

sons are named to execute any commission, without mention of a quorum, the power lies in the whole body, to be regulated, indeed, by the votes of the majority, in case of variance of opinion; but still not in any number less than the whole, and far less by a scrimp majority, meeting by themselves, without having filled up vacancies, or advertising the other members.—*Hunter* against *Executors of M. Michael*, 13th February, 1624. *Moir* against *Grier*, 10th February, 1693.

3tio, As to the fault imputed to the pursuer, that he absented himself from the chapel for some time even after the rebels had left the city, he now stated that he had been rendered incapable of doing duty by a disease in his leg.

The petitioner further complained that he had not only been dismissed from his office, but also that his stipend should cease from the 29th of September preceding the date of the act of deprivation, which is dated 23d January; and, besides, praying for an alteration of the interlocutor on the merits, he prayed their Lordships to find that at any rate the stipend is due till the act of dismission.

The petition was refused without answers. The following are Lord Kilkerran's notes on the petition.

“ Refuse, except as to the point about the stipend, and that remitted to the Ordinary.

“ *1st*, No ecclesiastical superior in this case which distinguishes it.

“ *2do*, He does not say he ever acquainted the Vestry where he was the time he kept out of the way; his allegiance now, *ex post facto*, that he had a sore leg, comes too late.

“ *3tio*, The decisions upon the point of a quorum which are in private cases have no analogy to a body corporate.

“ The single instance of not praying for the King, strictly was a sufficient ground for the Vestry; especially, as he does not lay it on a lapse of memory; but then they join with that his absconding.

“ Doubted if we have power to review the judgment of the Vestry; for it is no consequence that then they will be arbitrary, for at that rate, any Court that are judges in the last resort might be called arbitrary. This only stirred as a doubt. But we will be the more cautious in reviewing their proceedings.”

1748. *June 10.* CUNNINGHAM against WHITEFOORD.

THIS case is reported by *Elchies*, (*Death-bed*, No. 19.) and by *D. Falconer*, (*Mor.* 16119.) Lord KILKERRAN'S note of the reasoning which took place on the bench is as follows:—

“ *June 10, 1748.*—Adhered, by the President's casting vote.

“ It was argued by the minority, *Primo*, That the heir could not quarrel the deed 1746, further than he was thereby prejudged, and that he was not prejudged, so far as it was the same with the deed 1741, for so far he would have been excluded by the deed 1741, had the deed 1746 not been made.

“ *2do*, That he could not approbate and reprobate the same deed; and, therefore, if he founded on the revoking clause in the deed 1746, he could not quarrel the disposition therein made of Whitburn to the defender.

“ 3^{tho}, That the revoking clause, though general, was not to be understood to mean farther than a revocation of all former settlements, so far as they were different from that now made in 1746, which contained the revoking clause; and to understand it otherwise, and more largely, is *captare verba*; for no one can believe the intention to have been other than has been said; and though it may be true, that in construing conveyances to lands, there is no arguing from intention against plain words, yet that does not apply to this case, where there is no doubt about the validity of the conveyance 1741, but all the question is upon the import and meaning of a revocation which is *animi*; that this case differs from any that is to be met with either in our Law Books or Decisions; all the cases to be met with in either, are of two dispositions, to different persons; *ex. gr.* A disposes to B, a stranger, with a power reserved to alter even on death-bed; he afterwards disposes on death-bed the same subject to C, and the question is, whether the heir of A can quarrel the disposition to C; on which question, besides the authority and decisions referred to in the petition and answers, one was mentioned, of June, 1738, *Irvine* against *Irvine*, where, directly contrary to the doctrine in the answer, it was found, that an heir could not challenge a posterior disposition, though on death-bed, in respect of a prior to a different person, which excluded the heir, and contained a power to alter. But if there was not a doubt on that, where can be the doubt where both first and second dispositions are to the same person, and which is the present case ?

“ The strength of the argument on the other side, was put upon the generality of the revoking clause, in the deed 1746, so expressed as to admit of no dubiety; but that it was by that deed, and that only, that his estate was to be carried, and which was farther confirmed from the circumstance of his suffering that duplicate which was in his own hands, of the deed 1741, to be thrown into the fire; and there was no arguing from the defunct’s *animus*, contrary to a plain declaration that admitted of no dubiety.

“ And as to the point that the pursuer could not approbate and reprobate, it did not apply, unless the pursuer were to take by the deed containing the clause which he reprobates, whereas he proposes to take nothing by it; and, indeed, the import of the revoking clause was the chief question, which the minority considered but as a clause of style, and to be construed from what undoubtedly appeared to have been the *animus* of the granter.”

1748. *July 23.* M’KINNIE and OTHERS, Merchants in Glasgow, *against* FORRESTERS, Pedlars.

GEORGE and Robert Forresters having been transmitted from Glasgow to the tolbooth of Edinburgh, as mentioned *voce* Summary Application, 23d Dec. 1747, the creditors, John M’Kinnie and others, merchants in Glasgow, in order to bring the matter into the shape of a regular process, raised a summons against them of fraudulent bankruptcy, wherein, upon advising the proof, the Lords “ found the charge of fraudulent bankruptcy proved against George, and that Robert had been aider and assister to him therein; and, therefore, liable *nomine damni* in the debts contracted by George;” and as the Lords were clear that the statute strikes no