tutor having lifted a moveable sum and secured it heritably, that this altered the succession, and made it fall to the heir; whereas, formerly it would have belonged to the executor, and that because it was not *in bonis defuncti patris*, but he was denuded by an assignation. And the daughters alleged he was not fully denuded, in respect the assignation bore a faculty and power to him to alter and uplift, and so it was still *in bonis defuncti*. But the Lords adhered to their former interlocutor, and preferred the heir, and found the reserved power, never being exercised, did not alter the case. It occurred to the Lords of how dangerous a consequence it might be, if a tutor might, by changing securities, alter the succession; for though a tutor may meliorate the minor's condition, and get additional security for their means, yet it deserves consideration, if this should put the sums out of the natural channel of succession the parent had left it in, and alter his meaning, who of design left moveable sums for his younger children's provisions; and if a tutor should, by getting an heritable security, make these belong to the heir, then he should be more than a father and proprietor, and invert the father's destination, if the daughters had been admitted to the sum.

Then it was ALLEGED for one of them,—That the sum being left to her sister, now deceased, and her *in eodem grœmio* of an assignation, *jure accrescendi*, her sister's portion accresced to her, with seclusion of the rest of the children not mentioned in that right, being both *re et nomine conjunctæ*.

ANSWERED,—There could be no *jus accrescendi* nor *jus non decrescendi* here, because they were *verbis conjunctæ et non re*, the sum being left equally betwixt them. But the heir being preferred, there was no use for deciding this subtile point between the sisters. *Vol. I. page* 527.

1692. *December* 7. The DAUGHTERS of ARTHUR STRAITON of Kirkside *against* STRAITON, their Brother.

IN the case of the five daughters of Mr. Arthur Straiton of Kirkside *against* their brother, the Lords doubted much if the factory Mr. Arthur left to Straiton, apothecary in Montrose, his cousin, to set his lands, and divide the price equally among his six children, giving the son a double portion, was obligatory and effectual now against his heir, to cause him sell in that manner, and distribute the price conform to the factor's appointment; seeing it took no effect in his own lifetime, and his factor had not executed his order; and so it was alleged, *quod morte mandantis perimitur mandatum;* but they thought the case very favourable, if it could subsist yet, or was only of a testamentary nature, or *donatio mortis causa*, not obliging the heir; and therefore ordained it to be heard in their own presence. *Vol. I. page* 528.

1692. *December* 7. BOGLE *against* ARMOUR.

BOGLE *against* Armour. The first point was, whether the modification of the aliment, made against him, would go back for years preceding the same, or only

from the date of the modification. The plurality of the Lords thought, it being due, that it drew back even before its liquidation; but the President declared he would hear them first in presence, before it should pass into a decision.

There is a case in *Stair*, 4th Dec. 1675, *Watson*, that compensation is only from the liquidation, see *Dury*, 1st Dec. 1626, *Balbegno*.

The next point reported was, whether the relict's *third* intromitted with by the tutor should not bear annualrent from his receiving it, at least half a year thereafter, as minor's money; the Lords found it had not the benefit of *nummi pupillares*, though it were all lent out in one bond; and that he was only accountable for annualrent, from the time he should depone that he either lent it out, or traded with it.

As to the third point, against Napier the cautioner, (he being also called,) the Lords decerned against him, seeing the tutor was discussed by a registrate horning, unless he condescended upon a farther estate belonging to the tutor.

Vol. I. page 528.

1692. *December* 7. WILLIAM SIBALD *against* SIR ALEX. HOME of Renton.

WILLIAM SIBALD, smith in Renton, against Sir Alexander Home of Renton. The Lords repelled Sir Alexander's reasons of advocation of the poor man's process of ejection, and remitted it back to the Sheriff; and found the Baron's jurisdiction not exclusive of his, and that he could not summarily remove the smith from the croft and acres without a warning. *Vol. I. page* 528.

1692. *December* 7. MACKBRAIR of Netherwood *against* Roome.

[*See Index to the Decisions*, M'Brair *against* Rome.]

THE case of Mackbrair of Netherwood and Roome was advised, and the Lords adhered to the former interlocutor; and found Sir Robert Murray might compense his tack-duty with the 10,000 merks, owing by the setter; and though the minor was lesed, and the tripartite contract not fulfilled, yet he had not revoked *debito tempore*; but allowed a probation of what was contained in the Mains of Netherwood, and in the lands of Conhentrig, and how far the one was included in the other, and what was the rent of each of them. *Vol. I. page* 529.

1692. *December* 8. ROBERTSON *against* ROBERT MALLOCH.

IN Baillie Robertson's son's reduction against Robert Malloch, many of the Lords were convinced that it was an exorbitant profit, first to have L.18 per month, for the use of the brewing-looms, conform to the officer's decreet at Leith,