terms of the late Act of Sederunt, 20th November last; with certification, if farther intromission be proven against him, he shall be liable in the double. And it was alleged this must be easily formed; seeing the books would instruct what coals were then lying on the hill, and how much salt in the girnels, and what victual was in the lofts, at the time of Mr James's entry. Others thought this was to state him in the favourable case of a *negotiorum gestor;* whereas, the Earl convened him as a predonious possessor, and expected his *juramentum in litem* against him. Therefore the Lords, by a plurality, allowed a conjunct probation, before answer, of the facts mutually alleged; from which it would appear in what quality and character he should afterwards count; though this method seemed to retard the process and counting. *Vol. II. Page* 702.

1693, 1695, 1704, 1709, 1711, 1712. SARAH CAMPBELL, ANDREW BLAIR, her Husband, and JOHN WILSON of SPANGO *against* JAMES FARQUHAR of GILMINSCROFT.

1693. *January* 24.—FARQUHAR of Gillmilnscroft against Wilson of Spango. The Lords refused to stop execution upon Spango's clear bond, on the pretence of his reduction; seeing his reduction was not against the bond, but only against the pursuer's right of assignation thereto; which was reserved to him, as accords. *Vol. I. Page* 549.

1695. *November* 29.—IN the mutual actions pursued between James Farquhar of Gilmilnscroft and John Wilson of Spango,

The Lords having advised the probation, they sustained Andrew Blair's title as nearest of kin to the deceased Campbell of Glassnock; and found the disposition granted by the said Glassnock to Gilmilnscroft was proven to be signed the day before his decease, and that he was then so stricken with a lethargic palsy, that he did not know the nature of it, nor was the same read, nor the tenor thereof intimated to him, nor he capable to understand it; and therefore reduced the disposition, and assoilyied Spango. But in regard it resulted from the testimonies, that John Ferguson, the notary, had been very instrumental in drawing and offering that disposition to the sick man, and yet afterwards entered into a contract with the heir to quarrel it, and was to have a share of the gain in the event of the reduction; therefore it was contended, that he ought to be liable in damages to Gilmilnscroft, in whose favours the disposition now reduced was granted, he having concurred in subverting a right he had been employed to procure.

The Lords thought, the being a witness in a writ could not preclude the witness from impugning the same; but, where one was active to reduce a deed which he had managed and carried on, they thought this might be construed a breach of trust.

The question then arose, How this could be drawn in upon this process, where Ferguson was not a party?

Some moved, that they should be remitted to pursue him by way of action. But the Lords finding that, as the fact seemed fraudulent and unfair, they might try it instantly; and therefore ordained him to be cited *incidenter* in this same

process, to defend why he should not be condemned in the damages, the disposition being questioned on a deed of his, and made null, as far as he could by his deposition.

I remember the Lords have sometimes found witnesses liable for damages to the party, where the writ has been annulled on their confessing upon oath, that, at the signing, they did not see the party subscribe, nor hear him give them warrant to sign, conform to the 5th Act, Parliament 1681.

Vol. I. Page 681.

1704. *January* 25.—THE Lords decided the case betwixt Campbell and Farquhar of Gilmilnscroft. William Campbell of Glasnock having, the day before his death, made a disposition of his whole moveables and stocking, to a considerable value, in favour of Gilmilnscroft; and Wilson of Spango being the disponer's debtor in 500 merks by bond; and being pursued for payment, he, with concurrence of Andrew Blair and Sarah Campbell, Glasnock's heirs, raises a reduction of that disposition, as granted when he was *non compos* and incapable to understand what he was doing; and probation being led, it appeared to have been granted after he was seized by a palsy and a lethargy, and was almost turned deaf; and it was not read to him, and he died the next morning.

The Lords, on this, reduced the disposition: and a process being raised against Gilmilnscroft for repetition of 3 or £4,000 Scots he intromitted with, by virtue of that disposition, he repeated a reduction of the decreet *reductive* of his disposition, alleging, the material witnesses adduced for proving his incapacity were inhabile, *viz.* Ferguson, who had a share of the benefit assigned to him by the executors; and Crawfurd, the apothecary, who was not an instrumentary witness, nor present at his subscribing; and laying them two aside, the reason of reduction was not proven.

ALLEGED,—That they opponed the probation, which was full without them; and this was to quarrel the decreet on the head of iniquity, and that the Lords had found that proven which was not: neither could they object against these witnesses now, seeing they had not protested *debito tempore* for a reprobator; and they adhered to their decreet *in foro;* which was *res judicata,* and, till it were taken off the file, they would not debate the grounds whereon it proceeded.

ANSWERED,—*Exceptio rei judicatæ* could not be obtruded here; because that only takes place where it is *inter easdem personas, et idem jus, eadem quantitas et corpus, eadem causa petendi, super eodem medio, et eadem conditio personarum*; and unless these concur, *non est eadem res, sed alia,* as the law decides, *l.* 12, 13, 14, *D. de Except. Rei Judicatæ.* And now, to apply it, it is not the same persons; for, there, the principal parties were Spango and Gilmilnscroft, —here it is the creditors of the executors and nearest of kin; there it was only Spango's debt of 500 merks,—here, it is the whole subject of the executry disponed; it is not *eadem causa petendi,* for, there, Spango did it only to sustain his discharge he had got of his 500 merks bond; now, it is to reduce the disposition simply, *et in totum:* so neither the subject nor the cause is the same.

REPLIED,—The decreet has all the requisites to a *res judicata*; for Spango was not the sole pursuer, but likewise Andrew Blair, the heir and executor; so it is still *inter easdem personas,* unless Gilmilnscroft condescend upon another that is nearer; which he cannot do. See Stair, *book* 4, *tit.* 40. Likeas, the goods and sums disponed are the subject of both processes.

The Lords found the decreet was not only a *res judicata quoad* Spango, but

likewise, as to Glasnock's heirs, they being pursuers of the reduction as well as he; and therefore they assoilyied from Gilmilnscroft's reduction, and found it was *res judicata*, simply *et in totum*, and so debarred him, else there should be no *finis litium*; it being the interest of mankind that pleas be not immortal, and that one be not the seed to propagate another, like Cadmus's teeth.

Vol. II. Page 214.

1709. *July* 19.—THE deceased Campbell of Glasnock dispones sundry moveable debts to Farquhar of Gilmilnscroft. One of the debts being 500 merks, due by Wilson of Spango's bond, Farquhar pursues him for payment. He applies to Sarah Campbell and Andrew Blair, the nearest of kin to Glasnock, the disponer, and enters into a bargain with them, that they giving him a factory to pursue a reduction of that disposition, as done *in lecto*, when Glasnock was *in extremis*, and knew not what he was doing; and, if he prevailed, he was not only to get a discharge of his own sum, but a premium of 400 merks more; and when Farquhar was like to get out a decreet against him, then he repeated a reduction of the foresaid disposition, raised in his own name, as factor for the disponer's heir and executor. And it being received *incidenter*, a probation is led of Glasnock's condition at the time that he subscribed that disposition to Gilmillscroft: and being advised, the Lords found it proven that he was incapable and insensible; and so reduced the disposition.

Of this decreet, Gilmillscroft raises a reduction on thir reasons. 1*mo*. The decreet is null, because Andrew Blair's relation is not proven but only by a declaration under Sarah Campbell's hand: And her own retour calls her *neptis patrui defuncti*, which is ambiguous; for, in propriety of grammar, *neptis* is a grandchild, as appears *per l.* 1 *D. de Grad. Affin.*—but there it signifies a brother-daugher. 2*do*. There was nothing but an attested double of the factory produced, which was no sufficient title to sustain the process. 3*tio*. The reduction was only repeated for Spango by way of defence, to support his suspension *quoad* his own debt; and so could never reduce the disposition *in totum*, but only in so far as Spango was prejudged thereby. 4*to*. It is farther null, being put in the minute-book only as an absolvitor and reduction in Spango's name, without mentioning the nearest of kin. 5*to*. The only material witness that proved Glasnock the disponer's incapacity, was one Ferguson, a notary, who, besides other prevarications, confesses he was to have the half of the goods on the reduction's taking effect; and so was deponing in his own cause.

ANSWERED,—They opponed their decreet *in foro*, which are not to be overturned on insinuations of iniquity or dark shadows of nullities; and scarce any decreet can be instanced where the fertile inventions of lawyers will not pick some nullity; which is of universal consequence to the security of the nation; for, *hodie mihi cras tibi*. And this has all the marks of a decreet *in foro* and a *res judicata*, it being *inter easdem personas*, the same individual question, with the same reasons and arguments, both in fact and law, as are prescribed in *l.* 4 *D. De Except. Rei Jud. l.* 4 *D. De Hæred. Petit. Res judicata obstat cum, inter easdem personas, eadem quæstio in dubium revocatur.* And not only is the propinquity of blood fully proven, and his utter incapacity of knowing what he was then doing, proven; but the Lords have found it so; and to quarrel it, is to stage the Lords with iniquity, in finding that proven which was not proven.

The vote being stated, Whether this reduction was total or partial, only in so far as concerned Spango's interest;—the Lords, by plurality, found it only partial,

and so opened the decreet. As to the inserting the names in the minute-book, the Act of Sederunt, December 10th, 1686, relates only to the defenders' names, and not to the pursuers'. *Vol. II. Page 517.*

1711. *February 7.*—[See the Report of this date, Dictionary, page 12,082.]

1712. *January 16.*—To shun repetition, I refer to what is marked *supra*, 19th July, 1709, where the Lords found Spango's decreet of reduction of Glasnock's disposition to Gilmillscroft was only partial *quoad* himself and not *res judicata;* and allowed Gilmillscroft and Campbell a conjunct probation, as to his sense and capacity, the time of subscribing the right of his moveable estate to Gilmillscroft. And each party having adduced witnesses, and Campbell likewise repeating the probation of his insensibility, adduced in Spango's decreet, where the Lords had found it proven that he was utterly destitute of all sense and capacity to understand or know what he was doing at the time he subscribed that disposition; but Gilmillscroft having adduced no probation then, and the Lords having allowed him a mutual probation now; the whole came in to be advised this day. And Campbell's lawyers founding on the former decreet annulling and reducing that disposition as a *res judicata*, and how ill it would sound in the House of Peers, on an appeal, that the Lords the one year should find it utterly null, as done by a man so struck with an apoplectic lethargy that he knew not what he was doing; and the next year, that the same very court should sustain the disposition as legal, just, and rational:—

ANSWERED, This would neither import indecency nor incongruity; seeing the Lords do not proceed to contradictory interlocutors *super iisdem deductis*; but on a quite different and split new probation, not in the field at the time of the first decreet. So that both the *first* and *second*, though *in terminis* contrary, are justifiable in law.

Then the Lords considered the testimonies of all the witnesses, both those led in the first process, and these now deduced in this summons *reductive*; and it appeared that both had proven their allegeances, to the shame and opprobrium of the witnesses; for Campbell's witnesses proved, that the day he signed the disposition quarrelled, (the next morning he having died,) he was so stupid that they could draw no answer from him, without great crying and tossing him, but YES and NO, with some indistinct muttering; and sometimes answering HUMPH, and falling instantly asleep, and his bed-sheets taken from under him all wet, and yet he never complained. That, as no order was given for drawing the disposition, so it was not read to him before his subscribing; and that the palsy had affected one whole side of his body, which could not but weaken both his memory and judgment.

On the other hand, Gilmillscroft's witnesses proved, that, for a long time before his death, he was turned hard of hearing, and somewhat slow and letsome in his tongue; so that it was no wonder they were put to cry in his ear, and that he spoke but little; yet, that he was as sensible and rational that day he signed the dispositon, as he had been of a good time before; and that he counted with his tenants, and gave them discharges, and paid off his servants' fees, and gave them tickets for what was resting; and being intrusted with a right, by one Davidson, he gave him a retrocession that same day. And one craving his paced pony from him, he refused, giving this reason, that he had given all his

moveables to Gilmillscroft. And another seeking some of his linens and napery, he answered, they had got too much already. (This, by the by, shows how a poor man is disturbed when he should be least.)

All that was left to the Lords in this conflict of a contrary probation, was to find out, in so great a mass of testimonies, which of them had proven most pregnantly?

It was CONTENDED for Gilmillscroft, that he had proven sufficiently *ad victoriam causæ*, his capacity and sensibility at subscribing; for he had all the principles of law on his side, such as *unusquisque est rei suæ moderator et arbiter*; and the law of the Twelve Tables gave an illimited power *uti quisque legassit*. *2do. Quisque præsumitur sanæ mentis donec contrarium probetur*, as appears by our reserving faculties to alter *etiam articulo mortis*. *3tio.* In an inconsistent probation about one's capacity or incapacity, some affirming, others denying, *plus creditur duobus affirmantibus quam mille negantibus*. *4to.* Where the party, receiver of the right, is a near relation, as Gilmillscroft was. *5to.* Where it is signed by the party himself, and not by notaries for him; a man able to write cannot be called insensible. *6to.* When the person institute is not upon suggestion from others, but expressly named by himself; as here, being asked, whose name will ye have filled up? he answered Gilmillscroft. *7mo*, It is a great diagnostic of the party's intention, when he had by a *præambula voluntas* given indication of his design by a former disposition, now lost; and giving legacies and gratifications to his nearest of kin, which he would never have done if they had been to succeed him *ab intestato*.

On the other hand, it was ARGUED for Campbell,—That the bulk and strain of the witnesses proved his incapacity as clear as words can make it; the very chirurgeon (who is more to be credited *in sua arte* than ten ignorant witnesses differing from him,) being positive, that he was so benumbed by the palsy he had quite lost his understanding; and, though he ministered the *sal armoniacum*, *oleum castorum*, and other strong medicines to him, yet they had no operation, but [he] grew still worse and worse. And the only witnesses who depone in favours of Gilmillscroft's disposition, making him rational and sensible at the time, *viz*, Davidson and Weir, are most suspect and incompetent; for, besides their deponing things incredible and miraculous of his perfect judgment, incompatible with that distemper, Davidson's testimony carries its dittay, and reprobates itself; for he acknowledges he got a retrocession of a trust from him the same day. Now, if he had called him insensible, his retrocession fell to the ground; so he evidently depones in his own favours. And, as for Weir, Gilmillscroft had him under caption for a debt; so he was not free from the terror of imprisonment.

To thir objections it was ANSWERED,—That the trust Glasnock denuded of to Davidson is sopited and transacted more than twenty years ago; and his oath could never prove for him; so he could neither tine nor win in the cause. And, as to Weir, it is no legal objection that a witness is debtor to the adducer.

Both parties adduced Menochius *de Præsumptionibus, et Mantica de Conjecturis ultimarum Voluntatum*; and Sande *Decis. Frisiæ*, where they state a testator *corpore quidem æger et infirmus*, but *mente sanus*, at least *dubitativè talis;* and give the marks and signs when his testament is to be sustained, and when not. And they state a case where the sick man *varia loquitur et phantasmata habet*; yet, if he obey the physician, and take his drugs, and, in the intervals, speak sensibly,

they think his testament good. And the Emperor Constantine, in *l.* 15 *C. de Testamentis*, favours the wills of defuncts so much, that he declares *momenta verborum non necessaria etsi seminecis et balbutiens lingua ea profuderit.* Campbell's lawyers acknowledged, that, though the Roman law had loaded testaments with great variety of solemnities, yet they were too fond in supporting them *usque ad supremum vitæ halitum*, where little either of judgment or sense can be expected; which has made the municipal law and customs of most nations to recede from that unbounded liberty of testing. And Clarus tells us, that some of the states and principalities of Italy require, to the validity of a testament, that it precede the testator's death at least two days; as now we have settled 60 days for heritage. There is no doubt but distempers seize the organs of the body, and thereby discompose the soul; for the mind follows *temperamentum corporis.* Yet neither lawyers nor physicians have determined the precise measure and degree of sense, reason, and judgment, requisite in a dying man making his last will. The condition of sick people is so various that it is impossible to fix a standard; so that all the rule we can take is the opinion of the bystanders present, how far they judge him sensible and rational at that time. And, though here the witnesses differ widely; Campbell's saying that he was seized with a palsy and lethargy; that it was with great difficulty they could make him hear what was said to him, even after shouting and tossing; and Gilmillscroft's being as positive, on the other side, that, though he was dull of hearing, and slow of speaking, yet he dispatched several affairs that day, cleared with his servants, discharged his tenants, answered questions, &c.; which could not be done without some degree of understanding and sensibility. By which contrariety, the Lords were left to balance where the weight of the testimonies did preponder.

Campbell insisted much, That it was wholly elicited and extorted, never being read to him: and cited a decision, *8th February* 1695, the *Viscount of Arbuthnot* against *the Tutors*, where the Lords annulled the testament, because it had not been read to him.

To this Gilmillscroft ANSWERED,—The specialty there was, that Arbuthnot labouring under a lent disease, the warrant for drawing it was given in May; and he, having lingered till August, and then drawing near to death, it was presented to him; and, after so great an interval, the Lords thought it should have been read to him. But here the order and signing was all in a day; besides, the substance of it was repeated to him, and its tenor intimated. See the *11th July* 1671, *Seton* against *Wilson.* And equity would not allow such wrangling sophistry to cover a supposititious extorted disposition, loaded with such evident defects. And the Roman law, the best of any law in the world, next to the law of God, condemns all such strained subtleties. And it were a most dangerous preparative to allow a second probation, where they see what is wanting in the first. This tempts directly to the subornation of witnesses. And when we call him insensible, we do not mean that he was incapable of the common functions of life; but only that his understanding was so affected that he did not comprehend the import of the writ offered. Neither does the signing one's name prove his deliberate consent; for one may do that in the hottest paroxysm of a fever, or in drink. Campbell, though he has the plurality of the witnesses for him (for that were but small matter, if it were all,) but he also has the most judicious, unsuspect, and knowing, both for reputation and probity. And Gil-

millscroft has only two, Weir and Davidson, wholly open to great exceptions; and have taken a vast liberty to make him perfectly rational that day; which neither his physicians nor any other present could see but themselves.

Gilmillscroft ALLEGED,—He would have proven much more, had not the Lords confined him to the man's condition the day he signed it, with the day before and the day after. Whereas, if he had been allowed to adduce witnesses who saw him from the commencement of his sickness, they would have told that he called for a former disposition he had given him, but it was abstracted and put out of the way; at which he declared himself very angry.

The Lords having balanced the testimonies, found judgment as much proven as was sufficient to sustain the disposition; and assoilyied Gilmillscroft from the reduction of it, as if he had been insensible at the time.

Vol. II. Page 705.

February 29.—Campbell of Gairclach gave in his protest against James Farquhar of Gilmillscroft, and the interlocutor *supra*, 16th January 1712.

Vol. II. Page 734.

1711 *and* 1712. JEAN LESSLY, Lady Innernytie, and BLAIRHALL, *against* ANDREW NAIRN, her Husband.

1711. *February* 27.—MISTRESS Jean Lessly, Lady Innernytie, and Blairhall, pursue Captain Andrew Nairn, Dunsinnan's brother, and her husband; libelling his many rude maltreatments and barbarous cruelty to her, whereby she was forced to withdraw; and concluding an aliment to be modified to her out of her own jointures he possessed *jure mariti* by her.

ALLEGED,—*Omnis libellus generalis est irrelevans et ineptus;* maltreatment is not sufficient to infer the conclusion, unless the acts of severity were condescended on.

ANSWERED,—This was forborne from a regard both to his honour and her own; and she would condescend *in termino* when she came to lead the probation and interrogate her witnesses.

The Lords found she must give in a special condescendence of the deeds she complains of, that he might have liberty to object.

Whereupon she having made a particular condescendence, she was allowed to prove the same, and he to adduce what alleviation he could for extenuating or exculpating himself. Then he objected, That no acts of maltreatment could be admitted to her probation but what were subsequent to the 15th of May last; because, by a declaration under her hand, and ratified before the baron-court, she acknowledged that she had given him grounds of just offence, and that she would live more quietly with him in time coming; and that she should intent no process against him that did either touch his person, estate, or reputation. So that being a full amnesty, pardon, and reconciliation, no preceding injuries can be now tabled or insisted on against so final a settlement betwixt them.

ANSWERED,—In such expiscations all must come to the trial; and preceding severities to that paper must be conjoined, to give the Lords a full view of the *sævitia* and intolerable cruelty, *ut juncta juvent.* 2*do*, By his breaking the con-