The Lords refused to take notice of a reclaiming bill presented by him, after the days allowed for reclaiming by the Act of Sederunt, 8th July, 1709, were elapsed; albeit the complainer had raised and executed a reduction of the interlocutor.

MS. page 5.

1713. *November* 27. DUTCHESS of BUCCLEUGH *against* SIR DAVID NAIRN.

SIR DAVID NAIRN and Mr. David Scrimzeor having dealt together in bills of exchange betwixt London and Edinburgh for some years, and, for conveniency, mutually transmitted their accounts in single sheets, by the ordinary post: the balance due by Sir David, in those from July, 1687, till June, 1697, transmitted by him to Mr. Scrimzeor, partly written by Sir David's own hand, partly by his servant's, was L.2409, 14s. 1d. Sterling; and in those transmitted by Scrimzeor to him, L.2542, 1s. 8d.; and Sir David's letter to Mr. Scrimzeor, dated 11th November, 1697, bore,—" I observe that the balance of your account due by me, as you state it, is L.2542, 1s. 8d., and as I state it, is L.2409, 14s. 1d. By which it would appear, that I have omitted several articles to my own prejudice. If you can point me to these errors, I will make it easier. I desire you will insert whatever you think you ought to have credit, or be made debtor for: which would bring the matter to a narrower close; whereas now the whole account stands open." The Dutchess of Buccleugh, as executrix-creditrix to Mr. Scrimzeor, pursued Sir David for the balance aforesaid, of L.2409, 14s. 1d.; and insisted upon the foresaid accounts and letters, as vouchers of the balance.

ALLEGED for the defender,—That the accounts are not probative, but still open: being sent down only as a scheme or scrolls to lead another to a right account; and the letter an appeal to the books of both parties.

ANSWERED for the pursuer,—It is true that the accounts, not being fitted and signed, are not so unalterably probative as not to suffer rectification upon discovery of any omission, or wrong stating of an article. But they are probative against the transmitter, and make up a charge against him *presumptione*, till redargued by him.

The Lords found, That the schedules and letter founded on by the pursuer are not of themselves probative to instruct the charge, but that the same ought to be otherwise proved. *MS. page* 6.

1713. *December* 4. THOMAS STUART of Fintilloch *against* JOHN M'WHIRTER, Elder of Garrihorn.

IN the complaint, at the instance of Thomas Stuart against John M'Whirter, concluding damage for his granting commission to John M'Whirter, younger of

Garrihorn, his son, to arrest the complainer in England, upon a debt that lay suspended by the Lords of Session: the verity of old M'Whirter's granting such a commission being referred to his oath by the complainer, he deponed that he gave no such commission to his son. Thomas Stuart,—having, before this oath was advised, recovered from young Garrihorn's doers, the principal commission, bearing old Garrihorn's subscription to it, and discovered that he had deponed *negative* concerning his giving the commission to his son; because he gave it not out of his hand to him, but laid it down upon a chest or table in his own house, that his son, then present might take it up, as he did;—supplicated the Lords to grant him a diligence for citing witnesses to prove that and other matters of fact, in relation to the father's granting the commission to his son.

ANSWERED for old Garrihorn,—That he having deponed, *deferente adversario*, no farther proof could be adduced to redargue his oath *quoad effectum civilem*, but only as to punishment for perjury.

The Lords, before answer, granted diligence for citing witnesses to prove the matters of fact aforesaid, not to redargue the oath, but only to clear it. Yet some of the Lords were not clear in this point; thinking, that if the artifice of laying down the commission, to the end that the son might take it up, were proved, the father might thereupon be criminally insisted against, as guilty of perjury.

MS. page 9.

1714. *January* 14. The Creditors of the deceased ALEXANDER CUNNINGHAM, Writer in Edinburgh, *against* JANET CUNNINGHAM, his only child, and her Tutors.

IN the count and reckoning, at the instance of the creditors of Alexander Cunningham, against Janet Cunningham, his daughter, and her tutors, who had served her heir to her father *cum beneficio inventarii;*

ALLEGED for the defenders,—That the heir cannot be liable to the pursuers for the value of the land, but only to give them localities thereof, conform to their sums.—Because, 1. The Act of Parliament allows apparent-heirs to enter *cum beneficio inventarii*, as use is in executry; and executors are liable only for what they intromit with, and to assign to the creditors, in so far as the testament is not executed. 2. Janet Cunningham being minor, cannot get credit to raise money to the value of the land, which would put the creditors to the necessity of adjudging. And when a sale is carried on, if a merchant cannot be had, the creditors must necessarily divide the land among them; and it is better to divide now, before it be exhausted by process, as afterwards.

The Lords found, that Janet Cunningham, the minor, must be liable to the creditors for the value of the land; and that she cannot free herself by offering them localities of land, conform to their sums.

MS. page 14.