to be found in his repositories, he applied to the commissaries for a warrant to search those repositories; and, having found the papers he wanted, he brought an action against the debtors in the bonds he had recovered, in order to try what could be made of the debts before he was at the expense of confirming them. While this suit was going on, Sutherland, and other creditors of the deceased, took out an edict, and confirmed these debts, as executors-creditors *ad omissa*, for the payment of which Ross was pursuing. The question was, Which of these creditors was preferable?

The President and Lord Coalston were of opinion, that the being decerned executor, whether as creditor or as nearest of kin, conferred the office, and gave a title to pursue for every subject belonging to the defunct. And they further thought that such executor, pursuing to recover payment of any subject, was preferable to another creditor stepping in and confirming the subject; because they thought his nimious diligence would not give him a preference to the other creditor, who was not *in mora*; in the same manner as a posterior arrester, though he recovered the first decreet of forthcoming, will not be preferable, if the first arrester be not *in mora*.

Prestongrange thought that an executor-creditor decerned could have no title to pursue for any subject not contained in his inventory, unless he had a license; and therefore he thought, in this case, Sutherland had the only right.

Lord Kaimes, and the majority, were of opinion, that, as Ross was at least *in cursu diligentiæ*, he ought to be preferred *pari passu* with Sutherland.

It did not appear to be certain what they would have done, in case Ross had had a license to pursue,—whether they would have preferred him simply, or both *pari passu*.

1757. *November* 17. FARQUHARSON *against* DUFF.

FARQUHARSON voted in the election of a collector for the county of Aberdeen without having the qualification required by law. A complaint was brought against him for recovery of the penalty of L.20, upon the statute, at the instance of Mr Duff of Hatton.

The defence was,—That this was a popular action, competent to any heritor within the county, and that there was a suit already depending against him, at the instance of Burnett of Kirkhill, before the county-court, for recovery of this penalty.

To which it was ANSWERED,—That this was a sham prosecution, carried on at the instance of one of the same party, and who was connected with the candidate for whom he voted, merely to screen him from justice; and accordingly Kirkhill did, immediately after the election, lodge his complaint in the sheriff-court, but, so far from showing any disposition to carry it on, had consented to an adjournment to a ——— day.

REPLIED,—That, as this penalty is founded upon the statute only, it must be governed by the statute; and there is nothing in the statute that hinders

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.

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 infeft; and that, this notwithstanding, the Protestant heir could serve, without necessity of setting aside the right of the Popish heir by a reduction and 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.

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 tailyied 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 tailyie, although he was not served heir-male of tailyie, but simply heir-male, and although in his retour none of