ram's, they found it *super diverso medio ;* and so could not preclude his insisting in this.

And whereas it was ALLEGED that the balance of £3500, reserved in that discharge, might be made up of the product of the brewery after Kincaid, one of the partners' death, and so Balram, as Kincaid's executor, could have no share therein ;—the Lords found the presumption lay for him, 1*mo.* Because it might be malt bought by them all before his death, and brewed after it. 2*do.* The discharge expressly bore a clause of warrandice to secure the clerk against Kincaid's representatives ; which is a tacit acknowledgment that he had a share and interest in that product, though after his death some months ; and therefore that he might claim his part, unless the defenders produce the account to which that discharge is relative ; and then it will appear what was before and what after his death. *Vol. I. Page* 625.

1694. *July* 4. SARAH DOUGLASS, and IRVINE of WOODHOUSE, her Son, *against* GRAHAM of MOSSKNOW.

THIS was a reduction of a decreet *in foro* in 1683, finding Irvine of Bonshaw had been tutor to the said Woodhouse, and, in the event of the count, that he was debtor in £17,000, for which they had adjudged Bonshaw's estate. The *first* reason was, That the decreet did not determine nor divide the several manners of probation according to the nature of the articles, but the pursuer had led witnesses on them all ; whereas, his being tutor, and the defender's being infeft, could only be proven *scripto ;* which was a clear nullity. The ANSWER to this was,—He was libelled against as tutor, and his deeds of pro-tutory were evidently proven, and also acknowledged by himself, in so far as he craved deduction for lands wasted by the English ; which presupposed his intromission as tutor. The Lords repelled this, and found it no nullity.

The *second* reason was, That the witnesses were not sworn ; seeing their depositions wanted these words in the end, " This is the truth, as they shall answer to God." ANSWERED,—Though the clerk had omitted this, and that the invocation of the name of God was essential to an oath, as that which struck terror, yet it was here materially supplied ; because it bore, in the beginning of the deposition, that they were solemnly sworn, which includes all solemnity of the words. The Lords also repelled this nullity.

The *third,* and more material reason, was, That, by the age of the witnesses, it appeared that two of them were but ten years old the time of the facts inferring the tutory, whereupon they depone ; and things observed in pupillarity cannot make faith ; seeing they are not then arrived to that maturity of judgment as to understand things. The Lords considered, if they had been examined on a commission *de recenti,* and been alive, there was some pretence ; but, being now dead, *et proximi pubertati,* when they saw the things on which they deponed ; and giving a good *causa scientiæ,* because they were his tenants' sons, and lived in the place, and conversed daily there : though at the time of their examination parties were not present, (as now, since the Act of Parliament 1686,) yet, *quoad initialia testimoniorum,* as their age and the like, they were not debarred, but had liberty to object : Therefore the Lords also repelled this

reason; especially seeing there were three or four other witnesses who concurred with them in the same things, and against whom there was no such objection. So, on the whole matter, the Lords adhered to the decreet, and refused to loose it. *Vol. I. Page* 626.

1694. *July* 4. The Two Daughters of Crookston *against* John Borthwick, their Brother.

The cause of the two daughters of Crookston, against John Borthwick, their brother, for payment of 12,000 merks, contained in their mother's contract of marriage, was reported. Alleged,—All these provisions to daughters of a marriage are only in case there be no sons, and the estate tailyied to an extraneous heir; so that the daughters, as heirs of line, are debarred; then portions are especially provided to them; but *ita est* there is an heir-male of the marriage here, and the clause is conceived by mere mistake; for never was it dreamed that daughters should have 12,000 merks off their own brother, by a contract, unless there were a bond of provision. Answered,—The clause is most express; and, whatever is the usual style, yet paction may derogate therefrom; *et in claris non est locus conjecturis:* and, in regard of this provision, the father had disponed all his moveable estate by his daughters; so, if they got not this, they would he absolutely frustrated, and get nothing. The Lords found the clause so express that they decerned conform; though it was both unusual and exorbitant, yet it was not unlawful. *Vol. I. Page* 626.

1694. *June* 22 *&* 29; *and July* 4. The Earl of Tweeddale, Chancellor, *against* The Earl of Lauderdale.

June 22.—Whitelaw reported the reduction, raised by the Earl of Tweeddale, Chancellor, against Richard Earl of Lauderdale, of a decreet obtained by the Duke of Lauderdale against him for the teinds of Pinkie. See Stair, *22d January* 1678. His reason of reduction was, That he succumbed then; because, having founded upon two tacks of these teinds, the one from Abbot Pitcairn to M'Gill of Rankieler, the second from Queen Anne;—the Lords had repelled both the defences founded upon these rights:—the *first*, Because, though Rankeiler's tack was produced, yet his assignation of the same to the Earl of Dumfermline, Tweeddale's author, was not produced; and so it was *super jure tertii:* and the *second*, Because Queen Anne, being but a liferentrix, her tack had ceased with herself. And now, as the Earl of Tweeddale had recovered Rankieler's assignation to Dumfermline of that tack, and producing it, he ought to be reponed,—it being but of the nature of a certification in a single reduction, which is always taken away by production; especially seeing he was ready to give his oath that he had it not then, but has recovered it since out of Dumfermline's charter-chest. Answered,—The decreet *in foro* cannot be opened, that being no nullity; and it was the Earl of Tweeddale's own fault that he did not seek an incident diligence for recovery of the assignation as well as the tack; seeing they