1682. *March* 24. JAMES ELIES *against* CATHARINE THOMSON and LORD CASTLEHILL.

IN Mr James Elies of Stanhopmiln's cause against Catharine Thomson and my Lord Castlehill, her husband; the Lords, on Saline's report, sustain Castlehill's defence of compensation, founded on the account produced by him, mentioning more articles than the 20,000 merks; and that, notwithstanding that the bailies of Edinburgh's decreet, founded on by Stanhopmiln, pursuer, mentions and relates to a fitted account; in respect of the said fitted account produced, which they find to be the very account related to in the said decreet; and that in respect of James Elies's declaration produced; and although the account is in some articles delete and scored, and the date of it unclear. This last line anent the deleting was disputed, but was not in the interlocutor; but the Lords went over it.

Then the Lords ordained both parties to count and reckon with each other, on Castlehill's summons against Stanhopmiln, for counting and reckoning, as heir to his father, who was cautioner for the said James Elies, factor at Campvere; which James, the factor, Castlehill alleged, was owing to Patrick Thomson, his lady's father, other sums besides the said 20,000 merks, contained in the bailies' decreet, So that the Lords found, by this interlocutor, (which was very strange,) that neither the fitted account, betwixt Patrick Thomson and James Elies, nor yet the decreet following thereupon, did comprehend all debts and accounts betwixt them preceding their dates; but that Patrick's heirs might yet charge James's representatives, and his cautioners, as factor, with other articles not stated in the said fitted account. Whereas we urged, the Lords might call for the opinion of merchants, and by it they would find that, in their customs, a stated account was presumed, in mercatorian law, between merchants, to include and comprehend all articles they had to charge one another with, preceding the date of that fitted account.

Then a bill was given in against this by Stanhopmilns. But it was refused; only they ordained Castlehill to depone, if, after search among all his father-in-law's papers, he had found, or knew any other account between them, except this vitiated one he produced. Which he denied upon oath.

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1682. *March* 24. GORDON of TROQUHEN *against* CANON of BARNSHALLOCH.

See the prior part of this case, Dictionary, page 4722.

THE Lords, having heard Halton report the debate, find it is *jus tertii* to Barnshalloch, the defender, to propone upon the minute entered into by the pursuer with the rebel; and find the defender has not the benefit of a possessory judgment; but grant joint probation to both parties, for proving the rental of the lands possessed by them hitherto *pro indiviso*, as conjunct donatars to M'Lennan of Barscobe's forfeiture; Troquhen for three parts, and Barnshal-

loch for the fourth; to the effect it may appear whether or not the lands the defender possesses be the just fourth part of the whole lands.

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1682. *March 25.* ANENT TOCHER.

IT was argued amongst the lawyers:—Whereas, by our custom, when a marriage dissolves within year and day, we re-integrate all things, and give back the tocher, and the wife gets no jointure, unless there is a child born; it was thought more just and reasonable to give the woman (who is devirginated) her election whether she will take back the tocher or will betake herself to the jointure and liferent.

2do, It was argued; where a marriage dissolves within year and day, and no bairn is procreated within that time, but, before the marriage, there was a child procreated, and which was legitimated by the marriage; *quæritur*, if he will gain the tocher or courtesy by this. Some think he will; because such a child, *fictione juris*, is held in all respects as born *in legitimo matrimonio;* and, though this seems to encourage and bestow privileges upon uncleanness, yet it does gratify it no farther than the subsequent marriage does. Yet that of the return of tochers being *ex jure consuetudinario* with us, it ought not to be extended *ultra proprium suum casum;* and the words of the custom seem to run against his gaining of the tocher; seeing the child is not truly, but only *præsumptione juris*, born after the marriage.

3tio, It was doubted among the advocates,—where, by a contract-matrimonial, a tocher is appointed to return to a wife's heirs and executors, why a husband may not crave, though the marriage be dissolved, and his wife was not an heretrix of lands, to liferent the said tocher by the courtesy of Scotland, as he would liferent her lands? Though it has not yet been done, yet nevertheless some thought it might be so extended by the Lords *a paritate rationis.*

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1682. *March* 28. ROBERT GIBSON *against* GEORGE HANDYSIDE.

ROBERT Gibson, merchant in Edinburgh, against George Handyside, clerk to the Weigh-house in Leith, and James Livingston, his cautioner. The Lords, from the probation, found it was not proven to be the custom of the tackmen of the Weigh-house of Leith, to accept of precepts or decreets against these who have goods lying there, in part-payment of the tack-duty which the clerk of the said Weigh-house accounts for to the tacksman. *Vol. I. Page* 181.