1771. *November* 23.

MARGARET FISHER, Relict of Alexander Farquharson, *against* FRANCIS SMITH and ELISEBETH SHEPHERD his Wife.

No 16.
One pursued in an exhibition, who deponed, that, at desire of the maker, he had destroyed the deed called for, but only after the maker's death. Found to have acted unwarrantably, and subjected in payment of a bequest contained in the deed destroyed.

THE pursuer brought an action against the defenders, libelling, 'That the 'deceased Mr John Shepherd executed a deed, giving or disponing to the pur-'suer's children a certain sum of money; which deed, about the time of his 'death, he delivered to Francis Smith or Elisabeth Shepherd, and which they 'still had in their custody, or had wilfully abstracted; and therefore calling 'for exhibition of the said deed.'

Besides these parties, three other persons, who were supposed to know something of the deed, were called as defenders; who, in substance, deponed, That they knew of such a will, and one of them swore that he had seen it in the hands of Francis Smith, had got from him a reading of it, and that there was a sum therein bequeathed to the pursuer's children.

Francis Smith deponed, That he saw the will in question, and that 400 merks were therein left to the pursuer's children; that Mr Shepherd desired him to do with the will what he pleased; and that, about the time of Mr Shepherd's death, or some time thereafter, he burnt the same. And Elisabeth Shepherd deponed to her having heard the will read; that it contained a legacy to the pursuer's children, and that her husband had told her he had burnt it.

The question having been reported to the Court.

The defender *maintained*, That this oath could not be divided; he had admitted that he had the will in his possession, and that he had destroyed it, but he had at the same time declared that he had done so in consequence of orders from the testator; so that this last was an intrinsic quality in his oath; that his conduct had not only been warranted, but, as he had followed the testator's directions, he would, had he acted otherwise, have been to blame.

The pursuer *answered*;

That the quality in Smith's oath was not intrinsic; there was no reference to oath as to the constitution of the legacy, that was proved *aliunde*; so that, as he had not now the deed to produce, it was incumbent upon him to prove that he had the testator's orders to destroy it; which, as it rested merely upon his own averment, had not been done. But even, according to his own statement, Smith had acted illegally; for as the deed had subsisted after the testator's death, it came to be his *ultima voluntas*, which no one had then power to cancel or destroy, 29th November 1679, Irvines *contra* Kirkpatrick, *voce* QUALIFIED OATH; 16th July 1714, Corse *contra* Sir John Kennedy, IBIDEM; 20th July 1749, Ewing *contra* Dundas, IBIDEM.

The following interlocutor was pronounced, November 23. 1771, "Find sufficient evidedce, that the within-mentioned testament, containing a legacy

of 400 merks to the pursuer's children, did exist after the testator's death, and was unwarrantably destroyed by the said Francis Smith; and although the same cannot now be exhibited by him, find there is sufficient foundation for an action for payment of said legacy, without necessity farther of proving the tenor of said testament.

No 16.

Lord Ordinary, *Monboddo*. For Fisher, *Jo. Douglas*. For Smith, *D. Græme*.
Clerk, *Ross*.

R. H. *Fac. Col. No* 111. *p.* 332.

SECT. VI.

Situations in which Oath *in litem* inadmissible.

1542. *May* 19. KIRKALDY *against* PITCAIRN.

No 17.
Juramentum in litem refused to a pursuer who *versimiliter veritatem ignorabet.*

PATRICK KIRKALDY and Janet Ramsay his wife's cause against Mr David Pitcairn, Archdean of Lothian. The said Archdean referred to the said Patrick's oath *quanti sua intererat* the wanting of the charter and sasine of the forty pound land of annualrent of Carreston, given in keeping by the said Janet's father; and the said Patrick alleged *contra non exhibitum dolose, juramentum in litem deferendum actori, L.* 4. *Cod. Ad exhibendum, cum ibi non per Paulum,* and so asked his interest to be referred to his oath. The other party, on the contrary, *alleged,* That he should prove it *legitimis probationibus,* and not to have it to his oath, because he granted at the bar judicially, in presence of the LORDS, that neither he nor his wife ever saw these evidents, nor yet wist what they contained; also *agebatur hic de facto alieno actori ignoto, et de jure veritati ignoranti juramentum non est deferendum etiamsi sit casus ubi de jure debet juramentum deferri actori, ut notat Jas. in L.* 9. *C. Unde vi, Paul. in L. Bar. et alii in leg. in bonæ fidei, et ibi glossa magna C. De reb. cred. Bar. Alex. et alii in L.* 31. *De Jure jurand.*; *et interlocuti sunt domini consilii unanimiter juramentum in litem in hac premiss. causa non est deferendum, sed eum debere probare suum interesse aliter legitime.*

Fol. Dic. v. 2. *p.* 10. *Sinclair, MS. p.* 26.

1697. *January* 2. FEA *against* ELPHISTON.

No 18.
In an action of spuilzie, the Lords found that in

THE spuilzie pursued by Fea of Whitelaw, in the island of Stronza in Orkney, against Robert Elphiston of Lopness, was advised, and his defence of law-