1746. *July* . POOR —— *against* ——.

AN action of damages and oppression not competent against the heir, if an act was not extracted against the predecessor, though the cause had been pleaded before the Ordinary, and though the action was *rei persecutoria.* The reason given by Lord Elchies for the decision was, that, till litiscontestation, or an Act extracted, the heir could not know upon what the predecessor put his defence. The Lords were unanimous in this. Actor, Rob. Dundass.

1746. *November* 7. DUKE of DOUGLAS *against* CREDITORS of LITTLEGILL.

[Elch., No. 11, *Writ;* Kilk., No. 8 and 12, *ibid.*; Falconer, No. 156.]

THE Lords found, *(Absent. Preside et Arniston,)* That, before the Act 1681, if two persons signed a deed, with the addition of witnesses to their names, their designations were supplyable by condescendences. For it was said by Lord Elchies, that, before the 1681, the solemnities of writs required by law, such as the designation of the writer and witnesses, and the naming of the writer, were only *ad fidem faciendam judici;* so that, if the deed wanted these, it *made na faith,* (as these Acts say,) but they were not absolute requisites that could not be otherwise supplied; and therefore, though the Act 175, 1593, absolutely requires the writer's name and designation to be inserted in the body of the writ, yet both the one and the other were supplyable before the Act 1681. This was the opinion of the Lords on the Friday, with relation to the point of law; but, as there was a point of fact they wanted to have cleared, they would not determine the cause that day. On the Tuesday following, Lord Elchies being in the Outer-House, they found, *in abstracto,* the designation of the witnesses not supplyable. But this was altered, January 6, 1747. *Preside presente.*

1746. *November* 18. JACOBINA CLARK *against* EARL of HOME.

[Kilk., No. 16, *Adjudication*; Falconer, No. 161.)

THE Lords found, *(Dissent. Tinwald et Drummore,)* That the negative prescription here took place with respect to the apprising, and the debt that was the foundation of it, in so far as there was no possession, and therefore assoilyied the defender.* As there had been infeftment on this apprising, and the legal expired, Elchies was of opinion, that the positive prescription by Lord Home and his authors excluded Jacobina; for he thought that, at the

* This judgment reversed in the House of Lords.

time this apprising was laid, and long after, down to the year 1672, or thereabouts, an apprising gave the right of property; and if, after the expiry of the legal, the appriser did not renounce the apprising, he was judged to lose his right of credit for ever, and to take land for his money: (The contrary found, *December* 7, 1631, *Scarlett* against *Paterson.)* Therefore, Jacobina Clark, having now no debt, and the property of the lands being lost by the positive prescription, has no claim at all. He was likewise of opinion, that the property of lands might be lost by the negative prescription, provided the possessor had any habile title to the lands; and for this he quoted a decision in 1782, *Town of Perth* against *Hospital*, where this indeed was not found, but supposed to be law; and he said it would be very unjust if it were otherwise, for, suppose a charter forged 100 or 150 years, so that it is impossible to detect the forgery, and suppose likewise that the proprietors have possessed all that time, without entering or making up their titles, so that they have no title of possession subsequent to the forged charter,—would it not be extremely hard, in such a case, that the negative prescription should not take place.

1746. *November* 23. ——— *against* GARTSHERIE.

[Kilk., No. 2, *Idiotry*, &c.; Falconer, No. 144.]

IN this case, it was debated whether a brief of idiotry, and one of furiosity, could be purchased against the same person at the same time,—the styles of the brieves being different, and the two diseases of the mind being not only different, but incompatible. It was likewise debated, how far the prosecuting of brieves of idiotry or furiosity was of the nature of a popular action, so that any man for fourteenpence could purchase a brief of idiotry against any man. The question, in a word, was, Whether the brieves in this case could proceed and come to the knowledge of the inquest? The Lords' deliverance upon this debate was somewhat extraordinary. They ordered the person, against whom the brieves were purchased, to be sisted before them in presence. Some days after, they altered this, and ordered him to be sisted before a committee of their number.—*Adhuc absentibus Præside et Arniston. November* 24. The same case came in again, when it was generally agreed among the Lords, that the prosecution of a brief of idiotry or furiosity was not a popular action, but required some title in the person of the purchaser of the brief. In this case, the nearest agnate was an infant, and the brieves were purchased by one of his tutors without the consent of the rest, so that the question was, Whether one tutor could be authorised by the Court to prosecute the brieves. And it carried he might; and, therefore, in order to know whether it was proper for the Court to interpose its authority, Gartsherie, the fatuous or mad person, was ordered to be produced before the whole Lords; which accordingly was done, and they severally, not upon the bench, but at the fireside, in a familiar way, asked him some questions. Upon the 2d of December, the Lords had a full hearing of each other upon the subject, and some were of opinion that he was fatuous, and some that he was not. But it was said by Lord