The Lords, before sentence, recommended to the Lord Drumcairn to consider the account now produced, which is alleged to be Robert Collison's handwrit, and to compare the same with the other account that is stated by him and Magnus Prince, whereon the decreet proceeded; and if he find there is any contradiction or disconformity betwixt them, that he examine him upon the ground of the alteration. *Vol. I. Page* 463.

1687. *July* 5. JOHN RICHARDSON and ALEXANDER CRAWFURD *against* The FACULTY of ADVOCATES.

MR John Richardson, and Mr Alexander Crawfurd, advocates, who had entered by bills, declining to pay their whole 1000 merks, the Faculty ordered their gowns to be sequestrated, and they to be debarred, and kept out. Whereupon they complained to the Lords, who so far countenanced them, as to ordain their gowns to be restored, seeing that would break their employments; and seeing they had given bond, the Lords allowed to proceed *viâ ordinariâ* against them by horning: and being charged, they gave in bills of suspension, which were debated and determined on the 12th of July. Their reasons were:—they ought to be exemed, 1*mo*, Because several in their circumstances had been dispensed with. 2*do*, That it was contrary to the nature of a liberal science, *prætio nummario dehonestari*, and was only for mechanics; and that the Act of Sederunt in 1679, in *Nairn of Greenyard's case*, favoured them. ANSWERED,—Any dispensations given, were for such as entered prior to the Act of Sederunt 1684, which abrogated that in 1679.

The President inclined there should be no difference in the sum for the manner of entry. But it was carried against him, and the letters were found orderly proceeded; so they made payment of their other moiety of 500 merks. *Vol. I. Page* 463.

1686 *and* 1687. SIR THOMAS NICOLSON of TULLICOULTRY *against* The LAIRD of CARNOCK'S HEIRS.

1686. *September* 3.—THE Lord Napier (who was also Laird of Carnock,) dying in France, his maternal estate of Napier went to his aunt Madam Birsbane; but his father's fortune (which was the best,) fell in debate, between Sir William Nicolson of Tillicoutry, as heir-male and of tailyie, and the three daughters of Sir Thomas Nicolson, as heirs of line, married to Greenock, Mochrum, and Bancrieff; who raising brieves to serve, a bill of advocation thereof was presented by Tillicoutry, as served heir-male in general, and having a declarator of his right depending, which was *actio præjudicialis; et, lite pendente, nihil est innovandum.* ANSWERED,—1*mo*, The design of his declarator was, that they, as lineal heirs, should enter and denude; which they could

not do without a service: so he had no prejudice. *2do*, The lands lay in non-entry, which behoved to be obviated.

REPLIED,—If they served, he would be put to the unnecessary trouble of a reduction.

The three Lords would not advocate, (though it was done to *Mitchel in Prestonpans*, and to *Napier of Wright's-houses*, heirs in an *ultimus hæres*:) but finding the heir-male feared that they, being served, would attain the possession, they would not formally sequestrate the rents, (which belongs only to the whole Lords to do,) but discharged them to meddle till Candlemas.

It was objected against the service,—1*mo*, That the executions were null; because, by the 16th Act of Parliament 1672, none but writers to the Signet can be clerks to services; *et ita est*, the clerk to the granting the warrant for executing the brieves was not a writer to the Signet. *2do*, By the 94th Act 1503, the brieve must be executed before the officers of the town; which this was not. *3tio*, Sir John Dalrymple, though their advocate, was chancellor of the inquest. ANSWERED to the *first*,—A writer to the Signet is not necessary to the preparatory acts, but only on the day of the service. To the *second*, The Act is in desuetude.

The macers proceeded to serve, reserving to the heir-male reduction, as accords.

But if a thing be evidently null and informal, the Judge, by sustaining of it, *litem suam facit*. *Vide* 15th February 1687. *Vol. I. Page* 423.

1687. *February* 15.—Lord Lochore reported the mutual declarators pursued betwixt Sir Thomas Nicolson of Tillicoutry, and the heirs of line of Carnock, mentioned 3d September 1686, upon this point, Whether Sir Thomas Nicolson had tailyied his lands of Carnock to his heirs-male or not; seeing he had, in a minute of a contract of marriage, obliged them to pay his heirs-female such portions, and to aliment them; which, though not formally, yet materially implied a tailyie. ALLEGED,—This proceeded on a *falsa causa*, supposing a prior tailyie; and he could make none: for he was then a minor, having curators; and being without their consent, it was null. ANSWERED,—A tailyie is no lesion to a minor, though it be an alienation from the heirs of line.

The Lords ordained it to be heard in their own presence. *Vide* 22d June 1687. *Vol. I. Page* 447.

1687. *June* 22.—The mutual declarators anent the estate of Carnock, between Sir Thomas Nicolson, claiming as heir-male, and the three sisters married to Greenock, Bancrieff, and Mochrum, the heirs of line, as mentioned 15th February 1687, were debated. He, founded on Sir Thomas Nicolson's minute of contract of marriage in 1648, with the Earl of Lithgow's daughter, which seemed to tailyie the estate to heirs-male, by taking them obliged to pay the Lady's jointure, and to aliment the daughters, and to pay their portions; which could not be, unless the heir-male had been to succeed; for *cui incumbit onus, is etiam debet habere commodum*. ANSWERED,—1*mo*, He, being minor, and having curators, could not then make a tailyie, because that is an alienation of his estate from the natural heirs, and one of the most important settlements of a man's life. *2do*, The contract imports no tailyie, but only in favours of the heir-male of that marriage, or of his own body, but not at all to his stranger heir-male whatsoever.

REPLIED,—1*mo*, A tailyie is not an alienation. 2*do*, It was not revoked *debito tempore, intra quadriennium utile.* 3*tio*, By making this tailyie, there was no lesion to the minor himself; and unless a minor can qualify lesion, he is not reponed against an alienation of heritage *sine decreto judicis*; see Dury, 2*d February* 1630, *Hamilton.* And in *Nicolson's case*, observed by Stair, 15*th December* 1677, the Lords sustained Thomas Nicolson's breaking his father's tailyie, and paying his debts, as rational acts, though he was minor and did not adhibit the consent of his curators. To the 2*d*, A tailyie may be as strongly inferred by consequences as by their direct style; for, 1*mo*, All men naturally desire the preservation of their memory and honour, which is more perpetuated by the masculine succession than the feminine. 2*do*, The Roman law of the 12 tables preferred the agnatic line before the cognatic; and the *Lex Voconia* excluded women from the succession as long as there were males, though of a much remoter degree, till Justinian, by his Empress Theodora's instigation, levelled both sexes. And the feudal law lays this down for a principle, *ubicunque fit mentio hæredis in genere, semper est intelligendum de hærede masculo.* Craig, *Feudor. p.* 50, 241, *et* 248; and Sande, *Decis. Fris. lib.* 4, *tit.* 5, prosecutes this at large from all the topics of conjectures. 3*tio*, This being only a minute, it is ordained to be extended by advice of men of judgment. This is what lawyers call *abbreviatura notarii secundum sensum sapientis extendenda.* Now the Lords, as *viri boni*, and the supreme reason and sense of the nation, are in use to extend the wills of parties according to law, *ubi minus dictum quam senserant.* See Stair, 2*d Feb.* 1667, *Poury*; and 2*d July* 1667, *Sir John Sinclair.* And the Lords had so proceeded lately, in *Hay of Rattray's case* with *Hay of Boussie*, whose father had disponed his lands to his second son, with the burden of an aliment to the eldest, who was dumb; and the second dying without issue, the Lords found the eldest could not succeed to him *ex præsumpta defuncti patris voluntate*; and so preferred Hay of Balhousie his next cousin.

The sisters ALLEGED, the first Sir Thomas Nicolson who acquired the lands, made no tailyie, but took them to his heirs whatsomever; and they also cited *John Charteris' case, supra*, 14*th March* 1682, where there were more presumptions of a tailyie than here, and yet the Lords rejected them; as also that Zelophehad's daughters excluded their remoter agnates by God's special law; *Numbers, cap.* xxvii.

This being advised on the 28th of June; after they had near consumed the whole forenoon, the Lords recommended to the President and Carse to endeavour to settle the parties. *Vide* 5th July 1687. *Vol. I. Page* 458.

1687. *July* 5.—The heirs of line of Carnock, mentioned 22d June 1687, upon a bill obtain a warrant to transmit the charter-chest to the hands of the clerk of process. This was to inspect if they could find the act of curatory there. And, on the 12th of July, it being proposed that the Lords would advise the process, in regard the Lords to whom it was recommended could not agree them; the Chancellor produced a letter from the King, sisting that process, till he considered how far he had interest therein; for he had procured a gift of that estate to Drummond of Machany, his brother-in-law, as devolved in the King's hands *tanquam ultimus hæres*, by the conception of the minute of the contract of marriage, where the last termination is on the heirs-male of that Sir Thomas's body, who are now failed in the last Lord Napier.—But it was

thought this was no *ultimus hæres*, seeing infeftment never followed on that contract. *Vol. I. Page* 463.

1687. *July* 6. JOHN BALLANTINE *against* GRAHAM'S CREDITORS.

JOHN Ballantine, in the King's Guard, a papist, his reduction against the creditors of Provost Graham in Dumfries, is debated *in præsentia*. ALLEGED, —He could not reduce their rights *ex capite inhibitionis*, because they had right to a recognition of the lands by Provost Graham's taking base infeftment therein when he was breaking; and though the Act of Parliament 1686 does statute that inhibitions shall not be prejudged by recognitions, yet that is but *lex nova*; and the law before that was, that the grounds of the recognition could not be quarrelled by anterior inhibitions, the King not being concerned therein; and it was so found *supra*, 16*th December* 1680, *Hay*. ANSWERED, —The cases differed; for, 1*mo*, This inhibition was not against Graham, who incurred the recognition, but against M'Brair his author. 2*do*, Before the recognition, the pursuer had raised a reduction *ex capite inhibitionis*, and so *res erat litigiosa;* and there are none in his circumstances, and so no hazard of a preparative; and the Act of Parliament clears it *pro futuro*.

On the 7th of July, the Lords, on the specialties of the case, reduced, *ex capite inhibitionis*.

Then it was alleged, his bonds were null, being subscribed at several places, and there were only two witnesses for all. 2*do*, By this inhibition, he had received partial payments from sundry other creditors whose rights he had quarrelled. *Vol. I. Page* 464.

1687. *July* 8. DALMAHOY *against* ———.

IN the case of Mr Dalmahoy, married to the Lady Lufnes, it was debated, whether his son could have a moveable heirship, seeing he was neither prelate, baron, nor burgess, but had only some heritable bond by secluding executors, and was a *civis honorarius* by having some burgess tickets. But I find Stair, *tit.* 27, § 9, adduces decisions where neither of thir two were found sufficient to give heirship. *Vol. I. Page* 464.

1687. *July* 8. ANENT the PRIVILEGE of JOINTURES.

IT has long passed among lawyers as a brocard, that wives' jointures have a privilege; and therefore the Commissaries prefer them *in mobilibus*, (for, in heritage, diligence carried it,) when they seek to be confirmed executors-cre-