bra curiæ, (the Magistrates' oaths,) what contradicted their Acts of Council, which ought to make more faith than to be disproved in such a manner;---but the Lords found the qualifications foresaid so probable. *Vol. I. Page* 787.

1697. *July* 23. The EARL of TILLIBARDEN *against* MR DAVID GRAHAM of KEILLOR.

THE Earl of Tillibarden, against Mr David Graham of Keillor,---being a declarator, That he had bought and acquired the lands of Keillor for the Marquis of Athole and the pursuer's behoof, as their trustee, in regard he was depositary of a right from Murray of Keillor to the Marquis, and likewise of the Marquis's bond for the price; and, that disposition not taking effect, he bade at the roup of the lands, and carried it as the greatest offerer; and, by letters subsequent thereto, insinuated as much as if he had purchased them for the Marquis's behoof. ANSWERED,---The trust ceased when the lands were exposed to sale; and the letters import no more but that he was willing to treat with the Marquis; and any such communing may be resiled from before delivery of writs; and he had no compulsitor whereby he might force the Marquis to have taken the bargain off his hand: Likeas, he had sold his place as clerk to the bills to pay the price, which no trustee would have done.

The Lords found it a continuation of the first trust; and ordained him to denude on payment of the price and all his expenses, he being kept *indemnis cum omni causa.* *Vol. I. Page* 789.

1697. *July* 27. MARGARET SMITH, and JAMIESONS, her Children, *against* FORBES of BALFLUG.

MARGARET Smith, relict of Jamieson, and her Children, pursuing Forbes of Balflug for a spuilyie,---the DEFENCE was, It is prescribed, *quoad modum probandi*, by the Act of Parliament 1579, not being intented within three years after the committing. The ANSWER was,---The children are minors, against whom that prescription does not run. REPLIED,---The title, as executrix, is in the mother's person, who is major, and cannot stop the prescription. DUPLIED,---It is only *nudum officium*, and she is *fidecommissaria*, and trustee for the nearest of kin, the legatars and creditors; and so the bairns, *jure sanguinis*, having the natural right,---the personal privilege, That prescription runs not against them while minors, may very well be proponed by the mother *ob connexitatem causæ*, they being *consortes ejusdem litis*: and the mother is not *domina bonorum mobilium*; for, if she were denounced rebel, they would not fall under her escheat; as was found, 21*st December* 1671, *Gordon* against *Irving*. TRIPLIED,---The sole administration and *jus exigendi* is vested in her person; likeas, she has right to a third of the moveables *jure proprio*: and, if this were sustained, its consequences might go too far; seeing creditors have an interest in the executry of their debtors; and, *posito* that one of them were minor, would that afford a defence of minority to the executor?

The Lords, without deciding this nice point, and finding the mother had not yet given up inventory, but only taken out a decreet-dative with a license, allowed the confirmation to be carried on in the minor children's name.

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1697. *July* 28. Ross of Tillisnaught *against* George Innes.

Ross of Tillisnaught gives in a complaint, bearing, That, in an improbation pursued by the Duke of Gordon against him, and sundry other vassals, there was a certification granted; but he, on a bill, got the same stopped, and made a production of his charter and seasine; after which, it lying over, and he coming to call for the process, finds that one George Innes, a servant in the clerk's chamber, has given up the papers to the Duke's agents: whereby his property is like to be evicted from him, without the Lords interpose their authority to redress the same :---

The Lords immediately gave order to one of their macers to bring the said George Innes before them, lest, on the noise, he should make his escape; and, being come, they examined him; and finding sufficient matter of suspicion, that, for money, he had given up some of the papers, (though he denied he ever saw the charter and seasine,) they committed him to close prison till the matter were fully examined. *Vol. I. Page* 790.

1697. *July* 29. Lindsay, Bailie of the Regality at Glasgow, *against* Paton, Ferguson, and Sundry other Maltmen living there and in the Gorbells.

Lindsay, bailie of the regality at Glasgow, having convened Paton, Ferguson, and sundry other maltmen living there and in the Gorbells, for contravening the 37th Act, 1696, anent selling malt by the measure, and having fined them for every particular act in £10 Scots, *toties quoties*,---they gave in a bill of suspension, on this reason, That he had taken a decreet against each of them for £3000, which was more than any of them was worth; and the most he could go was only £10 for each conviction. He opponed the Act of Parliament, which bore £10 *toties quoties*, which could be applied to nothing else but for every breach and contravention; else, after a year's transgression, they would cheerfully pay one £10 for all, and so elude the act.

The Lords considered this was a penal law, and not to be extended; and that magistrates and judges ought not to ensnare the people by letting their processes lie over, (which were to invite them, as connived at, to break the law,) and then take a decreet for all, to their utter ruin and undoing. And, the Act being new, they resolved to hear them, in their own presence, How far the judge, by his own negligence or wilful forbearing, ought to lucrate these fines; and what the words "*toties quoties*," in such a case, shall import; especially seeing the act is not *in viridi observantia*, nor has yet taken effect in many places of the kingdom. *Vol. I. Page* 790.