1739. *June* 26. JEAN CRAICK *against* ANNE NAPIER.

[*Vide* Kilk., No. 2, *Minor;* C. Home, No. 121; Elch., No. 7, *Executor*, and No. 7, *Minor.*]

THE Lords found, 1*mo*, That, in respect the substitution left the free disposal of the subject to the daughter, and only took place in case she died without disposing of it, therefore the father had full power to make such a substitution. 2*do*, That the assignation or translation to Anne Napier, though made by a minor to her curatrix, was valid; either because it was revocable at pleasure, and therefore more of a testamentary nature, than of a deed *inter vivos;* or because, in this case, Anne Napier seemed rather to be named curatrix *ad certum effectum* than *ad omnia*. Arniston even denied that the maxim, *Tutor non potest esse auctor in rem suam*, obtained in this case more than it did betwixt man and wife. 3*tio*, As to the testament, the Lords found that it was likewise a valid conveyance of the subject in question; and repelled the allegeance, that the bond was made heritable by the substitution, and so could not be transmitted by testament, or that, supposing it was testable, it could not be conveyed by these general words, executor and universal legatar, which can give no more than what would have gone to the executor dative if there had been no testament.

1739. *July* 6. SHEIL *against* CROSBIE.

[Elch., No. 8, *Writ;* Kilk. No. 4, *ibid.*; C. Home, No. 124.]

THERE were two questions here; 1*st*, Whether a bond signed only by one notary subscribing for the party and two witnesses, was supplyable by the party's oath, That he had given orders to the notary to subscribe for him? Some of the Lords thought that such an obligation was null *ipso jure*, and so not supplyable by oath of party; in the same manner as if it had wanted the subscription of the party required, by Ja. V., Parl. 7, Act 17, or the subscription and designation of the witnesses requisite by Act 1681; in both which cases, it was allowed that it would not be supplyable by oath. But the President, Arniston, and the majority, were of opinion that it was supplyable by the oath of the party; for they observed, that there was this difference betwixt the Act 1681 and the Act Ja. VI., Parl. 6, Act 80, by which the subscription of two notaries is introduced, that, by the first, the deed was declared null, if it wanted the solemnities there required; but, by the other, the deed was not said to be null, but only *to make na faith*. The requisites mentioned in Act 1681 were solemnities, which, if wanting, could not be supplied; but the subscription of two notaries was only *ad majorem securitatem*, because the law would not trust one, for fear of falsification; which fear is entirely removed if the party depones that he gave orders to subscribe for him. And, lastly, The constant practice

has been, that such obligations have been validated, either by the oath of party, or subsequent deeds of homologation. See Hope's Minor Practicks, § 347.

N.B.—This point carried by the President's casting vote.

2d, The second question was, Whether the party could so qualify his oath, that he indeed did give order to the notary to subscribe for him, but that he imagined it was a deed of a quite different nature from what it really was? But this quality was rejected unanimously; only the party was allowed to insist in a reduction, as accords.

1739. *July* 6. DRUMKINTON *against* MAGISTRATES of ELGIN.

DRUMKINTON, and three other pursuers, having been Magistrates of Elgin, did, during their administration, settle an Episcopal minister in one of the kirks of Elgin, where the Presbyterian ministers were in use to preach on the week days. This it seems was done with some sort of violence; for the kirk-session of Elgin raised criminal letters against the four above mentioned persons, and prosecuted them for a riot. About the time these letters were raised, the council met, and came to a resolution that the kirk belonged to the town in property, and that they would to the utmost assert the right of the town, and defend the pursuers in the prosecution for the riot. The council consists of seventeen, and there were here present thirteen, including the pursuers, eleven of which subscribed the act of council, and two did not. When the affair came before the Lords of Justiciary, they thought that it depended upon a previous question, *viz.* Whether the kirk belonged to the town or kirk-session, and remitted the prosecutors to the civil court to fix that point. Accordingly, declarator was raised before the Session, in name of the kirk-session, in which they prevailed, and the kirk was declared to belong to them. In consequence of this, Drumkinton and his followers were condemned by the Justiciary to pay a considerable fine; but they appealed to the House of Lords, who reversed both the sentence of the Session and of the Justiciary, and ordered the defendants to pay back to Drumkinton the fine they had got off him. The matter rested there, till now that Drumkinton and the three bailies bring a process against the Magistrates and Council of Elgin, for repetition of the expenses they had laid out in defending the town's right (as they said,) before the Justiciary, the Session, and the House of Lords.

It was argued for the pursuers, 1*mo*, That, as administrators for the town, they were obliged to defend the property of it, which was here the principal question, and upon which all the others depended.

2*do*, That they had an express mandate for so doing by the above mentioned act of council.

3*tio*, That the event sufficiently justified their conduct, and shewed they had good reason for what they did; since, by the decree of the Supreme Judicature, the church in question was declared to belong to the town.

The defences were, 1*mo*, That the council, upon which the pursuers founded,