

*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 decret 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 decret given by an uncle null, the defender not having homologated his jurisdiction by compearance, but having suspended the decret, and died before discussing.

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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: *1mo.* By tearing out leaves thereof; *2do.* 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; *3tio.* 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 spuilie and masterful violence, by ejection or intrusion; which cannot be pretended here. *2do.* 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. *3tio.* 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. *4to.* 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-*

*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 spuilie 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. Sabauda dict. tit. Marvii 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.

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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,