which I think right; as I think it also right that it should go so far, because it would be very hard to put a man to the expense of a special service before he knows, by the production, whether he has any right to reduce or no.

1757. *March* 10. WILLIAM NAIRN, Advocate, *against* SIR THOMAS NAIRN.

[Kilk. *eodem die*; and *Fac. Coll.* II, No. 24.]

THE question here was, Whether a remoter substitute in an entail could, upon a summary application to the Lords, get the entail, which had fallen into his hands, recorded? The heir in possession appeared, and contended that this could be done only by way of process, and that such had been the form for many years past; and that it had been so decided in a controverted case, when Mr Forbes and Arniston were upon the bench; since which time it was thought to be a fixed point. But the Lords were all of opinion that it could be recorded upon a summary application, except my Lord Kaimes, who said he had a very great doubt whether an entail could be at all recorded after the death of the maker, except by the heir in possession, who could record the entail made by his predecessor, for the same reason that he could make a new one. He said he thought that the recording of an entail was necessary to complete it, and make it an entail, in terms of the statute, that is, an entail against creditors and purchasers, as much as the inserting irritant and resolutive clauses was; and the one could be no more supplied, after the death of the maker, than the other: Without both it might be a good deed *intra familiam*, but it was not a statutory entail. This point was argued in presence, about ten years ago, in the case of the entail of *Kinaldy*, and informations ordered upon the pleading, but it was transacted and never came to a decision; and it was said that the late President Arniston was clear of opinion against the registration, and Elchies was doubtful; but, at any rate, Kaimes said, if it could be registered at all, it must be by a process, in which the heir in possession would be heard upon any defences that he might have against the registration; such as that it was revoked by a posterior deed, or that it was nonsensical and unintelligible; upon which account it was said that in one case the Lords had refused to registrate an entail. But it was answered, that the registration of the entail would neither make it better nor worse; and, in the meantime, while the process was going on, the estate might be sold.

1757. *November* 16. ROSS *against* SUTHERLAND.

Ross, creditor of the deceased ———, confirmed, as executor-creditor, certain debts due to the deceased; and, being informed that there were other debts of his which might be made effectual, and of which the documents were

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