

never designed to adduce that declaration as the only mean of probation to the inquest; though, by the Roman law, *dulcissima filii nominatio* was reputed a *modus legitimandi*,—*Novell. 117, cap. 2; et Authent. Si quis C. de Liberis Naturalibus*: But they will adduce a genealogical scheme, with every person's name and his marriage, up to the common root and *stipes* from whom they descended; so that the Queen has neither interest nor pretence, and is not competent, unless there were a donatar of bastardy or *ultimus hæres* competing; but Chapman, dreading the validity of his own right, is at the bottom of all, and has started thir needless difficulties; and none can judge it better than an inquest *ex vicineto*, to whom both parties were known.

The Lords thought that, if there were any real intricacy or dubiety, the Queen might compear, whether it were gifted or not, and had the same interest a donatar had; but found the pretence of an *ultimus hæres* very thin in this case, and remitted it back to the sheriff, with this instruction, that farther probation should be adduced of the propinquity of blood besides the defunct's declaration, and which the heir offered to burden himself with. And the Lords thought the Queen's name was only drawn in here to serve a turn, for Chapman's private design; and therefore refused to advocate the brief to the macers.

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1711. *February.* The HERITORS of MARYTON *against* The MINISTER and HERITORS of DUN.

MILNE of Balvillo, and the other Heritors of the parish of Maryton, gave in a protest for remeid of law to the British Parliament, against the Minister and Heritors of the parish of Dun; because the Lords, as commissioners for plantation of churches, had found the minister of Dun had better right to fourteen bolls of victual uplifted by the minister of Maryton out of his teinds, seeing *decimæ de jure debentur parochio*; though that loss must be recompensed and made up to the minister of Maryton out of the free teinds of his own parish. Which made his heritors protest to be free of that new burden.

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1711. *February.* FORBES of WATERTON *against* The EARL of ABERDEEN.

FORBES of Waterston gave in a protest for remeid of law to the British Parliament, against the Earl of Aberdeen his uncle. The case was,—Waterton, holding lands of the Earl of Dumferling, employed my Lord Aberdeen to transact the bygone casualties, and procure a change of the holding, which he did; and, after counting, paid in 8000 merks to his uncle for the same. Waterton apprehending that he was overreached in this sum, and that his uncle, when Chancellor, had by his power obtained the same either gratis or at least for a very small gratuity, he raises a reduction, and craves repayment of the 8000 merks, as *indebite solutum et ob injustam causam*; for, being his trustee, he could charge him with no more than he actually gave.

ANSWERED,—I made a most lucrative and profitable bargain for you. There were two marriages due, which far exceeded the sum paid; and I got you both a *novodamus* and a change of the holding; all which you have ratified by several reiterated deeds since your majority; and all know Waterton to be both *sciens et prudens*, and after so long an interval cannot now draw such solemn transactions in question.

Waterton contended no transaction could validate or take off fraud and dole.

The Lords assoilyed from the reduction; and found he could have no repetition of the money paid. Against which interlocutor he protested for remeid of law.

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1711. June 6. ANDREW MERRY *against* LOCKHART of LEE.

ANDREW Merry, chirurgion-apothecary in Edinburgh, having attended John Lockhart of Lee during a long course of sickness and swelling in his legs, and furnished a sear-cloth at his burial, pursues this Lockhart of Lee, his brother, on the passive titles, for payment of a great account; who objecting against some articles set down for his pains and attendance, it was ANSWERED,—That within burgh the payment of the drugs used to pass for all; but where the patient lived in the country, the waiting on him, to the loss of his other employment, was a plain damage, at least a *lucrum cessans*; which happened in this case, for he made a journey on his account to the Lee; and, after staying several days, left his apprentices *alternis vicibus* for some months, to attend him.

The Lords thought the payment of the drugs could not here compensate his pains; but that he might very well charge a separate article for his attendance and loss of time; which forced Lee to propone a total exception,—That, he being fiar of a tailyed estate under irritancies *de non contrahendo debitum*, he was not liable for this more than for any other debt; for this might be the ground of an adjudication to evict the estate, and so evacuate the design of the tailyie.

ANSWERED,—This was of a very different nature from other debts; it being *officium humanitatis et debitum naturale* to bury. And if this privileged debt were cut off, then the heirs of tailyie in Scotland (who were very numerous) behoved to lie above ground and rot; for who would funerate, that knew he was to get no reimbursement?

The Lords thought this point deserved farther deliberation, and therefore did not decide it at this time.

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1711. June 16. THE MARQUIS of LOTHIAN *against* THE VASSALS of JEDBURGH PRIORY.

THE Marquis of Lothian, as Lord of the Erection of Jedburgh Priory, pursues a reduction and improbation against the vassals and feuars of that abbacy; and he craving a certification against them, because they refused to take a term