

of 400 merks to the pursuer's children, did exist after the testator's death, and was unwarrantably destroyed by the said Francis Smith; and although the same cannot now be exhibited by him, find there is sufficient foundation for an action for payment of said legacy, without necessity farther of proving the tenor of said testament.

No 16.

Lord Ordinary, *Monbodo.*  
Clerk, *Ross.*

For Fisher, *Jo. Douglas.*For Smith, *D. Gram.*

R. H.

*Fac. Col. No III. p. 332.*

## SECT. VI.

Situations in which Oath *in litem* inadmissible.

1542. May 19.

KIRKALDY against PITCAIRN.

PATRICK KIRKALDY and Janet Ramsay his wife's cause against Mr David Pitcairn, Archdean of Lothian. The said Archdean referred to the said Patrick's oath *quanti sua intererat* the wanting of the charter and sasine of the forty pound land of annualrent of Carreston, given in keeping by the said Janet's father; and the said Patrick alleged *contra non exhibitum dolose, juramentum in litem deferendum actori, L. 4. Cod. Ad exhibendum, cum ibi non per Paulum*, and so asked his interest to be referred to his oath. The other party, on the contrary, *alleged*, That he should prove it *legitimis probationibus*, and not to have it to his oath, because he granted at the bar judicially, in presence of the Lords, that neither he nor his wife ever saw these evidents, nor yet wist what they contained; also *agebatur hic de facto alieno actori ignoto, et de jure veritati ignorantem juramentum non est deferendum etiamsi sit casus ubi de jure debet juramentum deferri actori, ut notat Jas. in L. 9. C. Unde vi, Paul. in L. Bar. et alii in leg. in bonæ fidei, et ibi glossa magna C. De reb. cred. Bar. Alex. et alii in L. 31. De jure jurand.; et interlocuti sunt domini consilii unanimiter juramentum in litem in hac premiss. causa non est deferendum, sed eum debere probare suum interesse aliter legitime.*

*Fol. Dic. v. 2. p. 10. Sinclair, MS. p. 26.*

No 17.  
*Juramentum in litem refused to a pursuer who verisimiliter veritatem ignorat.*

1697. January 2.

FEA against ELPHISTON.

THE spuilzie pursued by Fea of Whitelaw, in the island of Stronza in Orkney, against Robert Elphiston of Lopness, was advised, and his defence of law-

No 18.  
In an action of spuilzie, the Lords found that in