No 7.

Replied; This obtains, as is declared in the same chapter, in fees-simple, but not in fees-tail; for there the blood is entailed, and therefore if a son commit treason, and die before his father, the grandson shall have the fee-tail, 3. Coke's Reports, Dowtie's case, 10. B. This estate being destined to heirs-male, is an estate in tail-male; and by the authority cited, goes to the heirs in tail, notwithstanding the corruption of blood.

Duplied; A destination to heirs-male makes with us a fee-simple, the estate being entirely at the disposal of the fiars, and not like an estate tail, which is unalienable except by the device of fine and recovery; and that estates pass, notwithstanding of corruption of blood, is entirely a consequence drawn by the lawyers from their being unalienable.

Triplied; This destination ought to carry the estate, notwithstanding the Lord Drummond's attainder; it does not import that it was forfeitable; for, by the case in the authority, that estate might have been forfeited, and would have been escheat if the son had lived; but it went to the grandson, for this reason, that he was not called by the law in virtue of his relation, but by the donor; and, though the legal relation was cut off, was sufficiently pointed out by the description of the natural relation which subsisted.

THE LORDS found that James Lundin, the claimant, could not be served heir-male to James Drummond deceased, the person who stood last infeft, in respect that he behoved to connect his title through the person of James Drummond, formerly Lord Drummond, whose blood was corrupted by the astainder; and further found, that the said James Lundin not having claimed as protestant heir before the estate was forfeited by the attainder of John Drummond, commonly called Lord Drummond, he could not over-reach the forfeiture, and draw back the estate from the Crown, on pretence of his being the nearest protestant heir. See FORFEITURE.

Act. *R. Craigie*, et alii. Alt. *The King's Counsel.* Clerk, *Gibson.*

D. Falconer, v. 2. No 171. p. 204.

No 8.
A lady who professed herself a nun, was found not to have forfeited her right to claim her share of a personal bond in favour of the children of a marriage.

1755. *July* 2.

MARY COLLINS and Her TRUSTEES, *against* Lord BOYD.

WILLIAM Earl of Kilmarnock, grandfather to the defender, by his bond dated in the 1714, proceeding upon the narrative of love and favour, obliged himself 'to pay to his uncle Captain Charles Boyd, and Katharine Van Reest his 'spouse, and longest liver of them, the ordinary annualrent of 6000 merks, 'and to the children procreated or to be procreated between the said Captain 'Charles Boyd and his spouse, the principal sum of 6000 merks, at the first term 'after the death of the longest liver of the said Charles and his spouse, *proviso*, 'That if there should be no children surviving at the same term of payment,

'then the bond, in so far as conceived in favours of children, to be void and 'null.' No 8.

Captain Charles Boyd survived his wife, and died in the year 1736, leaving issue of the marriage a son and daughter, Malcom and Jean. Jean, during the life of her father, became a professed nun in the cloister of the penitent capuchines at Bergen St Veron in French Flanders. Malcolm intermarried with the pursuer Collins; and, by tripartite indenture made upon their marriage, he transferred the Earl of Kilmarnock's bond, and the sum of 6000 merks, thereby secured to certain trustees for particular uses; and, *inter alia*, in trust, for paying over, after his death, the 6000 merks, as the same shall be received, to Mary Collins, in case she shall survive him.

Malcolm having died, his widow and the Trustees pursued Lord Boyd, who had become bound for his grandfather's debts, for payment of the whole 6000 merks; *alleging*, That Jean Boyd, by her profession of a nun, and vows of poverty, chastity, and obedience, was incapable to take or hold any civil right; that she became *civiliter mortua*; and therefore the whole obligation for the 6000 merks, payable to the children of Charles Boyd and his wife, surviving their parents, vested in Malcolm as the only surviving child, in the same manner as if Jean had been naturally dead before her father; in which case, neither she nor her heirs would have had any right in this sum.

And, in support of this plea, it was further *contended* by the pursuers, That, by the very constitution of monachism, and by the vows of poverty taken by all professed monks and nuns, they neither could have property nor enjoy any civil right. This is the rule of the civil law, Authen. ingress. C. De sacrosan. eccles. assumed into the canon law, tit. De statu monachorum, C. 6.; and, in every question such as this, the Canon law was undoubtedly the law of Scotland before the Reformation. Craig expressly establishes, by his opinion, the doctrine here maintained, lib. 1. dieg. 13. § 20. 'Monachi enim nihil in bonis 'ratione suæ professionis habent, in feudum non concedunt.' And again, dieg. 14. § 11. 'Monachus apud nos, cum non solum servo equiparetur, sed etiam 'mortuus mundo dicatur, neque novi feudi, neque paterni est capax.' And in lib. 2. dieg. 18. § 14. he lays it down as an invariable rule, 'Monachum, qui 'seculo renunciaverit, ad successionem non admitti.' And, though he speaks of feus, yet the reasons apply with as much force to the case of moveables; and do equally prove, that a professed monk or nun can enjoy property of no kind.

And though the law varies in different popish countries, in some the monk acquiring to the monastery, as, by the civil law, a slave acquired to his master; in others, the estate devolving to the heir *ab intestato*, as if the monk was naturally dead; yet the laws of all countries do agree in this, that the monk cannot enjoy. By the laws of England and France, the two great sources from which the law of Scotland is derived, profession as a monk was deemed equal to natural death, and place was given to the *ab intestato*. Coke upon Littleton, F.

No 8. 132. Perez. in Cod. l. 1. tit. 2. No 20, 21. This, there is all reason to believe, was also the law of Scotland before the Reformation; but supposing the other custom should be thought to have prevailed, and Jean Boyd considered as acquiring to the monastery, yet that will make no variation in the argument. Our law, since the Reformation, will not allow a foreign monastery to take any estate in Scotland, whether real or personal. A foreign monastery is undoubtedly an alien; it is no body, politic or corporate, to take in the right of any of its nuns; and, more particularly, they are effectually barred by the act 1700 for preventing the growth of popery; which enacts, 'That all dispositions, &c. 'in favours of cloisters, or any other popish societies, or to any person for their 'behoof, shall be void and null, in so far as concerns the said cloisters or po-'pish societies; but the same shall, *ipso facto*, fall and accresce to the nearest 'protestant relation to the giver, at the time when the said disposition, &c. 'was destinated to be effectual.' If, therefore, Jean Boyd's interest in this bond must necessarily fall to the monastery, it is undoubtedly voided by this statute; and Malcolm, the nearest protestant heir, is vested in the right of her the giver; or, if Lord Kilmarnock should be thought to be the giver in the meaning of the statute, still this defender can have no right, as he is excluded by his father's attainder.

Jean Boyd being thus barred from having any interest in this bond, both by the common law and by statute, she being in the state of an alien, incapable to take, as well as the popish monastery, in right of her; Malcolm, and the pursuers in his right, are entitled to the whole sum. Had the grant been *nominatim* in favours of Jean, it must be held *pro non scripto;* but, as no part of it is payable to Jean *nominatim*, but the whole to the children of the marriage in general, any one child is entitled to take the whole sum in his own right, if no other child concurred with him, whether such want of concurrence happened by non-existence of other children, or by their being debarred by legal impediment.

Answered for the defender; Jean Boyd, from the day of her birth, was creditor to Lord Kilmarnock in a proportional part of the sum in question; and no forfeiture of this *jus crediti* can operate *ipso jure*, without a declarator, to which she herself must be made a party. Defences unknown to the defender may be competent to her. She may have objections to the validity of this supposed profession; may be released from her vows; may quit the monastery without being so released; may abjure popery; may embrace the protestant religion; and, by all these means, be re-instated in her civil rights.

And though this process were sufficient to forfeit her of her right, yet she is no party to it; she was not called in the original process; and, though that defect was endeavoured to be supplied, by citing her in a multiplepoinding raised in name of the defender, yet that is not sufficient; Jean was born abroad, consequently is no native of this country; nor has she a *forum ratione originis* here,

therefore is not amenable to this Court, as no method has been used to found a jurisdiction by arrestment or otherwise. No 8.

2*do*, *Et separatim*, It is true, That by the rules of the civil and canon law, religious persons professed were incapable to hold, but they were not incapable to take; the monastery, as a body corporate, took in right of its several members; in the same manner as by the treason-laws of Great Britain, though an attainted person cannot hold, he can acquire to the King. The civil and canon laws, in all questions of this kind, were held before the Reformation to be the law of Scotland, when not altered by positive constitutions or established usage; and, although other nations have departed from these laws, and have preferred the heir *ab intestato* to the monastery, the law of Scotland has not done so; and the laws of other countries have no authority in Scotland; and therefore, if this question had occurred before the Reformation, when these religious houses had the protection of the law, the monastery would have acquired.

But more particularly, since the Reformation, the law of Scotland, with regard to rights which arise from the Roman catholic religion, is totally changed; that religion being now suppressed, every right consequential thereof is at an end. There is no distinction betwixt religious of one profession and another; they have no *nomen juris* here; the profession itself is disallowed; and it has been the care of the Legislature to regulate, by particular statutes, the rights of succession, acquisition of property, &c. so as most effectually to prevent the growth of popery; but no distinction is made or implied in these statutes betwixt professed religious and others of the church of Rome; neither was there occasion for such distinction as the law now stands reformed.

But the law, however justly severe against Roman catholics since the Reformation, has not carried its rigour so far as to refuse them the common privileges of mankind: Jews, and even infidels, are allowed the benefit of trade with us; the law maintains them in every commercial right and privilege; and makes bills and bonds effectual to them. Roman catholics are not in a worse situation; and, whether particulars, or monasteries, would have action for the price of goods sold, or for payment of bills or bonds granted them. The subject at present in dispute, is a sum of money contained in a personal bond: That Roman catholics in general can hold such rights, is indisputed: That they can maintain action for payment of such sums is equally certain; and, as the law now knows no distinction between one Roman catholic and another; and, before the Reformation, the nearest of kin did not take as in place of the monasteries; in every view of the case, there is no foundation for the pursuer's demand.

To the argument drawn from the statute 1700, it is *answered*, 1*mo*, The statute refers only to deeds granted directly to those popish societies, or, under cover, to others for their behoof; neither of which is the case here; for, at the date of the bond, Jean Boyd, if then born, was an infant; so it could not be foreseen that she was to become a nun. 2*do*, Supposing she was to be con-

No 8.

sidered as an interposed person for the behoof the monastery, the devolution provided by the statute is not in favours of the nearest protestant heir of the donee, but of the donor; in this case, the Earl of Kilmarnock, and, under this character, Malcolm Boyd never could claim.

It was *observed* on the Bench at advising the cause, That although Jean Boyd, not being born in Scotland, has no *forum originis* here; yet as the sum in question is a Scots debt, and the debtor in Scotland, the matter falls to be determined by the rules of the law of Scotland, and the man is amenable here, and is properly called by the multiplepoinding; and as she had it in her power to claim when she pleased, if any religious notion hindered her, no other person, not having right, could claim.

"THE LORDS repelled the objection to the citation of Jean Boyd, and found, That she is a proper party in this process; but adhered to their former interlocutor, sustaining the defence, That the pursuer has only right to 3000 merks of the sum pursued for."

Act *Macqueen* et *Advocatus*. Alt. *Lockhart*. Clerk, *Kirkpatrick*.

W. S. *Fol. Dic. v.* 4. *p.* 38. *Fac. Col. No* 155. *p.* 230.

1756. *February* 12. LILIAS BREBNER and Others, *against* JOHN LAW.

No 9.

If one take an estate to himself in liferent, and to his son, a papist, in fee, and infeftment follow thereon, the protestant heir may insist to be served immediately when the liferent right ceases.

JEAN CAMPBELL made an entail of her estate of Lauriston to John Law her eldest son, and his male-issue; whom failing, to William Law her third son, and his male-issue, passing over Andrew her second son, and his issue; whom failing, to her nearest heirs whatsoever, under certain provisions and limitations.

By her death, the right of succession devolved upon John Law her son. He possessed the estate until his death, but made not up titles to it.

By his death, the right of succession devolved upon William Law. He was served heir general of tailzie and provision to his brother John; by which service the personal right to the entail, and to the procuratory therein contained, became vested in him.

William disponed the estate of Lauriston in liferent to himself, and in fee to his son John and his male-issue; whom failing, to the heirs whatsoever of Jean Campbell, under the provisions and limitations contained in the entail above mentioned.

In terms of this disposition, William and John his son obtained a charter, and were infeft.

William Law died in France, where he had been long settled, leaving two sons, John and James, both residing in foreign parts.

They had attained the age of fifteen years complete before the death of their father, and had been educated in the popish religion, and continued to profess it.