two parish kirks called Kinnaird, that the summons should have been executed at both of them, but was only executed at one of them, and it was uncertain which, and therefore prayed for our warrant for letters of incident diligence for citing the Company and the creditors at these two parish kirks on 21 and 6 days; which the Lords granted, and ordered the executions to be recorded in terms of that act; *me solummodo, sed maxime, renitente*, because that was a method of citing edictally all persons having or pretending to have interest, established by proper authority, and that had been observed above 40 years; and though we might alter it and make a new and different regulation, yet till that was done it was binding even upon us, and we had no dispensing power to dispense with it *via facti*, especially since the persons concerned neither were nor could be in the field, the question being only in what manner they should be summoned. *Vide contra*, 26th June 1752, (No. 24 *infra*.)

No. 23. 1752, June 3. ANDERSON, *Supplicant.*

A PETITION of Anderson's complaining of the Magistrates of Canongate's interlocutor in modifying his aliment on the act of grace, was found incompetent without an advocation.

No. 24. 1752, June 26. HAMILTON *against* DALGLEISH.

THE heir of the common debtor was minor, and the pursuers had neglected to call his tutors and curators at the market cross, and Justice-Clerk, Ordinary, gave them a diligence to call them. The defenders reclaimed. The President was clear, that no person necessary to be called originally in a process could be called by a diligence. And on advising bill and answers, we found without a vote that the tutors and curators could not be called on a diligence. *Vide contra*, 26th February 1752, Duke of Norfolk and Creditors of York Buildings Company, No. 22, *supra.*

No. 25. 1752, Dec. 12. MR JOHN GOULDIE *against* THE HEIR AND TRUSTEES OF MURRAY OF CHERRIETREES.

MR GOULDIE, as having a gift of *ultimus hæres* to the last heir of Maison-dieu, pursued declarator with reduction of a disposition to Murray of Cherrietrees, which came before me, and was fully litigated, and after some no-processes, determined both by me and the whole Court. I took the principal cause to report; and informations on both sides were drawn; but before report Cherrietrees died, and the process was transferred against his son. And when I came to make my report, a lawyer for the son appeared, and declared he did not represent, and was ready to renounce; upon which the Lords gave decreet for the pursuer, which bore in common form to be on my report,—it also mentioned the said compearance. On this decreet he pursued maills and duties against the tenants; and Cherrietrees having executed a trust deed, the cause was by them advocated, and the question was, Whether they could be heard after that decreet *in foro*, or whether it was a decreet *in foro?* I thought it was not, nor could not be so against the defunct, because there never was any decreet in his life, and not against the son, who was willing to re-

nounce;—and accordingly, 28th November, the Lords found that the trustees might be heard, notwithstanding the decreet. Lord Advocate reclaimed, and insisted that it was a decreet *in foro*, the cause fully debated, and no more could have been said were Cherrietrees still alive; that by the regulations a party compearing cannot pass from his compearance, &c. But I observed, that in the question whether it was a decreet *in foro*, the argument would have been as strong if Cherrietrees had died before any debate *in causa* after or even during the debate about the no-processes; that if any new defence occurred to Cherrietrees, it was competent any time before decreet, but if it was a decreet *in foro*, the trustees were barred by competent and omitted; that probably the Court would not alter their opinion if nothing new was pleaded that was not in the former informations, (though in fact they never were reported by me,) but I thought they could not be barred by the decreet from pleading any thing, for that it was not a decreet *in foro*. And the petition was refused *nem. con.* 12th December 1752.

13th June 1753, Margaret Morison, an infant about 15 years of age, having succeeded to her uncle in the lands of Maison-dieu, and being an infant of a sickly constitution, disponed them to Murray of Cherrietrees, and died in two or three weeks. Professor Gowdie, her uncle, by her mother, applied to the Crown, and obtained a gift of *ultimus hæres*, and pursued reduction of Cherrietrees's disposition on death-bed and minority, which came before me first, as is marked *supra*, 12th December 1752. The defence is now taken up by Cherrietrees's trustees, who alleged, 1st, that though this was called a right as *ultimus hæres*, yet in reality it was no succession, the King was no heir, but *quasi hæres*, and had right to the estate only as *bona vacantia*, and therefore can neither reduce on death-bed nor on minority. 2dly, That the gift was obtained by subreption or obreption. On this report, we found unanimously, that the objection of death-bed was competent to the Crown's donator; and one consideration that moved me was, by our most ancient law, feudal rights could not be transmitted without consent of the superior, and therefore neither by testament nor on death-bed, not even in prejudice of the King. But we were more doubtful as to the reason of minority, and therefore did not decide it. And we found the qualifications of subreption or obreption condescended on not sufficient; but in this last Kilkerran differed. Another point was also stirred at the report, by the Lord Advocate, that the objection of subreption or obreption was not competent to one who derived no right and had no gift from the Crown; but as this point had not been pleaded before the Ordinary, nor reported, we did not decide it. 31st July Adhered unanimously.

No. 27. 1753, Aug. 8. WITHERS *against* HARLEY.

WITHERS petitioned the Court to advise his cause, that was enrolled in both our ordinary and concluded cause rolls, out of its course, because if it waited its course of the roll, he was in hazard to lose his debt, Harley being *vergens ad inopiam*. I objected the 11th and 12th articles of the regulations 1672, which we read. But notwithstanding thereof the Court granted the petition, and called and advised the cause.