1745. *February* 10. ——— *against* ———.

THE Lords found, That, in a squabble, the party who was the first aggressor or provoker, though heartily belaboured, was not entitled to damages, nor even to the expense of the process. Or, supposing it was not clear who was the aggressor, yet the Court seemed to be of opinion, that where there was *mutua pugna* there was *nulla pœna.*

1745. *June* 20. PATERSON *against* SPRUEL.

[Kilk., No. 5, *Deathbed; Rem. Dec.* No. 73; Falconer, p. 123.]

DECIDED this abstract point, Whether a man upon deathbed, disponing his whole heritable and moveable subjects to his heir, the same being likewise nearest of kin, may legate an heritable subject, below the value of the moveable subjects disponed to the heir by the same deed? and it was found, by plurality of votes, that he might. *Assent. Arniston, Preside, Tinwald. Dissent. Drummore. Absent. Elchies.*

A distinction was made, by Arniston, betwixt the case where such a legacy was left in a testament made *in liege poustie*, and the case where it was left upon deathbed. The first case he thought clear, the other more doubtful; because all dispositions of heritage upon deathbed are reducible, as proceeding from persons weak and disordered in mind. A distinction was made too, betwixt the case in which the heir accepts the disposition, and the case where he repudiates the disposition, and takes up both heritage and moveables *ab intestato*: in the first case, it was generally agreed that he could not divide the disposition, and take what made for him, and reject what made against him; the second case was thought more doubtful; but it seemed to be the general opinion, that the heir could not disappoint the legatar, by repudiating the disposition.

The fact here was, that the heir homologated the disposition by several acts; but he was minor, and could revoke these acts of homologation, and take up the succession *ab intestato.* The decision seemed to go upon this principle, that the heir was not prejudiced here, since he was left moveables which the defunct might have put by him, sufficient to pay the legacy. The Roman law, too, was brought in aid, and a legacy of an heritable subject was compared to a *legatum rei alienæ*, which, to a conjunct person, (the case here,) is valid *utrum sciverit testator an nesciverit alienam esse, l.* 10, *Cod. de Legat.*; though I think, when a man makes his heir his executor, and legates an heritable subject, it is rather *res hæredis*, so that there is no occasion for the distinction *utrum sciverit an nesciverit.*