1670. *June* 25. LORD LOVAT *against* LORD M'DONALD.

THIS was an improbation in which it was found, 1*mo*, That a service without a retour instructs the party served to be heir *passivè*, but not *activè*, and so will not furnish an active title whereon to pursue. *Vide Durie*, 18*th February*, 1627, *Simpson*. 2*do*, A general service may be led before any judge in the kingdom at the party's option, though neither the defunct nor the heir lived within his jurisdiction.

Advocates' MS. No. 35, *folio* 76.

1670. *June* 25. REID and RANKEIN *against* BURRELL.

BY a contract of marriage there is an annualrent provided to the husband and the wife, and the longest liver of them two in conjunct fee, and to the bairns of the marriage; which failyieing, to the wife's heirs. The wife's heirs are FOUND to have right thereto; notwithstanding, it was ALLEGED, That by existency of bairns of the marriage, the wife's heirs were wholly excluded, and the right of the annualrent returned back to the heirs of the husband; for they found though these bairns had been served heirs to their father, yet whenever they failyied, the wife's heirs, by virtue of the substitution of the contract, will come in as heirs of tailyie or provision to them; and notwithstanding that the father, or the heirs of the marriage, as fiars, might have alienated the said annualrent, seeing they never made use of their power.

Advocates' MS. No. 36, *folio* 76.

1670. *June* 25. Anent An ALLEGEANCE OF MINORITY.

WHERE there is an allegeance made up on minority, and for taking it away, majority is offered to be proven, the Lords are in use, before answer, to admit of a joint probation.

Advocates' MS. No. 37, *folio* 77.

1670. *June* 25. STEWART *against* STEWART.

ONE being charged upon a bond, he suspends, that the same is null, being only subscribed by the two initial letters of his name. It was REPLIED,—He offers him to prove he was in use so to subscribe at other times.

This reply was FOUND RELEVANT. Neither was it respected that the sum in the bond was 2000 merks, and so a matter of importance; for my Lord Stair called to mind where the Lords *in præsentia* had sustained a bond for L.500 Sterling, where the party subscribed only by a mark like to a craw-tae, because of the reply of use, though he was averse from it himself.

Act. Lermont. *Alt.* Yeoman.

Advocates' MS. No. 38, *folio* 77.

1670. *June* 25. WALKER *against* RONALD.

THIS was an action for proving the tenor of a writ that was lost, wherein it was ALLEGED They behoved to be clear and special *super casu omissionis*, otherwise the bond must be presumed not lost but retired.

To which it was REPLIED, it was impossible to be clear on that, viz. what way, in what part, and at what time, he lost it; for if a man remembered these circumstances, he needed not prove the tenor, but after some search he might recover the very writ. The *casus omissionis* here was, that the party to whom the bond was granted his wife foolishly and recklessly had burnt the same at a candle, at which time there being none present, and so none could depone thereon but herself.

Advocates' MS. No. 39, *folio* 77.

1670. *June* 21 and 29. ELEIS of Southside *against* DR. CARSE.

June 21.—THIS is a pursuit for payment of a debt against this defender, as representing the debtor; 1*mo*, In so far as he being his apparent heir, he meddled with his charter-kist, which, by the constant practice, infers gestion. 2*do*, As heir, he made a revocation of all deeds done by the debtor, his predecessor, which might tend to his prejudice. 3*tio*, He called the comprisers to count and reckoning, offering to prove them paid by their intromissions, and more than paid; and so craved the superplus to be given back to him.

Against his meddling with the charter-kist, it was ALLEGED, 1*mo*, That Dr. Carse, (though a Scotchman,) yet, from his infancy almost, having been bred, and having resided in England, (being one of the king's chaplains,) upon the death of his friend, he came down to Scotland; and being altogether ignorant of our laws and customs, he simply, without any intention of being heir, took inspection of some writs that were in the defunct's charter-kist, and this, within the year allowed to apparent heirs for deliberation: and within the year also, he offered the charter-kist back to those who had interest, which they refused. Which kind of meddling being so innocent, and also within the time prescribed by law, can in no equity nor reason make the Doctor liable to the defunct's debts. To the second *non relevat* a revocation, unless ye will say that something followed