

Earl the grandson of the General for the money, for that his father Thomas the son of Kilmarnock succeeded to the honours and estate in 1726, and claimed penalty and annualrent from the term of payment in terms of the bond. The defences pleaded were that he had not succeeded to the whole of the estate, for that part had been sold, and a great part evicted by the Marquis of Clydesdale, now Duke of Hamilton, on a bond of tailzie by Earl John in favour of his daughter in 1716. I reported the case, and the Court took it upon a different footing, that the bond was *contra bonos mores*, that it was *captare votum mortis viventis*, and at best can be no better than the bond that Dr Abercrombie took from Lord Mordaunt on payment of L.200 to pay him L.800 on his succeeding to Earl Peterborough his father, (No. 17.) where after the example of sundry English precedents in Chancery we gave the Doctor no more than his L200 and interest of it. Therefore did we know in this case the sum paid by Mr John Stewart, we could give him no more than that sum and interest of it, agreeably to the decision in the case of Lord Mordaunt; and accordingly we found this bond void and null, reserving to the consideration of the Court whether the pursuer ought to be repaid what money was paid for granting the bond, the pursuer proving the same, 22d December 1752. 7th February 1753, The Lords adhered by the President's casting vote.

PAPIST.

No. 2. 1740, Jan. 22. MAXWELL *against* MAXWELL.

THE Lords sustained the title notwithstanding the objection. There were two questions; First, Whether there can be an adjudication against the Protestant heir upon a charge to enter, or if the benefit given by the act of Parliament can only be by service? 2dly, Whether this point is already determined in this cause? As to the first the President and Dun were clear that there could be no adjudication, but the rest seemed to be of a different opinion, and I own I had difficulty whether there could be an adjudication at the instance of a common creditor, and had not formed a judgment upon that point; but I thought where such adjudication was on the apparent heir's bond to make up a title to the estate, it was competent, the act allowing his title to be made by service or other legal means. As to the second, though the point had been determined formerly, and in the case of Murray of Conheath it was even found that an adjudication against the Popish heir was null, and though both the objections and interlocutors in this cause plainly supposed it so, that sustaining the objection would make the former procedure ridiculous, yet the abstract point was not formally determined nor indeed objected:—therefore we waved finding it directly *res judicata*, but sustained the title in general as above.