be *contra bonam fidem*, and against law too, to suit execution against the disponer further than they cost him; and if the disponee's right were burdened in favours of other persons, the benefit ought to accresce to them, and that because of the privity and trust betwixt the disponer and disponee, by granting and accepting the disposition.

"And in the present case, if the respondent, instead of taking confirmation from the superior, had taken a gift of non-entry, that would have been preferable to the inhibiting creditor, and he might have taken the benefit of it to exclude him; yet, if his father's meaning was to give him the lands with the burden of the debt, I doubt whether he could use it to evade the debt; though I confess the decision, 23*d February*, 1667, seems pretty much contrary to the notion; and I confess I am still very doubtful of it, since his right is not expressly burdened with it.

"But then the fact now represented suggests another consideration. This disposition, 1711, was in effect revoked by the bond of corroboration and tack 1720, for nineteen times nineteen years, for a tack duty not equal to the annual-rent of the sum in the corroboration. Had the respondent not accepted the disposition, I should have had no doubt that he might purchase what rights he pleased. Now, suppose he accepted, yet, if the disposition had directly been revoked, the acceptance would have gone for nothing. It is true it is not directly revoked, because the property is not formally conveyed away; yet in effect it is revoked, and, therefore, it would be hard to bar him, by that acceptance, to acquire other rights; and had they been pled in the question with the other children, I do not know but it would have varied my opinion.

"What follows, was wrote at advising petition and answers the 13th *February*, 1745.

"The Lords altered.

"KILKERRAN and TINWALD both spoke for the interlocutor.

"ARNISTON and PRESIDENT spoke against it. I spoke last, but rather against it, upon the case as it was before me. But I thought the disposition revoked, and, therefore, the same as if it had not been accepted. Upon my speaking, several moved to remit it back to me, but the President put the question, adhere or alter? Kilkerran voted to alter. Tinwald did not vote. I voted *adhere* upon the revocation; but the Lords would not allow of that; therefore, I did not vote, and it carried by a narrow majority to alter*."

1745. *July* 30. Creditors of ROBERT CUNNINGHAM *against* SUSANNAH CUNNINGHAM, his daughter, and MARY GAVIN, his wife.

THE said Robert Cunningham, who died in the West Indies, by his last will and testament, bequeathed to Mary Gavin, his second wife, in liferent, and to her daughter, in fee, his whole moveable estate in Scotland, and nominated his only son, Daniel Cunningham, his executor.

* The above report appears to have been written by Lord Elchies, as is proved by the following note, made by Lord Kilkerran, on the back of it. "Within is a copy of what Elchies had wrote on the margin and last page of the petition against his own interlocutor, in the case *Wilson of Gillies* against *Thomas Purdie*."

Daniel did not appear to claim the office of executor; but a competition for it ensued between the defenders and Elizabeth Cunningham, daughter of the deceased by a former marriage. The defenders were preferred by the Commissaries; and the Court, on advising a bill of advocation for Elizabeth Cunningham, 3d February, 1744, "Remitted, with this instruction, that the Commissary of Glasgow do not proceed to name any person executor till the 1st of July next, or that notice come from Daniel Cunningham, executor nominated in the deceased Robert Cunningham's latter will and testament; but prejudice to the commissary granting warrant, in the meantime, upon proper application, to dispose of such of the moveables as may be perishable, the price whereof to be lodged in the hands of such proper persons as the commissary shall appoint, who shall find caution to make the same furthcoming to all parties having interest."

Application was accordingly made, and the perishable articles were disposed of by roup.

Various creditors of the deceased now came forward, and having brought processes on the passive titles, and obtained decreet *cognitionis causa*, they applied, after the term named by the Court had elapsed, without the executor nominated appearing, to be confirmed as executors creditors. This was opposed by the wife and daughter; and the commissaries refused the office of executor to the creditors, "in respect of the other compearers' interests, who are already decerned executors; but finds the said executors ought to give up inventories, and expede confirmations of the subjects of the defunct."

The following question now occurred between the creditors and the executors. The former insisted, that as the debts of the deceased exceeded his funds, and as they allege that a quantity of plate, which had belonged to the deceased, had been greatly undervalued in the inventories, it should be disposed of by public roup. On the other hand, the executors maintained that they were entitled to have the plate at the appreciate value, and were no further liable; leaving the creditors, if they thought themselves aggrieved, to the legal remedy of confirmation *ad male appretiata*.

The commissary ordered the plate to be rouped; but on advising a bill of advocation, Lord *Tinwald*, Ordinary, "remitted to the commissary, with this instruction, that the confirmation be expede without delay, and that he stop the roup;" and to this interlocutor the Court adhered, though with some difference of opinion.

Lord KILKERRAN says, July 18, 1745,—"Upon moving this bill, *Kilkerran* took notice, that however it be ordinary and proper, where for any just cause confirmation does not proceed, to obtain warrants to sell by roup such goods as may be perishable, yet he never understood any number of creditors could bar another from confirming any subject, which could not suffer by delay of confirming, by an application to have the subject rouped.

"ELCHIES, with whom concurred the PRESIDENT, thought such sale, in every such case as the present, was right, as that whereby most was to be made of the subject; for that a confirmation *ad male appretiata* was but a lame remedy, for that by law it could not take place unless the mal-appreciation was to the extent of a third. They added, that after the sale, the price was still to be confirmed. After so much said, the petition was appointed to be seen and answered.

"The reasoning, as above, may be for what is expedient, but my notion of it is, that it is exceeding new."

[I do not find any further notice of this case in Lord *Kilkerran's* papers, but it appears, from *Elchie's* report of it, (*Executor*, No. 17,) that the Court adhered to the Lord Ordinary's interlocutor.]

1747. *November* 19. FOULIS *against* The VESTRY OF BLACKFRIARS' WYND CHAPEL.

THIS case is reported by *D. Falconer*, (*Mor.* 6581.) The following are Lord KILKERRAN'S notes:

"*November* 10, 1747.—Altered and found, that in removing the pursuer, the Vestry have not acted arbitrarily, but agreeable to the discretionary powers given by the founder.

"All agreed that the Vestry could not arbitrarily dismiss the minister; and also, that it was not the intention of the founder that they could not dismiss him without applying to a Court of law. They thought, therefore, the Vestry had a discretionary power; and that, if it did appear to the Court that they had not acted arbitrarily, that was enough to sustain their sentence; albeit, neither a legal crime, nor legal proof, should be by them brought; and his conduct was sufficient ground for their exercising their discretionary power; for it was agreed, at advising, that not only had he gone off from the universal concert of the established church, which was not to open their churches, as it might not be safe to pray for King George, and to pray by an ambiguous expression, was what they thought not lawful; but after the Highlanders left the place, he concealed himself in Edinburgh, and would not appear, though sought by the Vestry at his house, and not to be found; nor did he appear till his colleague had returned from England, whither he had retired, and which was long after the ministers of the Established Church had begun to preach."

[Here ends Lord Kilkerran's note on the first petition and answers.]

In a petition against the above-mentioned interlocutor, the pursuer pleaded,

1*mo*, That as this was an establishment for divine worship, according to the form of the Church of England, and as the patronage and other powers were committed to a Vestry, it was important to look to the powers belonging to such a body in similar circumstances in England. Now, by the law of England, the power claimed by the defenders, of censuring or dismissing the minister, belonged not to the Vestry, but to the Ordinary, or Judge Ecclesiastical.

2*do*, The act of dismissal, in the present case, was null, not being the act of the whole members of the Vestry, and no number less than the whole being named as a quorum, by the deed of mortification. By that deed, there is a perpetual succession of seven persons for composing the Vestry, called the ordinary Vestry, even in opposition to certain others, who are to be extraordinary members. Provision is made that when any of the ordinary Vestry even die, or leave the country, their places shall be filled up by the majority remaining in Scotland. The fact is, however, that the Vestry consisted but of five persons, when the act of deprivation in question was passed. And one of these was neither present nor called to the meeting. The objection then is, that when a certain number of per-