nearest of kin, without any confirmation, was sufficient to transmit to the representatives of such nearest in kin the right to bonds, or any other executry subjects; and further, that one of several nearest of kin being decerned executor, would vest the right in the rest, because they thereby acquired a right to call him to account.

It is worth while to observe here the progress of the law. First, in the case of *Drum*, they found, that a decerniture as executor *qua* nearest of kin, with the confirmation of a part, vested the whole; then, in the case of *M'Whirter*, they found that the possession of the *corpora* of moveables, without either decerniture or confirmation, was sufficient to transmit the right to such *corpora*; then, in the case of one *Spence*, she being decerned executrix *qua* nearest of kin, and having conveyed to her husband certain bonds due to the defunct, and he having upon that conveyance taken a decreet of constitution against the debtor's heirs, and thereupon adjudged,—this adjudication was sustained, in a ranking of creditors, though the wife died without completing her title by confirmation: And now the majority of the Lords seemed to be of opinion that a simple decerniture, without any thing following upon it, vested the subject sufficiently, not only in the person of him who was decerned executor, but in the person of the other nearest of kin, not decerned executors, for whose behoof, as well as for his own, he was supposed to hold the office.

In the papers it was said, that a decerniture of executor *qua* nearest of kin was equivalent to a nomination in a testament-testamentary, in which case it could not be doubted but the right of the nearest of kin vested without any confirmation by the executor nominate, or any thing done by such nearest of kin.

But the point was not determined in general, but went off upon certain specialties, such as, that one of the nearest of kin was not only decerned executor, but made an inventory of all the bonds and other effects, and further, he granted an obligation to the other nearest in kin, obliging himself to account to them for his intromissions, and also he confirmed one bond, which the debtor otherwise refused to pay; but then, before this confirmation, one of the nearest of kin was dead, whose share, nevertheless, the Lords found, transmitted: so that, though the decision was put upon specialties, yet it can only be supported upon the general point.

1758. *January* 17. COUNT ANTONIO LESLY *against* GRANT.

THE said Grant took out brieves to be served nearest Protestant heir to the estate of Balquhain; Count Antonio Lesly proponed improbation of the execution of these brieves.

The President was of opinion, and the majority of the Court seemed to be of his mind, that such improbation could only be proponed *sub periculo causæ*: so, he said, it had often been decided, particularly in cases of election of burghs, and it would be very hard if such a cause as this could be delayed,

perhaps for years together, at the expense of L.40 Scots, and in the meantime the person claiming to serve might die; he therefore proposed that the service should in the meantime go on, leaving it entire to Count Antonio to reduce the whole procedure, in case he can prove the execution to be false. The reason why improbation could not be proponed in this case, *sub periculo causæ*, was, that Count Antonio's factory and commission to Mr Dundas, his doer, did not empower him to play so deep a game; and therefore the President's proposal was unanimously gone into.

N.B. A reclaiming bill was offered against this interlocutor, upon advising of which, with answers, the Court unanimously adhered.

1758. *January* 26. COUNT ANTONIO LESLY *against* GRANT.

IN this case the Lords found that a remoter heir of entail might pursue a declarator against an heir in possession, that he was an alien, and consequently incapable to succeed; although the pursuer was not the next heir when the alien was set aside, but there was a nearer entitled to take before the pursuer. In this case the declarator concluded also against that nearer heir, that he was Popish, and there were brieves taken out to serve the pursuer nearest Protestant heir, in which service it was to be proved that the nearer heir was a Papist. But some of the Lords put their opinion, not upon that specialty, but upon the general point, that any remoter heir of entail could pursue a declarator of irritancy against the heir in possession, because it was his interest to have one at least removed that stood before him, if he could not get them all removed; and so Prestongrange said it was decided in the case of Irvine of Drum, which was the first cause he had ever pleaded.

1758. *January* 26. ——— *against* ———.

A WIFE pursued a divorce against her husband on account of adultery. The defence was reconciliation, in so far that, after the adultery was committed, she had cohabited with her husband, and had a child by him. The answer was, 1*mo*, That she had not then any certainty of the fact being committed, though she might have had very reasonable grounds of suspicion; 2*do*, Suppose she had known certainly, yet her not separating from her husband immediately, but continuing to live with him in an ordinary matrimonial way, was no proof of her having forgiven him, or being reconciled; 3*tio*, Supposing this to be an evidence of her being disposed to forgive, yet there was a fresh provocation alleged, viz. an attempt to poison her, which made it lawful for her *revocare ad animum* the first injury. But these answers the Lords did not sustain, by the President's casting vote.