1700. *January 5.* JAMES OGILVIE of CLUNY *against* CHARLES STUART.

MR James Ogilvie of Cluny pursues Charles Stuart, merchant in Perth, for delivery of twenty dozen of pairs of stockings, conform to a sample produced, and a bargain betwixt them in presence of sundry famous witnesses. ALLEGED,---The whole affair was mere sport, being *inter pocula*, and noways designed to oblige either party, but only *verba jocantia et jactantia*; which may appear from this, That the price agreed on, of fourteen pence the pair, was impossible to be afforded at near the double. ANSWERED,---The thing was serious, and earnest given upon it; and Cluny twice loosed him from the bargain; but the defender cried the third time for the dollar of arles, and would stand to the bargain.

The Lords found, he having taken the earnest three times, he behoved now to be in earnest; and found the bargain obligatory. Some doubted, the value arising to more than £100 Scots, if it could be proven by witnesses; but it was found, a bargain of such moveables was not, *quoad modum probandi*, confined to that sum.

Then it was ALLEGED, that it was expressly communed the bargain should be redacted into writing; and, before that was done, there was always *locus pœnitentiæ;* and he actually resiled the next day.

The Lords sustained this reply,---that it was agreed to be put in writ; and found it probable in the same manner by the witnesses present.

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1700. *January* 9. MARGARET HAMILTON *against* MARGARET LOCKHART and WILLIAM MARTIN.

WHITELAW reported Margaret Hamilton, relict of Lockhart of Harwood, against Margaret Lockhart, heiress of Harwood, and William Martin her husband. There being no contract of marriage betwixt the said Margaret, daughter to Monkland, and Harwood, he grants an obligement on death-bed, at least holograph, whereby he obliges to infeft himself and her in an annuity of 600 merks *per annum* out of his lands; and, in case he die before that be done, then he burdens his heir with that and sundry other conditions, and discharges them to intromit till she be paid. He dying, without recovering or obtaining himself infeft, his relict intents a declarator against his sister and heiress, and her husband, bearing, that she is a creditor on the foresaid obligement: and, by the late Act of Parliament 1695, where one has possessed three years, his next apparent heir must fulfil and pay all his debts and obligements; and that Harwood was more than seven years in possession before his death, and therefore his sister and heir must implement his obligement; and the least they will be liable in is for a terce of the estate; to which she restricts herself.

ALLEGED,---The Act of Parliament was never intended for extending women's liferent-provisions, or the legal obligement of terce, but for conventional debts, else the contracts of marriage of apparent heirs, and all their engagements, may fall upon their apparent heirs; which will occasion an infinite disorder, and pleas. *2do.* It is now turned to a fixed principle in the Scots law, that a wife can claim

no terce except in lands wherein her husband died last vested and seased; whereas Harwood was never infeft in any of his lands; *ergo* no terce. *3tio.* The obligement founded on is both holograph, and so presumed to be on death-bed; and, *de facto*, was so, and cannot bind his heir.

ANSWERED,—The Act of Parliament makes no distinction, but makes them liable for all their predecessors' deeds who were three years in possession. To the *second*,---Though, *regulariter*, no terce is due but out of lands wherein the husband died infeft, yet this rule has its own exceptions; for, by the 2d book of *Reg. Maj. cap.* 16. *sec.* 3. 4. *et seq.* it is declared, that all men, by the canon and civil law, are bound to provide their wives in a competent dowry. And Skeen, in his learned notes, there confirms it by authorities of law, which sustained them, though they were not settled by the contract antecedent to the marriage, but even after, and so called *donationes propter nuptias*; and King Alexander II. in his Statutes, *cap.* 9. *et cap.* 22. *sec. ult.* decides the case, That she must have a jointure, though her husband were never infeft in the lands. Craig comes after, and, *Book* 2. *Dieg. ult.* states two cases, where a terce may be due, though the husband was never infeft: and Stair, *tit. Of Liferents*, agrees with Craig, and thinks the wife may prevail in a declarator: and Hope, in his Major Practiques, gives an instance, betwixt the *Laird and Lady Dunlop*, where a husband's provision of a liferent to his wife on death-bed was sustained: as also Craig, page 85. and Dirleton, in his Decisions, 21*st January* 1668, *Shaw* against *Calderwood*. And what hinders a man to serve himself heir on his death-bed, and procure himself infeft? which validates all the obligements and deeds he granted, though they would otherwise have evanished as null: Even so here. As to the *third*, Though the obligement be holograph, yet there want not cases where law dispenses with solemnities; as a testament *inter liberos* needed not the formality and number of witnesses of other testaments; missives and bills of exchange are sustained *inter mercatores*, for the good of commerce; even so writs *inter domesticos* are not to be regulated by the formalities of other contracts.

REPLIED,—The decisions from *Regiam Majestatem*, (though it were our law, as it is not,) and King Alexander's Statutes, were but in particular cases, and not general laws, and are sufficiently convelled and destroyed by other places in the same book; as appears from that same 16th *cap. sec.* 5. 14. *and* 15. and *cap.* 18. where no husband on death-bed may settle a jointure upon his wife: and so it was found and confirmed by the Lords, Dury, 1*st February* 1622, *Robertson* against *Fleming*. And what Craig and Stair speak are but rational proposals to be the matter of an Act of Parliament; and, though such a statute were made, it could not look back to preterite cases; and their overtures are only to obviate fraud, where dispositions are made to anticipate the terce, or an heir wilfully lies out from entering, that his wife may be cut off from her legal terce; but nothing of that can be subsumed here. And whatever obligations may be on husbands to provide their wives, or relaxation as to the solemnities of such writs, is but at most *obligatio naturalis*, and has no civil or compulsory effect: even as the tie of providing younger children is bound on parents, both by the laws of God and nature; yet, where a father on death-bed had given but a very moderate provision to the second son, the Lords refused to sustain it, being quarrelled by the eldest son, in a reduction *ex capite lecti*, 1*st July* 1637, *Riddle* against *Richard-*

son: even as the undetermined obligation of giving charity can compel none to give it.

The Lords thought this case of a terce, and the Act 1695, was new, and deserved to be heard in their own presence.

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1700. *January* 11. Sir Thomas Kilpatrick of Closeburn *against* The Officers of State.

Sir Thomas Kilpatrick of Closeburn pursues the Officers of State, on this ground, That the church of Closeburn anciently belonged to the abbacy of Kelso, and that of Dalgarno to Holyroodhouse. They being suppressed after the Reformation, there was a charter granted by King James VI. in 1594, to Closeburn's predecessors, disponing the patronage of these churches in his favours; and since that time they have been in use of presentation; only the Bishops of Edinburgh and Galloway, in the late Episcopacy, controverted his right: and now his Majesty's Officers of State, on the abdication of bishops, claim the disposal of the vacant stipends as come in their place, Therefore Sir Thomas raises a declarator of his undoubted right to the patronage; and that though patronages be now taken away, yet that he has the sole right and disposal of the vacant stipends, to pious uses within the parish, conform to the late Act of Parliament.

Alleged for the King, 1*mo*. Thir churches, on the suppression of monasteries, were annexed and incorporated into the bishoprics of Edinburgh and Galloway; and are of their mensal and patrimonial churches; and they have been in use to set tacks of the teinds of the same. 2*do*. The very charter in 1594 reserves the abbots' right. 3*tio*. By the general Act of Annexation 1587, patronages of kirklands being annexed, these could not be validly disponed to Closeburn, unless a dissolution had preceded.

Answered,—Any rights the bishops can show are long posterior to his church; and the see of Edinburgh was not erected till 1633; and any pretence they could have to the teind was only to the superplus more than paid the minister's stipend. And, as to the *second*, The reservation in the charter was allenarly of the abbots' liferent then in being, but mentions not their successors. And as to the Act of Annexation, it does not mention church-patronages; and many hundreds were disponed after that Act; which, if quarrelled, would endanger the most of the patronages now dispersed in the hands of the nobility and gentry of the nation.

The Lords declared in favours of Closeburn, and preferred him, as having the better right.

In this cause it was started, If the Justice-Clerk, being an Officer of State, ought to have a vote in actions where the King was a party; though they could neither lose nor win in the cause.

The Lords forbore to determine this declinator, seeing it was not given in by the party.

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