

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 gremio* 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