

and his being at consultations was not relevant, unless it had been since the Lords, by their act before answer, allowed the several points of fact alleged to either party's probation, but since that time he had never been present at any. THE LORDS thought this an affected abstinence, and therefore rejected him from being a witness. The Lady and her son did also recriminate against Sir Patrick, that he had tampered with her witnesses, by asking what they would depone, which Sir Patrick *contended* was wholly calumnious. She also adducing some witnesses to prove the rental of the estate, Sir Patrick craved they might be also interrogated on his brother's condition and sensibleness to go about business. Sir Robert and his mother *contended* that they did not adduce the witness for that, but on quite separate points. THE LORDS found the other party might make use of her witnesses for any thing contained in the act, though not cited by them. *See IMPROBATION.—PROVISION TO HEIRS and CHILDREN.—WITNESS.*

*Fol. Dic. v. 1. p. 357. Fountainball, v. 2. p. 6. 21. 34. & 57.*

No 5.

1741. February 19. M'KIE *alias* HERON *against* M'KIE.

WHERE a man had disposed his estate in prejudice of his heir, whereof reduction was pursued on the head of death-bed, the disponee having applied for the possession, at least for sequestration; it was found, 'That the apparent heir had right to continue the possession.'

*Kilkerran, (HEIR APPARENT.) No 1. p. 237.*

No 6.

1796. March 9.

The Honourable Mrs MARIANNE MACKAY and Colonel WILLIAM FULLERTON *against* Sir HEW DALRYMPLE, and Others.

THE honourable Mrs Marianne Mackay, with consent of her husband, Colonel Fullerton, in 1793, brought a reduction and declarator of irritancy against John Hamilton, (who had been infeft in the estate of Bargany upon a charter of resignation in 1742, and had been in the uninterrupted possession of it ever since,) and against Sir Hew Dalrymple, his nearest heir both of law and provision, in which she narrated an entail of the estate executed by Lord Bargany in 1688; the manner in which the succession under it had devolved on the late Sir Hew Dalrymple, and his renouncing it in favour of his younger brother Mr Hamilton; from which she inferred, that the late Sir Hew by granting, and Mr Hamilton by accepting this renunciation, and thereby altering the course of succession, had incurred an irritancy for themselves and their descendants; that the pursuer, as next substitute to them, was entitled to the estate;

No 7.

Notwithstanding the dependence of an action of reduction and declarator of irritancy brought against a proprietor and his heir-apparent, the latter, upon the death of the former, is entitled to continue possession till decree be obtained.