

“THE LORDS found the Doctor’s libel could not be sustained against the representative of the defunct, for attendance on that defunct, unless he would prove the debt by writ or oath.”

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1716. *July 31.*—IN this case, as stated on the 25th July 1716, the Doctor further insisted on this head, that it was usual with the Lords, and even for inferior Judges, to allow not only merchants and chirurgeons, but even common mechanics, when there is a *semiplena probatio* of their accounts, to make up what is wanting by their own oath in supplement, which is almost necessary in such cases, it being scarce possible for such things to be otherways proved; much more, then, ought a physician to enjoy the same privilege, of whose integrity there is far less ground to doubt.

*Answered* for the defender; That custom and practice has distinguished these from a physician; besides, these persons are in use to run with their patients and customers into accounts, and to give receipts when they are paid; so that the customer or patient hath himself to blame, if he pay without a receipt, knowing that such people keep account-books, and from these are allowed to pursue for, and prove their accounts; whereas, a physician’s account-book for his fees was never yet practised against a patient, nor do they ever give receipts for their honoraries, which makes a notable difference.

“THE LORDS found, That a physician, having an honorary employment, and not in use of giving receipts for what he receives from patients, hath no action against the defender, being a representative of the defunct’s, for any fees for his attendance, unless he could prove a promise or paction.”

Act. *Michelson.*Alt. *Arch. Hamilton.*Clerk, *Justice.*

*Fol. Dic. v. 2. p. 140. Bruce, v. 2. No 23. p. 30. & No 32. p. 43.*

1717. *February 7.*

DOCTOR RUSSELL *against* Sir JAMES DUNBAR of Hempriggs.

DOCTOR RUSSELL pursues Sir James Dunbar, as executor to the Lord and Lady Duffus, his father and mother, for the sum of L. 2000 Scots, for the Doctor’s attendance upon, and advices given, to the Lord and Lady Duffus, for the course of several years before their deceases. There was no question about the fact of the Doctor’s attendance, as the defunct’s ordinary physician; but it was *alleged*, That there did no action arise to a physician for fees or honoraries during his attendance; because these are presumed either to have been given from time to time, in such manner as the patient thought proper, and as satisfied the physician, or otherwise, that the attendance and advice was

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Physicians cannot pursue any action for their advice and attendance, except during the time of death-bed sickness.

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freely given ; for, in such case, there is no receipt or other document in use to be taken, but fees are given in the most private manner ; and, by the same rule, if processes were sustained for the fees and honoraries of physicians, lawyers might also pursue, who, on the like ground of law, are presumed either to be satisfied, or to serve *gratis* ; at least, whatever specialty might be allowed to a physician in an acute disease, or a deathbed sickness, it would be of very dangerous consequence to allow processes for a course of years ; for, if it would be competent to a physician or lawyer alive, the same action would be competent to their relicts or children after their decease ; and there would need no more but to prove the attendance for the course of many years, and no satisfaction could be proved to have been given any manner of way, the receiver of the fees being dead, and no writ or witnesses interposed in such cases ; for which reason, in a late case, at the pursuit of Doctor Johnston against Bell, (*supra*) the LORDS sustained no process even for deathbed attendance ; because, in that case, the process was not raised within the three years, but the LORDS having reasoned the case fully, were satisfied, that lawyers and physicians were upon the same footing, and that neither had any competent action for the course of years.

It was *answered* for the Doctor ; That my Lord Duffus's case and my Lady's was singular, especially my Lord's ; because, for some years before his death, his estate was affected by diligences of his creditors, so as he had no access to his rents, and had a very straitened subsistence for supporting his life ; so that the ordinary presumption of ready payment ceases ; nor is it presumable that a physician, who subsists his family by his employment, did attend with a resolution to serve *gratis*.

It was *replied* ; That circumstances in particular cases ought not to have any influence in the decision of general points of law ; and it is rather to be presumed, that the Doctor, who may have been better gratified formerly, would have served *gratis*, if there were no means of payment, or that the defunct's friends would be as careful, if necessity required, to make provision for medicine as for meat to preserve his life.

“ THE LORDS found, That the physician had no action for advice and attendance for the course of years ; but sustained process for his attendance during the deathbed sickness ; and having considered how far deathbed sickness might be reckoned in acute diseases, they found the same could not be extended beyond 60 days ; because, if the disease had continued longer, the presumption of satisfaction would in so far take place.”

*Fol. Dic. v. 2. p. 140. Dalrymple, No 171. p. 236.*