well as you; and so more privileged, being prior in diligence. This being an ordinary practice, both before inferior courts and your Lordships, That though I can prove my claim by writ, yet I will refer the verity of it to your oath; and if ye would deny it, then I will resile and prove it by writ. And as for the pretended collusion, it is no otherways probable but by the executor's own oath.

To which it was DUPLIED,—That he needed no reduction where the nullities of the decreets founded on were intrinsical, and resulted from the decreets themselves, and so needed no other probation: and the executor should have suspended upon double poinding, in which case I would undoubtedly have been preferred to these other pretended creditors. And where he says he had writ to prove it, though he referred it to her oath, it is duplied, Though that may lawfully be done where ye have to do with him that is *dominus bonorum*, yet it is noway lawful to do the same with an executor, who is only an administrator, *et nudum habet officium*.

It is certain a sentence obtained upon a probation by oath, will never militate against a creditor by bond; but if, in fortification of the oath, they offer to restrict the debt also by writ, I think it should be received.

The executor had another defence here, viz. that she was not liable to pay, (in case the foresaid decreets should not operate exoneration,) but only to assign. It was ANSWERED,—He behoved first to say he had done diligence. Second, he could not be heard now to offer to assign, because it was after six years, during which time he might have received the sums. REPLIED,—An executor was obliged only to do diligence by pursuing, obtaining decreet, and charging; all which he had done; and then *cedere actionem;* which he now offered.

Advocates' MS. No. 258, *folio* 113.

1671. *November* 18.

ONE being convened upon the passive titles to pay a debt owing by his father, and the pursuer insisting against him, as lawfully charged to enter heir; it was ALLEGED the charge was unlawfully and unwarrantably given, in so far as it was not executed against him till after the execution on the summons, and that being the passive title on which ye intended to make me liable, it behoved to precede the summons, and exist before the same. To which it was REPLIED,—That it needed not pre-exist, but behoved to exist, though supervenient; as well as a summons against a man as heir, will be sustained against him, though he was not heir served and retoured the time of the executing the summons, but be served long thereafter.

The Lords found there was not *par ratio*, and therefore refused process against him as lawfully charged on that summons.

Advocates' MS. No. 259, *folio* 114.