

Kirkhill, if he had been the father of Farquharson, to prosecute him for the penalty : and, if so, he has a right, by being the first prosecutor, which the Court cannot deprive him of upon pretences of collusion, which are not proof ; for the delay is hitherto not so long as that any collusion can be inferred from it, especially as it may have been occasioned by an apprehension of interfering with the Court of Session.

This reply the Lords sustained ; *dissent. tantum* Kaimes et Auchinleck.

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1757. *November 25.* GRANT of BALLENDALLOCH *against* ANTONIO, COUNT LESLY.

IN this case the Lords unanimously found, That it was no bar to the service of a Protestant heir that the Popish heir had made up titles and was infest ; and that, this notwithstanding, the Protestant heir could serve, without necessity of setting aside the right of the Popish heir by a declarator, and thereby making the fee void ; because the right of the Popish heir was, by act of Parliament, null and of no effect, so that the Protestant heir might serve as if the Papist was naturally dead.

The President said, That he would have had some difficulty in the case, and have thought that a declarator was necessary, as in the case of the irritancy of an entail, or a forfeiture by the Scots law, but that the practice had been otherways, particularly in the case of *Law*, where the very same objection was made, and repelled in the last resort. I think it makes a difference in the case, that the Popish heir in this case had never any legal right to the subject ; because he was after fifteen years before he succeeded, consequently the estate never vested in him, and there was no room for any declarator of irritancy ; whereas, if he had been under fifteen when he succeeded, the estate would have vested ; but his right would have been irritated by his not taking the formula when he came to be fifteen, and, in that case, I think there would have been some more difficulty in allowing the service to proceed without declarator of irritancy.

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1757. *November 30.* MAJOR MAITLAND *against* MISS MAITLANDS.

[*Fac. Coll.* II, No. 63.]

IN this case the Lords found, that a man, who was called to a tailyed succession as heir-male of the last heir, might serve himself heir-male to such last heir in the lands ; and by such service he would not be liable universally as an heir-male, but only liable as an heir of tailye, although he was not served heir-male of tailye, but simply heir-male, and although in his retour none of

the limitations of the entail were inserted, nor all the substitutions, but only such as were necessary to connect his title to the lands.

This carried only by the President's casting vote; *dissent*. Prestongrange, Kilkerran, Milton, Bankton.

1757. December 14. GRAY *against* LINDSAY.

[*Fac. Coll. II. No. 66.*]

1758. February 10. Adhered to this interlocutor, but not by a great majority. It was said that curators were given to minors, not only for their own sake but for the sake of their heirs; and therefore a minor, without his curators, could not alter the succession even of his moveable estate, except by way of testament; for example, he could not lend out his money and take the bond to himself, and to any particular series of heirs.

The case, upon the review, appeared more doubtful; and it may be doubted whether this be not a donation *mortis causa*, as a middle kind of thing betwixt a deed *inter vivos* and a testament.

1757. December 14. SIMPSON *against* DALZIEL.

[*Fac. Coll. II, No. 59.*]

THIS was a competition among the creditors of Patrick and James Jackson, in which the Lords sustained a disposition made by a bankrupt, in terms of the act 1696, to a trustee for the behoof of all his creditors, and therefore set aside some arrestments at the instance of creditors who did not accede to the trust-disposition.

Some of the Lords put their opinions upon specialties; but the President and Prestongrange said that they did not hold these later decisions, which established that a bankrupt could make no disposition, even for behoof of all his creditors, to be law.

1757. December 20. BRODIE *against* STUART.

[*Kilk. eodem die; Fac. Coll. No. 74.*]

IN this case several of the Lords gave it as their opinion, and it seemed to be the mind of the majority of them, that a simple decerniture as executor *qua*