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 assoilyied from the reduction; and found he could have no repetition of the money paid. Against which interlocutor he protested for remeid of law. *Vol. II. Page* 643.

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

ANDREW Merry, chirurgeon-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 compense 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 tailyied 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. *Vol. II. Page* 644.

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

to produce their writs,—it was ALLEGED they were not obliged, because he was not their true superior nor *dominus feudi directus*, but they were vassals to the Crown: for though he had right, by the erection, to their feu-duties and other casualties, yet that did not state him in the superiority, which title alone is sufficient to prosecute a reduction and improbation, and force them to produce; and therefore, without a special warrant from the Queen, no process can be sustained. Nor can the Queen's Advocate his general concourse support it; for that was refused to the Earl of Nithsdale, when he raised a process of this kind. And it was observed by a great statesman, that if the advocate were permitted to raise improbation against the Crown vassals, and force them to open their charter-chests, and sift out their defects and want of mid-couples, *profecto poterat esse valde dives.*

ANSWERED,—That the vassals were in two classes; some of them had renounced their holdings of the Queen, and had taken their lands holden of him; as to whom he was well founded to insist in his process of improbation. As to the rest, 1*mo*, He craved they might disclaim him on their peril.——But here there was small hazard; for the disowning of a subject as our overlord, and going to hold of the Crown, is never reputed a legal disclamation so as to forfeit the feu. 2*do*, ALLEGED,—By the feudal law there was *ostensio monumentorum*, an obligation to show their holding, that it might appear *quid de jure vassallus facere debet.* So the Marquis may justly insist for exhibition of their charters, to know the *reddendo* and feu-duties.

For understanding of this affair, it is fit to know, that, after the Reformation, the Parliament, considering that most of the kirk-lands had been mortified and given for saying of soul-masses, and other superstitious uses, therefore they annexed the temporality of the whole kirk-lands to the Crown, by the 29th Act 1587, to be a fund for defraying the necessary charges of the government, and to ease the subjects of stents and taxations; but such was the importunity of courtiers and favourites with our princes, that, in a short time, they got the most part of these kirk-lands erected into temporal lordships and baronies, whence they were called Lords of Erection; and the donatives had this excuse,—That the putting them in the nobility and gentry's hands was the best way to keep out the return of popery. King Charles I. being sensible of this dilapidation, he makes an ample revocation of all these gifts and alienations in 1627; but this startling and alarming many, he, by the 10th and 14th Acts 1633, allows the lords of erection the feu-farm duties; but declares the superiority of these vassals stood vested in the Crown: which was both an addition to the sovereignty, that the subjects should rather depend on it, than on other great men; and was the great ease, interest, and advantage of the vassals to hold only of the Crown. Therefore it was declared, That their feu-duties should be redeemable from them at ten years' purchase, or 1000 merks the chalder: but, to procure these lords' votes to carry on the Union, the court faction yielded to the 11th Act 1707 to discharge that reversion, and declare these lands irredeemable; by which gratification and bait they got sundry votes. These lords of erection gained another step by the 53d act 1661, by which it was left optional to these vassals of kirk-lands either to continue to hold of the Crown, or to take a new infeftment to hold of the lords of erection. After which, by cajoling them, in giving some abatement of their feu-duties and personal services, some of them were prevailed on to take their lands holden of the lord of erection, by which they became superiors

to all such as consented to this change; but, as to the rest who have not transacted, they still continue the Queen's vassals. And the declaring their feu-duties irredeemable, neither alters nor transfers the superiority; but it remains with the Crown *in statu quo prius.*

And therefore, in the present case of the Marquis of Lothian's, the Lords ordained him to give in a condescendence who had agreed and who had not; and then they would consider if he might not insist against the rest, in his exhibition, to produce their charters, that he might see their reddendo, feu-farms, and other services; but not to infer the severe certification annexed to improbation.

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1711. *June* 20. LYDIA FORBES and DANIEL AUCHMOUTY *against* JEAN FORBES and JOHN MONRO.

JEAN Forbes, sister-german to Captain Charles Forbes, confirms herself executrix as nearest of kin to her brother, and by that title intromits with his arrears and other debts owing to him. Lydia Forbes, conceiving herself to be lawful daughter to the said Captain, raises a process, with concourse of Daniel Auchmouty her husband, against the said Jean and John Monro her husband, to denude of the said office of executry in her favours, as lawful daughter to the said Captain, and to count for her intromissions, and repay them back to her, as truly the nearest of kin.

Against which it being excepted that she was not his *lawful*, but only his *natural* daughter, a conjunct probation was allowed to Lydia, the pursuer, to prove that Captain Forbes and Jean Price, her mother, were married and cohabited together as man and wife, and holden and reputed such; and to Jean, the sister, to prove that the pursuer is a bastard, and so holden and reputed. And so the point resolving in her legitimacy or illegitimacy, a probation was led on both sides; and a commission being directed to London, for examining witnesses there, it was directed, in the first place, to Lord Chief Justice Holt; and, failing of him, to my Lord Blairhall, then at London. Application was made to Holt's secretary, who told them he believed his Lord would not have leisure to accept and execute it; whereupon they presented it to my Lord Blairhall, who examined sundry persons on the points of the act.

But, in regard that a declaration under Holt's hand was produced, bearing, the commission was never shown to him, the Lords found it was not formally and legally executed; seeing the substitute-commissioner cannot be validly employed till the first nominated be required and refused, which was neglected in this case.

That probation being thus laid aside, the Lords proceeded to advise that which was warrantably taken on both sides. The substance whereof was,—*1mo*, Testificates produced for Lydia, the daughter, out of the baptism-registers, at London, one in 1684, and the other in 1685, bearing, one Charles Forbes and Jean, his wife, had two children baptized in these parishes. But none of them related to her; for she was born in 1678: and there was no testificate as to her baptism. Then she adduced the depositions of four witnesses, viz. Jackson, his landlord at London; Buxton, a tailor there; Skeen and Haliburton, two soldiers; who all depone, that they saw the said Captain Forbes and Jean Price