case, the complaint was that the freeholders had refused to enrol the claimant, the Lords found that they had done wrong.

1754. *December* 18. SIR ROBERT GORDON *against* DUNBAR of Thundertown.

In a process of molestation and declarator of property, at the instance of the said Sir Robert Gordon against the said Mr Dunbar; the Lord Elchies, Ordinary, remitted it to the sheriff of the county to take trial, by an inquest, of the marches, and upon proof taken of the allegations *hinc inde*, to place stones ascertaining and distinguishing the true limits and marches. Upon this remit a proof was taken, and upon that proof a verdict pronounced by the jury settling the marches. The question was, Whether such a verdict was under the review of the Court of Session: My Lord Prestongrange, Lord Auchinleck, and Lord Justice-Clerk were of opinion that this verdict could not be set aside by the Court of Session, except upon evidence of corruption or gross wilful iniquity; and this opinion they founded upon the Act of Parliament of Ja. VI., Act 42, Par. 11, which appoints such cases to be remitted to the Judge Ordinary to take trial thereof by inquest, and the remedy prescribed by the Act is, that the inquest committing error shall be liable to an attaint of error, or, as it is expressed in the act, to the *pœna temere jurantium supra assizam;* by which they thought it was meant that the verdict of such an inquest must have at least more force than the report of commissioners appointed in common form to take a proof. The Lord President said, on the other side, that the practice of trying such causes by inquest had begun not many years ago, and was a revival of the ancient manner of deciding such causes, by brieves of perambulation; that formerly all processes of molestation and marches were carried on in the form of declarators of property, and were determined as other processes before this Court: that since the new practice began of trying such causes by inquest, their verdicts were never looked upon as final, but were always reported to the Lords, and reviewed by them.*

The Lords, in this case, did not determine the general point, but found by a majority of votes that there was no reason in this case for altering the verdict of the jury.

In another case betwixt the same parties, the Lords not only sustained themselves judges, but reversed the verdict of the inquest.

1755. *January* 10. ——— *against* ———.

[Kaimes, No. 74; *Fac. Coll.* No. 125.]

A GENERAL disponee to all goods and gear having been decerned executor-creditor, according to the form of the Commissary Court, the nearest of kin of

* Balfour says that decreets of division made by an inquest upon a brief of division might be reduced by the Court of Session. *Vide* Reports, p. 180, &c.

the defunct interposed, and craved to be preferred to him in the office of executor; and accordingly the Commissaries did recal the decreet dative in favour of the disponee, and decerned the nearest of kin executor, because they considered the general disposition as giving a right only to the goods, and a claim of debt against the heir *in mobilibus*, but not the office of executor; but thereafter the cause being advocated, and the bill of advocation reported by my Lord Prestongrange, the Lords found, without a vote, *dissentiente tantum* Drummore, that the nearest of kin could not in this case confirm, for these reasons: 1*mo*, Because he had no interest in the matter, seeing that the whole moveables belonged to the disponee; and it was not sufficient that he had a right if he had not also an interest, and the law would not give him an office which was entirely unprofitable to him: this was my Lord Kaimes' reason. 2*do*, Because, as the law stood now, a man without confirmation got a right to the moveables by possession, and to the debts, by uplifting them from the debtors, if they would pay him, without the necessity of a confirmation: but if in this case the nearest of kin could confirm, the disponee would be obliged, whether he would or no, to be at the expense of a confirmation, which of necessity must come out of the whole head, whereas the law gives him the option to confirm or not as he thinks proper; and this was the President's reason. 3*tio*, For that the inconveniencies to the disponee would be very great, because the nearest of kin, by virtue of his confirmation, might seize upon the moveables at the value stated in the inventory, and apply them for the payment of debts: Now the disponee might choose not to part with these moveables, or might think them too low valued in the inventory; in which last case he would have no remedy but a confirmation *ad male appretiata*; and this was my Lord Huntington's reason. The Lords seemed to be of opinion that a confirmation of a disponee as executor-creditor was an absurd kind of confirmation, and that he should be rather confirmed as an executor and universal legatar.

N.B. In the case of a testament naming an universal legatar, but not an executor, it is likely the decision would be the same; so that now there is no difference betwixt the nomination simply of an universal legatar and of an executor and universal legatar.

1755. *January* 28. NEILSON.

[Kilk. *February* 8, 1755.]

IN this case the Lords decided a very general point of law, and of considerable consequence: They found that if a sale of lands was fraudulent upon the part of the buyer, though the right was completed in his person by charter and seasine, before any challenge brought, yet his creditors adjudging the subject from him, and noways in the knowledge of the fraud, were liable to reduction *ex capite doli*, and that without distinction, whether the adjudgers had completed their right by infeftment or no; for the Lords thought that an adjudger