

## S E C T. V.

## Honoraries presumed paid.

1716. July 25. DOCTOR JOHNSTON *against* JANET BELL.

## No 88.

Found, that a physician, having an honorary employment, and not in use of giving receipts for what he receives from patients, has no action against the representatives of a defunct for any fees for his attendance, unless he can prove a promise or paction.

THE said Doctor Johnston having pursued Janet Bell, (as representing her father and niece,) for seven years attendance on them, before an inferior Court, the Judge ordained him to prove his attendance; and he having adduced several chirurgeons, &c. witnesses, who deponed, indeed, upon his attendance, but there were not two of them who concurred in any particular act or time; yet the Judge ordained him to depone, and give his oath in supplement: The cause having thereafter come before the Lords by advocation,

It was *alleged* for the defender, *1mo*, That it is not usual for physicians to allow their patients to run into such long accounts; and that it is foreign from that liberal service and profession, and disagreeable to their practice; so that the Doctor's having received payment at each visit being presumed, it follows, *2do*, That his oath in supplement (especially where there were not two concurring witnesses) cannot be allowed here, it being a tender proof, wherein the pursuer has the probation of his own libel by his own oath, which the Lords do never admit but in very pregnant and circumstantiate cases, which this is not.

*Answered* for the pursuer, *1mo*, That there was nothing extraordinary here, nor is it inconsistent with the profession and science to run into accounts with patients, the richest patient not being always the readiest payer, though, indeed, it be a motive for continuing attendance, seeing, in the event, payment may be very reasonably expected; *2do*, That a fuller proof, in such a case, could scarce be adduced; and, if two witnesses had concurred, there had been no need for an oath in supplement; so that he having as clear and full a probation as is possible for any of that employment, it was but just, that, for supplying any defect that might be therein, he should have his oath in supplement, as to the number of visits and time of attendance, which has been often practised before the Lords, *viz.* to ordain a party to depone even in his own favour, where there is a *semiplena probatio*, as is observed by the Lord Stair, B. 4. t. 44. § 9.; and so it was decided, 25th November 1680, Crawford against Hutton, *voce* PRIVILEGED DEBT; where the LORDS sustained an oath in supplement to a pursuer to instruct the quantity of funeral charges expended by him, having otherways proved that he made the funeral expense.

“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.”

No 88.

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.