andrew's for the physician to furnish medicines, and to receive neither payment for them, nor any fees for attendance, until the termination of the disease, when both are regularly discharged; and that upon this footing, the pursuer himself had practised there during a period of 25 years.

The Commissary gave judgment against the defenders.

A bill of advocation having been passed, the defenders

Pleaded; It is a settled point, that physicians are not entitled to make any charge for attendance against the Representatives of a patient, except for the 60 days immediately preceding his death; 7th February 1755, Park against the Representatives of Langlands, (*supra.*) If this rule did not apply where the same person practised as surgeon and apothecary, as well as physician, it never would have been established, as, it is believed, the complete separation of these professions is but of modern date.

Answered; The general rule founded on by the defenders is a very proper one, wherever the professions of physician, and surgeon and apothecary, are kept distinct from each other, and the physicians are paid for their attendance at the time it is given, run no accounts with their patients, and give no discharges for their fees: But its application would be extremely unjust in a case like the present, where a mode, opposite in every respect, is adopted. No 93.

The general rule proceeds on the presumption, that fees for attendance have been already paid; and, like other legal presumptions, it must yield to a positive proof of the contrary; 15th June 1781, Hamilton against Gibsons, (*supra.*) The account of medicines remaining unpaid, affords, of itself, conclusive evidence that the claim for attendance is equally well founded.

The Lord Ordinary "restricted the pursuer's claim for honoraries to 60 days previous to Mr Alexander's death."

The Court, however, upon advising a reclaiming petition, with answers, were clearly of opinion, that, in the circumstances of this case, the pursuer was entitled to make a reasonable charge for attendance, during the whole period of Alexander's illness; and gave judgment accordingly. *

Lord Ordinary, *Stonefield.* Act. *Solicitor-General Blair, Monypenny.*
Alt. *Dean of Faculty Erskine, Inglis.* Clerk, *Menzies.*

D. D. *Fac. Col. No 178. p. 423.*

SECT. VI.

One employed as a hand, presumed to have accompted.

1636. *January* 21. COUTS *against* COUTS. No 94.

A MASTER pursuing his servant for payment of the prices of beer and ale which he laid in in his house and cellars, and which was vented and run by the defender, and which was libelled to be resting and owing for the space of a year together, at least so much was owing as extended to 500 merks; and it being questioned, if this should be proved by writ, or oath of the defender, or, if it was probable, by witnesses; the LORDS found, That the libel being taken together, viz. 'that it was resting owing,' should be proved only by writ

* Of the same date, the Court pronounced a similar judgment in an action brought by Dr Melville of St Andrew's against the same defenders.