

mentary settlements of moveables, though the first institute die before the testator, the settlement will not thereby be evacuated, but the next substitute will take.

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1756. *February 11.* ———— *against* ————.

THE President and the other Lords declared their opinion, that although it was the practice in some places that bailies of burghs of barony and regality granted acts of warding upon their decreets,—yet that was an illegal practice; because such privilege was only competent to the bailies of royal burghs.

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1756. *February 13.* BREBNER *against* LAW.

[*Fac. Coll. No. 187.*]

IN this case the Lords allowed the Protestant heir to serve, and found that the Popish heir had forfeited his right, although he could not take the formula precisely in terms of the statute; that is, either before the Lords of his Majesty's Privy Council, or the presbytery of the bounds where the party resided; because there was no Privy Council now in Scotland, and the Popish heir in this case resided abroad.

In this case also, the Lords found that the Protestant heir might serve to a man who had only a right of liferent in his person, having executed a procuratory of resignation, which he had right to, and taken a charter to himself in liferent, and his son, the Popish heir, in fee; so that the Protestant heir, overlooking the infestment altogether in favour of the Popish heir, as being null and void, might, by a general service, carry the procuratory of resignation as if it had been still unexecuted, and this without any previous declarator of the nullity of the infestment, only a declarator repeated with brieves of the disability of the Popish heir to succeed. Both these points the Lords determined unanimously.

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1756. *February 13.* SIR ROBERT GORDON *against* DUNBAR of Newton.

IN this case it was debated, Whether a verdict pronounced by a jury, upon a remit by the Lords to them to set marches, in terms of the Act of James VI, concerning molestations, could be reviewed by the Court of Session?

The President said, that anciently when questions about the property of conterminous grounds were decided by brieves of perambulation, the verdict of the inquest was then final: but the method directed by the statute of James VI. only regarded the possession in which the verdict of the jury might be final:

that of late years this practice had been followed in declarators of property, the determination of which depended upon marches ; but it has never been the practice to make the inquest final judges in such questions : they did no more than report to the Lords.

Lord Kaimes said, that even anciently nothing was more ordinary than to review the verdict of juries *in civilibus* ; and if it not had been so, there could have been no court of review, because all causes in those days, civil as well as criminal, were tried by juries. This the Lords found, and reversed the verdict of the jury in this case. *Dissent.* Auchinleck. Prestongrange *non liquet*.

1756. June 15.

BAILIE *against* MENZIES.

[*Fac. Coll.* No. 207.]

A MAN disposed to certain trustees, for behoof of his nine children, all and sundry debts and sums of money due to him, and particularly certain bonds therein specially narrated, and, among the rest, one bond for L.500 ; all which subjects were to be divided among his children according to such proportions as the trustees should think fit. Of the same date he made a deed, wherein he made particular provisions to each of the children, reserving full powers to the trustees to divide the remainder of his estate among them as they should think fit.

These trustees accepted and acted ; and the question here was, Whether the prescription of the fore-mentioned bond of L.500 was interrupted by their minority, or by the minority of the children for whose behoof it was conveyed to the trustees ?

The President said, That, if the disposition had been to trustees, for payment of creditors, it was certain law that the prescription would run against the trustees, not against the creditors. It was also certain, he said, that when an executor-testamentary makes up his titles by confirmation, the prescription will run against him, and be interrupted by his minority, though he be only a trustee, and accountable to the legatees, creditors, nearest of kin, and others having right ; and he said the case was the same here, where the disposition was *omnium bonorum* in favour of the children ; and it was very different from the case of a disposition of a particular subject, in trust for behoof of a particular person ; in which case the prescription would be interrupted, not by the minority of the trustee, but of the person for whose behoof the trust was ; and the difference betwixt that case and this was, that here no particular bond could be said to belong to any one child, whereas there the particular bond was in trust.

On the other side, it seemed hard that the prescription should run against persons who could lose nothing by it, such as the trustees here, who are not liable for omissions, and not against the persons who were to lose by it, viz. the children. But the Lords were of the President's opinion. Prestongrange and Kilkerran *non liquet*.