mant. *5to.* *Esto* it were competent *ob difficultatem probationis,* occasioned *ex dolo adversarii,* yet here was no fraud on the defender's part, but ignorance; for as to the leaves torn out, it is offered to be proven it was one Dalton, an Englishman's book, who had begun to write his accounts in it, and her husband getting it, these leaves whereon he had begun to write were taken out; and as to the deleting the debtor's names, she, being to produce the count-book to the commissaries, thought it indecent that noblemen and gentlemen's names should be read and propaled there, which moved her to score them out; and the interlinings were done in her husband's time; and one of the children recklessly did tear a part of the book.

Answered,—Our law has not restricted the oath *in litem* to spuilyie and violence; but the same must be received wherever the probation fails by the defender's fraud, the parity and analogy of law being the same in both, else dole may escape unpunished. *2do.* This privilege *transit ad hæredes et creditores;* and though *l.* 42. *D. de Reg. Jur.* presumes an heir ignorant of his predecessor's deeds, yet this is sufficiently taken off by a positive probation, That the heir and his tutors know the condition of the defunct's estate; which is inferred from thir grounds, familiarity, near neighbourhood, relation, and intimate correspondence with William Mein, the defunct, with the said William's own acknowledgments and declarations anent the value of his estate, and the testimonies of famous persons who traded with him, in buying and selling every day, and were oft in his shop, &c. And, seeing law requires no more but that the party be *verisimiliter instructus et informatus de rebus defuncti, si habitavit cum eo et negotia sua ei communicare solebat,* and these qualifications all centering in this tutor,—he ought to be allowed an oath *in litem* for his pupil's behoof: And this is founded on the opinion of the following lawyers:—as Wesembecius, *ad tit. D. de in Litem Jur.*; *Menochius de Quæst. Arbitrar. lib.* 2. *cas.* 208 *et* 160; Plotus, in his tract, *de Jurejurando in Litem*; *Anton. Faber. in Codic. Sabaudo dict. tit. Mævii Decisiones Wismarienses, lib.* 6. *decis.* 372 *et* 374; Mascardus *de Probat. Conclus.* 531. *num.* 43. *et seq.* and *l.* 4. *D. de in Litem Jurando,* admits a tutor to give this oath; as also, *l.* 7. *D. de Adm. et Peric. Tutor.*

The Lords thought the case new; and whatever might be pretended for taking the oath of the party damnified, yet it seemed a stretch to extend this to a tutor; and, on the other hand, some remedy was necessary to repress such malversation in corrupting of count-books after a party's decease, whether it should be by a *juramentum in litem,* or taking a *talis qualis probatio;* therefore the Lords judged the case to deserve a hearing in their own presence.

Vol. II. Page 53.

1699. *July* 6. Elizabeth Chalmers and Alexander Kennedy *against* John Chalmers of Bonnington.

Halcraig reported Elizabeth Chalmers, and Mr Alexander Kennedy, minister at Straiton, her husband, against John Chalmers of Bonnington, her father; being a reduction and declarator, that, by the contract of marriage with her mother, all the estate he then had, or should acquire, is provided to the heirs of the marriage; which she was: yet in defraud thereof he had married a second wife,

and not only given a liferent provision to her, but also his land-estate to the children of the marriage; and therefore craved the Lords would declare her right of succession after her father's death.

ANSWERED,---This was a preposterous action as well as unnatural; seeing an heir cannot pursue *vivente patre*, and no action should be sustained at their instance till after their father's death; and these clauses are no more but destinations of succession; and the father being still fiar, he may do any rational deeds notwithstanding of such provisions; as has oft been found, and particularly Dirleton records one, *7th January* 1675, *Innes against Innes;* that where an eldest son of a first marriage had served inhibition on such a contract, and raised reduction thereon, the Lords would not sustain process, because the father was living, and the son neither was nor could be heir while he was alive; but this last reason will not hold where the clause is conceived in favours of the bairns of the marriage.

Some Lords thought the pursuit might be sustained *declaratoria juris,* not to have effect or execution during the father's life; and that he could do no voluntary gratuitous or fraudulent deed in prejudice of the clause in the first contract. Others remembered Craig's case of the three Aikmans, sisters, and that the parental power is not to be infringed. Therefore it was ordained to be heard in presence.

Vol. II. Page 57.

1697. *July* 7. HAMILTON of KINKELL *against* AYTON of KINALDIE.

HAMILTON of Kinkell pursues Ayton of Kinaldie for reducing an old disposition of some lands made by his predecessor on death-bed. Kinaldie's defence was, He and his authors had possessed forty years without interruption.

Kinkell ANSWERED,---He stood intercommuned in the late Government, for opposing Episcopacy, from 1675 till 1689, when it was removed, and so that time must be deducted from the prescription, *quia contra non valentem agere non currit.*

REPLIED,---That brocard takes only place where one *non valet agere ob defectum tituli;* as if he be forfeited, but not *ob impedimentum facti,* on an accidental occasion, or such a personal impediment as a citation for conventicles, and in regard of his contumacy, that letters of intercommuning were served against him; for that did not divest him of the right. See *25th January* 1678, *Earl of Lauderdale* against *Tweeddale.*

DUPLIED,---As he durst not appear all that time, either to pursue or defend, so neither might he constitute an assignee; for none durst converse with him, or receive a right from him.

The Lords did not determine if this intercommuning was a sufficient interruption; but, before answer, ordained him to condescend and instruct how long it lasted.

Vol. II. Page 58.