

the head of fraud and imposition, and incapacity of Lord Roseberry to contract, on account of furiosity.

The Lords did not reduce the bonds *in totum*, but sustained the accounts so far as they were just and reasonable ; but so far as they were not just and reasonable, not only curtailed them, but also in the same proportion diminished the sums of money that made up the remainder of the two bonds to which the accounts referred, and in the same proportion, as by this means the two bonds should be diminished of which the accounts were produced, reduced the third bond, of which no account was produced, and remitted to an Ordinary to do accordingly.

1751. June 13.

STRAHAN *against* ———.

FOUND that tenants could have no allowance off a master on account of cess and levy-money forced from them by the rebels in the 1745. The Lords seemed to be clear in the general point ; but what made the doubt here was, that there seemed to be an agreement and consent on the part of the master to the tenants paying the levy-money and cess.

1751. June 19. MRS KENNEDY *against* MRS CAMPBELL.

[Elch. No. 7, *Proof*.]

THIS was a competition betwixt two ladies about a dead man, the late Campbell of Carrick, who in the year ——— granted a holograph certificate to Mrs Kennedy, the pursuer, certifying that he had married her such a day before two witnesses named, but not subscribing, at such a place. In consequence of this certificate it was not doubted but the *copula* had followed though they never publicly cohabited together. Some time after this he married clandestinely, without proclamation of banus, Mrs Campbell, the defender ; but at the same time he wrote a letter to the pursuer, acknowledging her for his wife still, and expressing the utmost sorrow for what he had done. However, he lived near twenty years thereafter publicly with his second wife, had children by her, and all this while the first wife made no complaint, (for certain prudential reasons, as was said, and for one obvious one, lest the man should have been hanged ;) but on the contrary behaved to Mrs Campbell as if she had been his wife. She now brings an action against Mrs Campbell to have her marriage declared. The Lords found at first, that by her silence for so long a time, and her acknowledgment of Mrs Campbell's marriage, she was barred *personali exceptione* ; but this decree the House of Peers reversed, as inconsistent with the sacred contract of marriage, and allowed Mrs Kennedy to prove the marriage. In consequence of which decree Mrs Kennedy insisted in the proof of her marriage before the Court of

Session ; and to prove the date of the certificate, (which being holograph did not prove its date,) she brought witnesses who deponed they saw it in her possession before the second marriage : yet the Lords found the first marriage not proved. Lord Elchies said that the certificate only created an obligation upon Carrick to marry the pursuer, upon which he could have been pursued for implement ; but not a marriage. But *quære*, Is not an obligation to marry actionable ; and is not every action of that kind a declarator of the marriage ; besides, that the certificate, if it is good for any thing, is an acknowledgment of the marriage being then made, not a promise to marry ?

1751. November 8.

GRAY against SMITH.

[Elch. No. 14, *Provision to, &c.*]

IN this cause several questions occurred : 1^{mo}, It was debated, Whether, in the case of a man's disposing his estate to his son, and a certain series of heirs without any infestment following upon it, a proper title could be made up to such a right by a general service to the father, the disponer, and not to the son, the disponee ? and the Lords were unanimously of opinion that such service was inept :—And as this was the pursuer's title in this case, they found that before extract he must produce a proper service to the son, the disponee. 2^{do}, It was debated, Whether a man having a right to an estate by two different titles, one as heir of the investiture, the other as heir by particular tailyie or disposition, and choosing to make up his titles as heir of the investiture, neglecting the disposition, he can, either by the positive or negative prescription, acquire the fee-simple of the estate to him and his heirs whatsoever, so that the particular tailyie or disposition shall become null and void ? And with respect to the negative prescription, the Lords were all of opinion that it could not run except from the time that the succession divided betwixt the heirs of the investiture and the heirs of tailyie ; because a man having several titles to an estate may impute his possession to any of them he pleases, and his choosing to complete one of them by infestment will never be understood as passing from the rest. And in this manner many estates in Scotland are possessed upon sundry different titles, without its being ever understood that any of them could be lost by prescription, while the possessor of the estate had a right to them all ; besides, that in such a case as the present, where the tailyie was alterable at pleasure by the heirs of the investiture, there was nobody against whom the prescription could run, because the substitutes in the tailyie were not *valentes agere*, at least *cum effectu*, because they could bring no effectual action to oblige the heirs of the investiture to execute a tailyie which they could alter next day : and here lies the difference betwixt this case and the case of M'Kerston, where the Lords found that the prescription could run. See the case, 5th December 1739. As to the positive prescription the Lords were divided in opinion ; Lord Drummore and some others were of opinion that the heir of the investiture might by the positive pre-