

No 4.

found, that an English promissory note, not protested, did not bear annual-rent.

THE LORDS repelled the objection of Sir George's being papist; and, as to the *pluris petitio*, they found, that the interest before the citation was not due, and therefore must be struck off.

*Eol. Dic. v. 2. p. 25. G. Home, No 115. p. 184.*

No 5.

What method to be taken by the protestant heir to follow out his claim.

1745. July 7. CHARLES GRANT against JOHN GRANT.

THE investitures of the estate of Carron being limited to heirs-male, and Colonel Grant of Carron having died without issue, John Grant, son to Peter Grant in Dell, was the nearest heir-male; but he being a professed papist, and a fellow in the College of Jesuits at St Omers, a declarator was brought by Charles Grant, concluding that he the pursuer is the next protestant heir, and that the said John Grant is a professed papist, at least habit and repute such, and therefore incapable to succeed to the estate of Carron. After the libel was executed, the pursuer applied to the Court, setting forth, that the witnesses to prove his propinquity were very old men, and therefore craving an examination to lie *in retentis*. Answers were made by the heir of line, who had the papist's authority to keep possession of the estate, that the *induciæ legales* not being run, no instructions were come from Mr Grant at St Omers, about the defence of the process. For this reason, the Lords refused the desire of the petition.

After the *induciæ* were run, and the process called, the pursuer insisted to have a proof of his propinquity before the Ordinary. Certain objections were made, which, with the answers, were reported to the Court. It was *objected*, *1mo*, That, by the act 1700, it is incumbent upon the first protestant heir, to prosecute his right within the space of two years after the irritancy is incurred, otherways the right devolves upon the next protestant heir, and that this action was not brought within two years after Colonel Grant's decease; *2do*, That this method which the pursuer has taken to declare his right, as protestant heir, is not competent, having no foundation in the act of Parliament 1700, the only method there prescribed being by service; *3tio*, That, as the act founded on is penal, irritating the defender's natural right to the estate of his predecessor, it allows him to purge himself of popery in the manner therein directed; but so it happens, from an alteration in our constitution, that it is impracticable for the defender, or any other in his circumstances, to comply with the act, so far as it directs that the *formula* shall be taken before the Privy Council, which is now abolished, or before the presbytery of the bounds where the party resides; and in that case his renunciation of popery is appointed to be reported by the presbytery to the clerk of the Privy Council within forty days; and, as this

cannot be done, no action can be maintained on the statute, to forfeit a person for not doing what is not in his power.

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To the 1st, it was answered, in point of fact, That there was no delay, as the pursuer's father set on foot his claim immediately after the Colonel's death, by a declarator of his propinquity, the prosecution of which was staid by his death; 2dly, In point of law, That the delay of two years gives access to the second protestant heir to claim the succession, but is not an irritancy upon the first protestant heir to bar him from prosecuting his claim, though the second protestant heir do not appear.

To the 2d, That a service is necessary to complete the title of the protestant heir; but that this excludes not a previous declarator to remove all objections to the service. If a protestant be entitled to serve heir, by the incapacity of the popish heir, he must be entitled to bring a declarator of his right upon the principles of common law.

It was answered to the 3d, That it proceeds upon a misapprehension of the statute; the sense of which is, that, if a succession open to a papist after his age of 15, which is the present case, the right of succession shall devolve *ipso facto* to the next protestant heir, who is allowed to serve heir to the predecessor, and to possess until the popish heir thus excluded purge himself of popery. The pursuer is therefore entitled to serve, and to bring a declarator to that effect. It is the popish heir's business, if he would claim the estate, to purge himself of popery in the terms prescribed by the statute; and, in the meantime, the pursuer is entitled to hold the estate until the papist fulfil the law. And if alteration of circumstances, by the abolition of the Privy Council, should even have the effect to make it impracticable to purge himself of popery, in the terms prescribed by the statute, this cannot effect the pursuer's right. At the same time, the difficulty is affected. If Mr Grant return to his native country, he may take the *formula* before any presbytery where he chuses to reside, which will purge his incapacity. It will not affect his right, that the same cannot now be reported to the Privy Council, more than the neglect of reporting when the Privy Council subsisted.

THE LORDS, before answer, allowed a proof to be taken to lie *in retentis*, which was what the pursuer chiefly aimed at.

*Rem. Dec. v. 2. No 69, p. 107.*

1750. February 15. DUKE OF GORDON against The CROWN.

GEORGE Duke of Gordon, who was infest *anno* 1684, upon a charter under the great seal, executed in the year 1711, a gratuitous bond for a great sum of money to his eldest son Alexander Marquis of Huntly, upon which the Marquis adjudged the family estate, took a charter of adjudication from the Crown, and

No 6.

A superior who was a papist was infest on adjudication against his predecessors.