of the obligation; and though the decisions of the Court had varied on this point, about the necessity of a service, yet Kilkerran observed that the latest decisions had found that a service was necessary to an heir of such an obligation in a contract of marriage, by which a father is bound to provide a sum of money to himself and the heirs of the marriage.

The decision went for the executor.

This interlocutor adhered to, 2d December 1755, by a great majority. The President put his opinion wholly upon the right of possession, which transmitted to the heir *ipso jure*, and by virtue of which he had a right to the rents and to every benefit of possession, and to defend himself in the possession, and to recover it, when lost, by every method known in the law.

1755. *July* 2. M'GILLIVRAY *against* M'BEAN.

AN heritable bond bore a provision of this kind,—That if the creditor should enter to possess, he should account for the victual at the rate of the fiars of the county. Upon this heritable bond the creditor adjudged, and then entered to possess. The question was, By what rule he should account for the victual-rent of the lands about thirty years back, during which time he did possess; whether by the fiars or the current prices? And the Lords found, That, as he had not entered to possess upon the heritable bond, but had taken the advantage of legal diligence, by adjudication, he could not also take the benefit of the stipulation in the contract; and therefore found that he must account by the current prices. This they determined rather upon principles of equity than of strict law, according to which there seems to be nothing to hinder the creditor to take advantage both of the legal diligence and the stipulation in the contract.

1755. *July* 2. THE MINISTER of ——— *against* COLLEGE of ST ANDREW'S.

THE minister of this parish pursued an augmentation against the College of St Andrew's, as titulars of the teinds, setting forth that his stipend was only 600 merks, and craving that it might be augmented to 800 merks, the least stipend allowed by law to ministers. The defence was,—That the teinds of the parish were, by an old mortification, confirmed by the Pope, given to the Provost of the Old College of St Andrew's, and had always been possessed by him as parson; so that the minister was no more than his vicar, and upon the same footing with the ministers in the mensal churches of the bishops; and therefore had no claim for a stipend but such as the College, his parson, was pleased to allow him. But, *2do*, This stipend is already augmented, by a decree of modification and locality, in the 1710, obtained at the instance of the minister,

by which the stipend was fixed at 600 merks. Now, it is a rule of Court, that no new augmentation shall be given of stipends augmented since the 1707, when the Lords of Session were made Commissioners for Plantation of Kirks, because it was supposed that the Lords had done more justice to the ministers than their predecessors had done.

To this it was ANSWERED,—That it was now clearly established in practice, that the minister's stipend could be augmented, notwithstanding the teinds belonged to a bishop or an university. *2do*, That the decree in the 1710 could not stand in the way of this augmentation, because *res devenit in alium casum.* At the time this decreet was pronounced, the Provost, or chief master of the College, had no other fund but the teinds of this parish, and if the Lords had given a full stipend to the minister, he had been quite impoverished; but now, by the union of the two colleges, he was very well provided, and could easily spare the augmentation which the minister wanted: that, no later than the 1752, the Lords, in a case where the same university was a party, augmented a stipend which had been augmented before in the 1718, for no other reason than that it was below the minimum, and that the titular could very well spare it. And so the Lords found.

The President said that the Commissioners of Teinds, before the 1707, had entertained a false notion that they had no powers to give augmentations out of teinds belonging to bishops and universities; and even after that period an opinion had prevailed that the teinds belonging to heritors were to be burdened with augmentations, rather than bishops' teinds: but these notions were now universally exploded, and most justly, since the bishops got by act of Parliament the power of setting tacks of their teinds, with the burden of augmentation of ministers' stipends; and his only difficulty in the matter was, that it did not appear to be the intention of the Legislature, by the union of the two colleges, to augment the stipends of the ministers, and thereby to take away from the professors what they had gained by the union; for, as to the decreet 1710, he thought it did not stand in the way, as the circumstances of the case were now so much altered.

1755. *July* 9. JEAN HAY *against* CREDITORS of CASTLEHILL.

THE said Jean Hay, wife of Castlehill, got a disposition in trust from her husband of certain lands, for the behoof of her children, with a precept of sasine, but whereupon she did not take infeftment till one creditor of her husband had adjudged, and taken infeftment upon the adjudication, and after him another creditor, within year and day of the first, but without infeftment; then the wife took infeftment upon her disposition, and the question came, betwixt her and the second adjudger, which of them was preferable? And the Lords unanimously found, That the wife was preferable; upon this general principle of law,—that, in all competitions betwixt adjudgers and voluntary disponees, the first feudal right gave the preference, and that, in all such competitions,