PLIED to the second,—That they offered to prove that the disposition was truly delivered by the father, in his own time, to the uncle of the three daughters on the mother's side.

The Lords did find, That John Douglas, being a lawful creditor, so that, if his marriage had been dissolved, without children, by the death of his wife, he, or any creditor having right from him, would undoubtedly have made the surviving heirs liable for the whole debt; so the contract of division taken off the tocher, as affecting the whole estate before division, could not be reduced upon minority and lesion,—his wife's third being liable thereto proportionably with the rest. But, in regard of the prior disposition made to the whole three sisters, which the said Margaret, being served as heir, was obliged to warrant, they found, That the two youngest sisters had good action of relief against their eldest sister, in so far as their two parts, or they themselves, could be distressed for more than two parts of the tocher; which, in effect and upon the matter, was to assoilyie from the reduction of the contract of division, as having taken of the tocher granted to the eldest, as a just debt of the whole three sisters, they were equally burdened therewith: which was just, they being all served heirs to their father; whereas, if they had held themselves with the disposition, and had not been heirs, the eldest sister's portion could only have been liable for her tocher.

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1673. *February* 14. The EARL of KINGHORN *against* The EARL of WINTON and MARSHAL.

THE Earl of Errol, having sold to the Earl of Marshal the lands of Reidcleuch, whereof George Mowat was tenant, from whom the Earl of Errol had borrowed the sum of 2000 merks, and given bonds for it as principal, and the Earl of Kinghorn being then his tutor, as cautioner for him; they, by the contract of alienation, did take the Earl of Marshal as principal, and the Earl of Winton as cautioner for him, obliged to relieve them of the said bond: notwithstanding whereof, Kinghorn, being pursued at the instance of the relict of Sir George Mowat, as having right, by progress, to the said bond, was decerned and forced to make payment. Whereupon, having intented action against the Earl of Winton for repayment of the said sum, upon the foresaid bond of relief;—

It was ALLEGED for the Earl of Winton,—That Kinghorn could not pursue upon the bond of relief, because he did not intimate his distress, which, if he had done, the defender would have furnished him with an unanswerable defence, *viz.*—That George Mowat, to whom the bond was granted, was debtor in as much to the Earl of Marshal, in so far as, after the right made to him of the said lands of Redcleuch, he possessed the same so many years as would amount to more than the sums contained in the bond.

It was REPLIED, That the defence, resolving in a compensation, could not be admitted; because it was not liquid by a decreet, neither was it *inter easdem personas*, he being only debtor by his possession to the Earl of Marshal or the Earl of Errol, but noways to the Earl of Kinghorn, who did pursue upon his bond of relief.

The Lords, in respect that Kinghorn had not intimated to them his distress, found, That the Earl of Winton ought not to be prejudged, if he had any just

ground which would have freed him from payment; and therefore did assign a long day to the Earl of Winton to pursue and obtain decreet against George Mowat or his representatives, who, being made liable for the payment of the duties of the lands during his intromission, might refund the money which Kinghorn had paid, or free both Kinghorn and Winton, at the hands of the Earl of Errol, from whom it was alleged that Mowat had a tack of the said lands, which did endure, after the sale thereof, to the Earl of Marshall, and was not excepted out of his right; whereby the Earl of Errol might have compensed Mowat upon the tack-duty; which being founded upon writ, as it was competent against Mowat, the cedent, so it was competent against the assignee.

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1673. *February* 19. ROBERT MALLOCH *against* GRAHAM of GORTHIE and his TUTORS.

IN an exhibition at Malloch's instance, against John Mitchell, clerk of the stewartry of Stratherne, as depositary of a bond of 4200 merks granted to the deceased Mungo Graham of Gorthie, upon express condition not to be delivered up until the pursuer should receive a disposition of the lands of Cairns, whereof he was heir of tailyie, to Mr Alexander Malloch, from Katherine Malloch, who was heir of line: As likewise, a bond of £1000 due to herself *proprio nomine*, with an assignation made to Gorthie for his relief and security, as being cautioner to the said Katherine for her said debt, and a sum of money given to her for her right and good-will: As likewise, in the said exhibition, Gorthie's apparent heir was called, and his tutors for their interests, bearing a declarator, that the foresaid bonds should be delivered back again; in so far as it was referred to Gorthie's tutors' oaths, that, *viis et modis*, they had gotten the said bond delivered by Mitchell to them since the intenting of this action; and, by Mitchell's oath, who was the depositary;—that it was consigned and deposited in his hands upon express condition not to be delivered up but upon the fulfilling of the foresaid conditions, *viz.* the delivery of the disposition of the estate, and the bonds granted to the heirs of line, with the assignation made to the deceased Graham of Gorthie; otherwise it ought to be declared that the said bond, of 4200 merks, should never be obligatory until the said conditions should be fulfilled:—

It was ALLEGED for Gorthie, That the bond called for, being now in his own possession, could not be taken away by the oaths of his tutors; for, by our law, the depositation of a writ is not probable but *scripto vel juramento partis*; and it were of a most dangerous consequence that children, having rights to bonds granted to their father, should be taken away by their tutors' oaths: and John Mitchell's oath could not be taken to make up any alleged conditions of depositation, seeing the bond was put in his hand as a notary for taking a seasine, in name of the deceased Gorthie, of the said lands, conform to the precept of seasine contained in the said bond; which being a necessary and just cause, and after taking of the seasine, the bond being delivered back, his oath can never be taken to prejudge the defender, who is a minor, and knows nothing of these alleged conditions of depositation.