REPLIED,---Neither the decreet nor oath could meet him; for, 1*mo.* It was *sententia inter alios lata*; and if his father has referred to the Dean of Guild's oath, he is not concerned, because his father was denuded in his favours before that, and so was not the *legitimus contradictor;* and that decreet cannot hinder him to prove his intromission by receipts *scripto.* 2*do.* Neither can his oath assoilyie him; because the Dean of Guild has ascribed these intromissions to other debts owing to him, for which he had done no diligence; whereas, in law, they must be imputed to the debt of the adjudication, as the *sors durior*; and his misapplication infers no perjury, but gives the Lords a handle to reëxamine him, and cause him condescend upon and instruct those other grounds of debts to which he would ascribe his intromission. And, without proving *aliam et diversam causam debiti,* he ought not to carry away the defender's estate, seeing he acknowledges he got an assignation, and thereby obtained payment: his oath is not definitive till he show these other debts to which he attributes these payments.

DUPLIED,---The Dean of Guild oppones his decreet and oath; for he was not to notice a latent disposition by a father to his son and apparent heir; and so it is not *res inter alios acta,* but one and the same person in construction of law; and as to the imputation he has made by his oath, though he had deponed the effects he got were for satisfaction of other debts, yet even, in that case, the quality would have been intrinsic and sustained; as was decided, 28*th March* 1629, *Gall* against *Eviot;* and 10*th July* 1632, *Lord Fenton* against *Drummond.*

The Lords demurred, how far the oath would assoilyie him, or liberate from a reëxamination, or condescendence on his other debts; but found he was in the case of *res judicata:* and therefore assoilyied the Dean of Guild on that ground.

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1699. *February* 23 *and June* 21. SIR JOHN PRESTON of PRESTONHALL *against* ROBERT RULE.

February 23.---SIR John Preston of Prestonhall pursues Mr Robert Rule, minister at Stirling, as executor to the old Lady Kinglassie, on this ground, That he had pursued her before the Sheriff of Fife, upon a promise of payment of 2000 merks to him, whereon she, being personally apprehended and not compearing, was holden as confessed, and a decreet extracted against her; and during her lifetime, for some years, she never raised reduction thereof. Mr Robert's defence was, Your decreet was unwarrantable, being pronounced by your uncle sitting as sheriff-depute, who in law was inhabile to judge in his nephew's cause; and so the holding her as confest can bind no debt on her executor.

ANSWERED,---If she had been on life there might have been ground to repone her; but now, the mean of his probation being perished by her death, the decreet must stand: Neither is it a nullity that it was pronounced by his uncle; seeing both the old Act of King James the Sixth, and the late one in 1681, anent declinators, only extend to the case where the declinator is proponed; which was not here.

REPLIED,---The judge in such a case ought not to proceed; but it is *partes*

judicis to decline himself; and the party is not obliged to compear and propone it. And though this may not hold in a collegiate society of judges, as the Lords of Session are, where the rest may judge, though one declinable in law sits and votes with them, when the declinator is not proponed; yet, where such an inhabile person is the sole judge, it ought not to be sustained.

The Lords, by a scrimp plurality of eight against seven, found the decreet valid, because the declinator was not proponed, and the mean of probation was now perished.

June 21.—This point being reconsidered upon a bill and answers, the Lords being equal, seven against seven; the President, by his vote, altered this interlocutor, and found the decreet given by an uncle null, the defender not having homologated his jurisdiction by compearance, but having suspended the decreet, and died before discussing. *Vol. II. Page* 46.

1699. *June* 21. ROBERT MEIN and JAMES YOUNG, his Tutor, *against* AGNES GRAY.

WHITEHILL reported Robert Mein, and James Young, his Tutor, against Agnes Gray, relict of William Mein, postmaster in Edinburgh. The said William, dying in 1696, left an estate of about £20,000 Scots, in merchant-ware, debts standing out, and household plenishing; and Agnes, his relict, having intromitted without making inventory, Robert Mein, as executor to his brother, pursues the relict for count, reckoning, and payment; and craves his oath *in litem* may be taken on the value of his brother's estate, in respect of her deceitful embezzlements and concealments, she having vitiated the count-books, by ocular inspection: 1*mo.* By tearing out leaves thereof; 2*do.* By scoring out articles in the books extending to £9000, as if paid in his time, whereas, by the uniformity of the ink, &c. it appears all done since his death; 3*tio.* By interlining the book in several places since: which being deeds so palpably fraudulent, the mean of probation is suppressed; and therefore, *in odium* of her dole, the child's tutor, who can give most pregnant verisimilitudes of his knowledge, ought to have his oath *in litem* against her.

ALLEGED by the defender,—That an oath *in litem*, by our law, is only in cases of spuilyie and masterful violence, by ejection or intrusion; which cannot be pretended here. 2*do.* It is competent to none but the party injured and skaithed, who may be presumed to know his own loss; but a third party or tutor cannot. 3*tio.* He must be *dominus litis*, and the estimation must be *ad utilitatem jurantis*, and cognition behoved to proceed of the defunct's estate and condition; and an oath *in litem* is only in supplement of that probation, but was never craved to stand for all. 4*to.* Though the Roman law permitted an oath *in litem* in many cases promiscuously, as *in actionibus bonæ fidei, in rei vindicatione*, and where there was either *dolus* or *culpa vera, vel præsumpta, per contumaciam*,—yet the modern lawyers show it is laid aside now, as making pursuers too much judges in their own cause; so Zypæus, in his *Notitia Juris Belgici*, testifies of France; Mynsinger, in his *Observat. Practicæ* of Germany; and Voet, *ad Pandectas*, says, *Hodie non obtinet, sed judices id quod interest ex bono et æquo æsti-*