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