clared to be payable at the first term after the father and mother's death. Upon this obligation Ludovick adjudged; and the father's estate coming to a sale, the question was, Whether he was to be ranked with the onerous creditors?

Lord Kaimes was of opinion that no child *nasciturus* could be a creditor; but Lord Elchies said that there might be a right of credit in a child unborn, and that there was nothing to hinder a man to grant a bond to another man's children *nascituris*; but if the bond was to his own children, then there might be a doubt whether it was a right of credit or a right only of succession; and, in general, our law was inclined to give to children rather a right of succession than to make them creditors, by which commerce was impeded, and the father's free disposal of his effects hindered; but, however, if the provisions were so conceived as to be exigible during the father's life, in that case they were understood to give a right of credit, and it was upon this principle that the decision in the case of *Easter Ogle* proceeded, as is mentioned in the interlocutor upon that case; but here, as the provisions are not due till after the father's death, they only give, according to the genius of our law, a right of succession. And so the Lords unanimously found.

N.B. This was decided according to the principles of the civil law, by which every thing *collatum ad tempus mortis* is understood to be taken as a succession. (See Cujacius *ad Consult.* 58.)

1754. *July* 2. ARCHIBALD TROTTER *against* MRS CAIRNS.

A WOMAN made a testament in favour of the said Archibald Trotter, which she afterwards revoked, and in the same deed made a second in favour of Mrs Cairns, her sister.

It was OBJECTED to this second testament by Archibald, 1*mo*, That the woman, when she executed this last testament, had not the perfect use of her senses; 2*do*, That it did not appear she had given any orders to make this second testament; 3*tio*, *Esto* that she had given such orders, they were forced from her by urgent importunity and solicitation, particularly by the importunity of Thomas Trotter, her brother, who guarded her and kept every body from having access to her while this second testament was a-making, except such as he thought proper. As the proof with respect to these allegations was not clear on either side, it was moved from the Bench that Thomas Trotter, the brother, who, it was proved, had given the order to the writer to make out the testament, should be examined whether he received any such orders from the defunct, and with respect to other facts relating to the cause; and it was proposed to do this *ex officio et ad informandam conscientiam judicis.*

It was OBJECTED by Archibald Trotter,—That Thomas Trotter was in every respect an exceptionable witness; *first*, On account of his near relationship to the executrix; 2*do*, Because he was the main agent in the business of the second testament; 3*tio*, Because he could not deny that he had got orders from

the defunct to make out the second testament without accusing himself of a crime; and it was said that, if such a witness was to be examined under any pretence, there was an end to all objections to witnesses. On the other hand it was said that he was not to be examined as a witness whom the Judge was to believe, whatever he said, but rather as a party, whom the Judge was to believe if he gave evidence against himself, but not if he gave evidence for himself, in the same manner as a party is examined in a trial of forgery; that it belonged to the office of a judge to take every method to get light in any affair, whether by the examination of witnesses, parties, or those connected with parties, giving to every one such a degree of credibility as the law has allowed them.

The Lords allowed him to be examined, by a division of six to five. *Dissent.* Elchies, Kaimes, Drummore.

1754. *August* 7. JOHN STEWART SHAW *against* LORD CATHCART.

[*Fac. Coll.* No. 132.]

SIR John Shaw, elder, and Sir John, younger, liferenter and fiar of the estate of Greenock, did tailyie the same in the son's contract of marriage, with strict irritant and resolutive clauses,—first in favour of young Sir John and the heirs-male of his body; whom failing, to old Sir John's five younger sons in order, and their heirs-male; whom all failing, to Margaret Shaw, old Sir John's daughter, and the heirs of her body. Of this marriage there was only a daughter, the mother of the said Lord Cathcart; and the five younger sons of old Sir John having failed without issue, the said Margaret Shaw became the presumptive heir of entail in exclusion of the daughter of young Sir John. This was the occasion of the said Sir John doing several deeds to burden and affect the tailyied estate in favour of his own issue, thereby to disappoint, as far as in him lay, the provision of succession in favour of his sister, Margaret Shaw, and her issue. And for this purpose, he took advantage of a clause in the entail, whereby it was "declared lawful for the said John Shaw, (that is, young Sir John,) or any of the said heirs of tailyie, to contract the sum of 50,000 merks Scots of debt, and therewith to affect and burden, in manner after specified, the said lands and estate, for providing of their daughters or younger children; but it shall not be lawful to any of the succeeding heirs of tailyie to contract any more debts for provision of their children, under the irritancies above-mentioned, until first the debts contracted by their predecessors for provision of their children be paid and cleared; at least it shall only be lawful for them to contract so much for the end foresaid, as, with the predecessors' debts above specified, unpaid, shall amount to the sum of 50,000 merks in hail." In the same tailyie, which, as said is, was in young Sir John's contract of marriage, there was an obligation upon Sir John the father, and his heirs of tailyie, to pay 30,000 merks to an only daughter of the marriage, with interest from her age of sixteen or marriage; and it is declared, "that this present tailyie and irritancies thereof are and shall be noways