now, is always understood to be a succession; that this is a plain restriction of the jointure, differing only in the form of words, and the reason of the difference is, that, as she had a locality, it would have been inconvenient to have broken the farm, so as to take from her the precise sum it was agreed she should give to the heir; and therefore, instead of that, leaving her locality entire, they laid her under a personal obligation. But this was the opinion of the President single; all the rest of the Lords were of the other opinion.

[See *Dict.* tit. *Personal and Transmissible*, p. 77, and two decisions there quoted, 16th November 1665, *Watt* against *Russel*, and 14th June 1667, *Boyd.*]

1756. *January* 28. PRIMROSE *against* PRIMROSE.

[*Fac. Coll.* No. 133.]

IN this case the President said, and it seemed to be the opinion of the Lords, that, since the Act of King William regulating the reduction of deeds on the head of deathbed, it was not necessary, in order to exclude the reduction, even where the maker of the deed died within the sixty days, to prove that he had been at kirk or market, although in sundry cases the Lords had found so; but it was sufficient to show, any way, that the defunct was not then ill of the disease of which he died.

1756. *February* 10. CHRISTIAN CUMING, Claimant upon the Forfeited Estate of Asleid.

[Kaimes, No. 101, 113; *Fac. Coll.* No. 185.]

THE Lords, in determining this claim, determined a point of law of some consequence, viz. That a father settling his estate upon his son, and infefting him therein, with powers reserved to himself to sell and dispone, burthen, and impignorate, without consent of his son,—the consequence of such settlement will be, that the father may exercise the powers reserved to him by a personal deed merely, as by a disposition to another, without infeftment, which happened to be the case here, and such deed will annul and irritate the fee in the son; so that, even if the son had sold the estate and infeft the purchaser, or granted real security to his creditors before his father's revocation, yet all such deeds by the son would fall to the ground, by virtue of the maxim, *resoluto jure dantis, resolvitur jus accipientis;* and this was said to be the case of all resolveable rights, in general, such as wadset rights, adjudications, &c.

Against this there was a decision quoted, observed by my Lord Kaimes,

No. 16, *Creditors of Provost Graham;* but it was observed that there the father had only a faculty to *burthen*, not to *sell* and *dispone*, and therefore, in that case, the Lords found, very justly, that the faculty could not be exercised by a personal deed only, and that the son's creditors, making their debts real upon the estate, were preferable to the father's personal creditors by virtue of the faculty. In short, they said, that in that case the father had only a faculty, whereas in this case he has in reality the fee, though nominally it be in the son. *Dissent. tantum* Bankton.

Adhered to this interlocutor, 23d July 1756.

1756. *February* 10. CAPTAIN GRANT *against* ———.

[Kaimes, No. 102; *Fac. Coll.* No. 193.]

CHARLES FARQUHARSON, writer to the signet, in the year 1721, when he was thought to be a-dying, made a general settlement of his affairs, whereby he disponed to his brother, Patrick Farquharson of Inverey, and his heirs whatsoever, all subjects he should be possessed of at the time of his death, heritable and moveable, lands, goods, gear, &c., dispensing with the generality, and declaring that the deed should be good and valid if it should be found by him at the time of his death. It so happened that Charles lived many years after this settlement, and survived his brother Patrick, by whose death the lands of Inverey, which were then settled, and had been for some ages past, upon heirs-male, devolved to Charles, as the nearest heir-male, who accordingly made up titles to them, by taking precepts of *clare constat* from their respective superiors. After this Charles died, and the above-mentioned settlement was found by him at the time of his death; upon which the two daughters of Patrick brought their action against the heir of the investiture of the estate of Inverey, who was James Farquharson, the brother consanguinean of Charles, to have it found and declared that they, as heirs whatsoever of Patrick, had right to this estate, by the settlement 1721, and that the heir of the investiture must denude in their favour.

The Lords were very much divided in opinion upon this case: Lord Kaimes and the majority were for the heir of the investiture, and they put their opinion upon two points,—1*mo*, That it was not the intention of Charles, by this deed 1721, to give to his brother an estate which he was then in possession of, but to give to him all that then belonged to Charles, or should afterwards belong to him, for the aggrandizing of the family, which he had extremely at heart; and the family he considered to be represented by the heirs-male, and not by the daughters. Accordingly he settled an estate which he had acquired himself, viz. the estate of Achlossin, upon the heirs-male of the family, in the year 1739, though that estate he had formerly taken to himself and his heirs-general; from which, therefore, and several other circumstances that might be mentioned, it appears clearly that it was Charles's intention not to take away from the heir-male of the family any estate that such heir would have been otherwise entitled to; but,