shows either diligence, or that it would have been frustraneous, he is willing to allow it, though not recovered: for, if the debtors were insolvent, that was to cast out money in vain to pursue them. But to exeme him from diligence totally, that he might count only what he had actually received, is contrary to the very nature of the office of executry, and destructive to the interests of orphans, relicts, creditors, legatars, and all others concerned; and saps and subverts the very foundations of law: For *quorsum* is an inventory given up, and faith made upon it, and caution found, if the executor will count for no more than what he has received? For how should we know what he has got and what he has not? Therefore, the only rule must be, what diligence has he done for recovering the inventory: and law has no remedy to relieve him of that, but in one single case, viz. where, by mistake, he has given up and confirmed heritable sums, as if they had been moveable; but the hazard lies most on the other hand, of giving up a short defective inventory. And this being a frequent case, occurring every day, law has provided two remedies for obviating thereof, viz. a dative *ad omissa* and *ad male appretiata;* but there is no dispensation with the doing of diligence. Yea, some think the testator himself could not discharge it, being contrary to *jus publicum* and the general utility; and the clause adjected by the bishop, giving the legatees access to affect executry-goods as fully as if they had a special assignation thereto, in case of the executor's negligence, makes no specialty to import a liberation from diligence; for that is no more than what is implied in the nature of all executors, that those having interest in the confirmed goods may affect them *quoad non executa.*

The Lords found Prestonhall and his son accountable for the inventory given up in the testament, whether recovered or not; but with this quality, That, in discussing the particular articles, he might discharge himself with proving he had done diligence, or that the parties were insolvent and the debts irrecoverable. This was so decided, *me referente.* *Vol. II. Page* 457.

1708. *July* 29. LADY TOLQUHON *against* FORBES of TOLQUHON, her Son.

LADY Henrietta Erskine, daughter to the Earl of Buchan, and relict of Forbes of Tolquhon, pursues her son, the Laird of Tolquhon, for an aliment out of his estate, till she have a right to her jointure, there being no contract of marriage.

ALLEGED,—That, she being married again to Mr Abercrombie, brother to my Lord Glassford, he is bound in law to entertain and keep her; and can claim no aliment from her son *super jure naturæ*; which action is only competent when they have no other mean of subsistence: and it is better she depend for that on her present husband than to straiten her son, whose estate is reduced to a very small pittance by his uncle Sir Alexander Forbes' mismanagement and infrugality. 2*do*, Though she has no contract nor jointure *provisione hominis*, yet she may claim a terce of what her husband died last vest and seised in, *provisione legis.* Likeas, she acquired the gift of her son's ward and marriage, by which she might state herself creditor. 3*tio*, She had sundry intromissions.

ANSWERED,—Her present husband has been forced to pay some debts she had

necessarily contracted through her son's ingratitude to her; and his condition is not very opulent. And, for the other claims of a terce and ward, it was her tenderness to her son that made her forbear these, and take the softer methods by an aliment. And, as to her intromissions, they were inconsiderable, and she was willing to count [for] them.

The Lords thought she had mislaid and mistaken her process, and should rather have insisted on the terce and ward. And, as to alimenting *super jure naturæ*, her present husband was *primo loco* liable in that duty and obligation. But, in regard it was an unnatural war, and that they differed much about the extent of Tolquhon's estate, they recommended it to some of their number to settle them. *Vol. II. Page* 459.

1708. *July* 30. Ross of Auchnachloich *against* Æneas Macleod of Cadboll.

The town of Tain having split in choosing their commissioner to the last Convention of Burghs that sat at Edinburgh in the beginning of this month of July, the Mackenzies elected Cadboll for their representative; the party for the Rosses in that town sent Auchnachloich. And mutual complaints being made of this at the Convention, that the Rosses had added three more to the sett of the burgh than their town-council used to consist of formerly, and so, by this innovation, had outvoted the other,—the Convention named three or four adjacent burghs to try and examine what was the ancient constitution and sett of that burgh, with power to determine. The Rosses thinking this was to turn them out and condemn their election, they give in a bill of advocation of this order, on thir grounds:—That they could not delegate their power so as finally to determine, but only to report; for that was to divest themselves, and instal the power in a few of the whole; which was destructive to the nature of societies. And, though our old laws permitted the royal burghs to meet once a-year, yet the subject of their meeting was only for the regulation of trade and merchandise, but not to overrule elections; which belonged only to the sovereign legislative capacity, and now to the Parliament of Great Britain.

Answered,—If the Lords considered the Acts of Parliament empowering the burghs to meet, as the 111th Act, Parliament 14th, James III, and many others, they will find the burghs invested with an ample power not only to regulate trade, but also their elections and questions arising thereon; and, accordingly, they have exercised that jurisdiction, and declared persons incapable of representing them; as in the case of the *Town of Selkirk*, and many others; and, being the third estate of Parliament, the Lords have never meddled in these questions.

The Lords considered this power delegated to the committee was too large and ample; and that now, by the Union, they were no more a third estate, and that the affair became a civil right, cognoscible by the Lords, as the supreme civil judicatory next to the Parliament; and so could not be declined. Some were for passing the bill of advocation; but the Lords fell on a medium, to declare they would hear the parties on their respective rights in November; and, in the meantime, stopped the procedure of the committee named by the burghs.