1671. *February* 25. Anent ADVOCATES.

IT was debated in a cause, whether an Advocate could be forced to depone upon a conveyance made by him in behalf of his client. And it was alleged, an Advocate was not obliged to reveal his client's secrets, no more than a Priest should reveal confessions,) except it be *in materia falsi* or *læsæ majestatis*. Yet advocates have been often examined upon their client's businesses. *Vide* Dury 14*th November*, 1628, *Betsone* against *L. of Grange*, and *Sir Robert Sinclair* and others were forced to depone in *Lewie Barclay's* action. See Mr. Styles' English practical register voce *witness, page* 569. *Vide* H. de Marsiliis, *singulari* 424. *Vide infra, February* 1674, *Dumfermling and Calendar, No.* 445, *in fine*.

Advocates' MS. No. 157, *folio* 93.

1671. *March* 5. CLAUSE.

The following clause was advised by Sir T. Wallace, in an heritable right, *viz.* a contract of wadset granted by a debtor to his creditor in his lands, with a precept of seasine, and upon which seasine did actually follow; that notwithstanding of the law, upon the death of the receiver of the wadset this right would appertain to his heir and not to the executor, yet *hoc non obstante*, it was the express intention and desire of all parties that this right might descend to the executor, notwithstanding of the common law to the contrary; to the which, the parties by this special paction will a derogation: and if it shall chance the heir to quarrel this, and to lay claim to the succession of this right, then and in that case the parties will and appoint this present real right to become null, to annihilate and expire as if it had never been, and the right to return to the bounds of a naked personal obligement, so that the sum in the wadset may ever belong to the executor; and ordain this clause to be inserted in the seasine, and all the other rights to follow thereupon. Though this was called the opinion of an eminent lawyer, yet some differed much from him, and think it a clause not sustainable in law; *nam pactis privatorum non potest derogari juri publico, l.* 38 *D. de Pactis;* especially such fundamental laws, as the heir's succession in real rights: hence a man cannot leave his wife tutrix to his bairns, in the case that she superinduces a second husband, (*infra February*, 1677, *No.* 555, § 2, see *February* 1680,) because it is a dispensing with a general law that deprives her of the tutory of her own bairns, so soon as it appears *eam convolasse ad secundas nuptias: vide* 8*th March* 1636, *Stewart* against *Anderson*, and the civil law there cited. And I would gladly know if it would be a valid paction betwixt a debtor and his creditor that, notwithstanding of the common law appointing no more profit to be taken but six for each hundred, yet that the debtor *ex certa scientia* dispenses with the said law, and is most willing cheerfully to pay eight or ten per cent; sure this would not be sustained but the creditor would be punished as an usurer; so that it is hard to determine how far persons may renounce laws introduced in their favours, (though *de jure cuilibet licet renuntiare favori pro se introducto, l.* 29 *C. de pactis;*) and it is thought debtors gave only valid discharges of the act of debtor and creditor 1661, because by the very act power was given to any who pleased to renounce it. And I ever doubted much of this reservation, I have seen cast in heritable bonds and real rights, that notwithstanding *de jure* a man on death-bed cannot dispone upon heritage, yet that

it shall be leasum and lawful to him at any time in his lifetime, *etiam in ipso articulo mortis* to uplift it, dispose of it, leave it by his heir to him he pleases, &c.: or thus, where a man and his wife are infeft upon a comprising in liferent or conjunct fee, and his three daughters in fee (this is *Magnus Ayton's* case), but with this provision that it shall be lawful to him, albeit the fee be provided to his daughters, to uplift the sum at any time in his lifetime though on death-bed, and dispose and use it at his pleasure, the question falls whether or no by virtue of this act *inter vivos* a man can validly dispose upon his heritage *in lecto ægritudinis* to the prejudice of his heir, so that it will defend against a reduction intented by the heir *ex capite lecti*.—See more of this in *February* 1670, *Mossman* against *Bells*, No. 7.

Advocates' MS. No. 160, *folio* 94.

1671. *March* Anent the JURISDICTION of the COLLEGE of JUSTICE.

IT is uncontroverted but the members of the College of Justice *in civilibus*, have *præscriptionem et privilegium fori*; none others, by acts of Parliament, being judges competent of their civil actions but the Lords of Session only. But whether it be so *in criminalibus*, as riots, or the like, may be much doubted. Paulus Voet in his tract *De Statutis*, page 282, states this question, and thinks an exemption to advocates, from answering to inferior courts of this kind, should not extend to criminal actions. Upon the one hand, it seems that the magistrates of Edinburgh, (though justices of peace within themselves,) nor no inferior judges to the Lords of Session, Secret Council, or Justice, can meddle with them, because by act 29th, Parl. 1661, ratifying the whole College of Justice's privileges, it is declared, that all liberties and immunities belonging to the Lords of Session are extended to belong, and appertain by the advocates and all other members of the College of Justice; but *ita est* by express act of the same Parliament, *viz.* act 38, containing instructions to the justices, the said justices of peace have no power to meddle with the Lords of Session; *ergo* neither with the other members of Session. (*Vide infra, February* 1678, *No.* 721.) Yet by that same 38th act, it would seem in the matter of riots and such like, the members of Session may be punished and proceeded against by the justices of peace, and consequently by the magistrates of Edinburgh, because they are empowered to proceed against all offenders whatsoever, under the degrees of noblemen, prelates, counsellors, and senators of the College of Justice; unless we say the whole members of Session must be understood there under the Senators of the College of Justice, as enjoying all the same privileges with them. Our privileges got a sore dash in 1670 by the eighth act of that Parliament, where the Lords of Session their privileges are ratified, and nothing of the rest—See my animadversions on that act.

Advocates' MS. No. 161, *folio* 94.

1671. *March* 9. Anent the KING'S HYPOTHEC.

SEVERAL creditors contending for the escheat of James Hamilton the Collector, before the Exchequer, Mr. Stamfield was preferred to it, but with the burden of 5 or 6000 pounds Scots, due by the rebel to the king for custom and excise,