the register to give out any such extract:—1*mo*. Because it came in only by a bill; and Sir George Campbell of Cesnock, Sheriff of Air, was neither called nor heard. 2*do*. This act was not touched; and so the Lords thought they could not supply the royal assent, nor make it an act: and, though many private acts need not touching, yet this was voted; which ratifications are not. 3*tio*. The sheriffship being older than the bailiary, which lies locally within the shire, there did not appear any reason to give it a privative jurisdiction. But the Lords did not hinder the clerk-register to give an extract of it, if he thought he might safely do it. *Vol. I. Page* 625.

1624. *July* 3. ROBERT MILN, Writer, *against* MR RORY M'KENZIE of DALVENAN, Advocate, and BUTLERS, his Cedents.

THE Lords found, seeing the assignation which the Lady Kirkland gave to Mr William Clerk, in her contract of marriage with him, to her jointure, was with the express burden of the bond she had given to the said Butlers, her children of the first marriage, that this made it real; so as no creditor of Mr William Clerk's could affect it by arrestment, or otherwise, no more than he could have reached it himself, having, by that clause in his contract, preferred them: notwithstanding the bond made no specific application to her jointure, but was only a personal obligement upon her, and that it was alleged it might be paid, and the discharges abstracted. All which the Lords repelled, unless they would propone a positive defence of payment, or the like: but, if it had been inserted in the contract, only by way of reservation, the Lords would have found it only personal. But a clause, "with the burden," is otherwise.

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1694. *July* 4. ORROCK of BALRAM *against* KINLOCH and ALEXANDER CHAPMAN.

THE first question was, If the discharges produced under the hand of the two co-partners in the brewery were probative without witnesses. For though, in writs subscribed by sundry parties, each of the subscribers are witnesses to one another, yet that presupposes three subscribers; for then two are witnesses to each subscription; but it is not so in two. On the other hand, many writs subsist without witnesses,—as bills of exchange, precepts, discharges of rents, &c. And it was contended, that, being in a matter of a society, though dissolved, the partners' discharge was sufficient to their clerk. This being a sort of commerce, *in materia favorabili*, the Lords inclined to sustain the discharge as probative. But, in regard it was alleged that there was a paper of the same kind, and labouring under the like defect, produced in a former process by thir defenders, which was sustained, the Lords ordained their oaths to be taken for producing it and that process; for, if they obtained an interlocutor sustaining it, they could not reclaim now; *nam quodquisque juris in alium statuerit, ut ipse eodem utatur*, is a rule of natural equity. And, as to the former pursuit of Bal-

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