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.

The pursuers, therefore, as heirs at law of Jean Campbell, being descended from her second son, took out a brieve from the Chancery, in order to have themselves served, in terms of the statute 1700, "nearest and lawful heirs-portioners of tailzie," of the reformed religion, "in general to William Law." No 9.

The service was opposed by John Law; and it was *objected* for him; 1*mo*, That the pursuers cannot be served heirs of provision to William Law; for that his right was only a right of liferent, and ceased at his death; the right of property is vested in the defender by charter and infeftment; and this right must be set aside before the pursuers can make up titles to the lands of Lauriston; 2*do*, The statute 1700 does not call the next protestant to the succession, unless the popish heir neglect or refuse to renounce popery in the manner prescribed; that is, that the renunciation be made, either before the presbytery within whose limits the heir resides, or before the Privy Council, who might undoubtedly grant commission for administering the formula to one residing in foreign parts. Now, neither of the alternatives can here take place; not the former, for that the defender resides not within the limits of any presbytery; not the latter, for that the Privy Council of Scotland is abolished by the act 6*to* Annæ; and this part of its jurisdiction has not been vested in any other court.

Answered for the pursuers; 1*mo*, William Law, by his general service as heir of provision to his brother John, carried the procuratory of resignation, and the personal right to the estate, which had been settled upon John by the entail of Jean Campbell. William did indeed execute this procuratory, and took the real right to the estate, in favour of himself in liferent, and of his son, the defender, in fee; but the liferent-right ceased by the death of William, and the right of fee is void by the statute 1700; the personal right therefore to the estate must be considered as remaining *in hæreditate jacente* of William, in the same manner as if no infeftment of fee had ever been taken in favour of the defender; and this personal right will be vested in the pursuers by that service in which they insist. To sustain the plea of the defender, would be to invalidate the statute 1700; for that he whose heir was a papist might take the right of lands to himself in liferent, and to the papist in fee; and, upon his death, the papist would be secured, by pleading that he was in the fee, and could not be divested by the statute 1700. 2*do*, The incapacity under which the popish heir falls by the statute 1700, is not from his refusing to take the *formula*, but from his professing popery after having attained the age of fifteen. He may remove this incapacity by taking the *formula* in the manner prescribed by the statute. He may either repair to Scotland, and take the *formula* before any presbytery in Scotland, or he may take it before the British Privy Council. The Privy Council of Scotland, and the powers and authorities belonging to it, are abolished by the act 6to Annæ; but the voluntary act of the popish heir in appearing before the Privy Council, can, in no propriety of speech, be termed a power or authority of that judicatory; so that the *formula* may still be taken before his Majesty's Privy Council for Great Britain, the only Privy Council

No 9.

which now subsists. It is evident, that, according to the defender's plea, a popish heir might, by withdrawing himself into foreign parts, be altogether exempted from taking the *formula*; were this plea sustained, the provision made by the statute 1700, for the security of the protestant religion, would be rendered ineffectual.

"THE LORDS repelled the objections proponed against the service, and allowed the service to proceed."

Act. *Miller.* Alt. *Sir J. Stewart, Ferguson.* Clerk, *Justice.*

D. *Fol. Dic. v.* 4. *p.* 38. *Fac. Col. No* 187. *p.* 278.

*** This cause was appealed:

The House of Lords "ORDERED, That the interlocutor complained of be affirmed, with this variation, after the words, "repel the objections proponed "against," that the words, "proceeding in," be inserted."

1761. *December* 20.

ROBERT MAXWEL *against* Sir THOMAS MAXWEL of Orchardtoun.

No 10.
Proof of popery allowed, after the papist's death, to affect the rights of a party contracting with him.

THE estate of Orchardtoun stood devised to heirs-male.

Sir Robert Maxwel of Orchardtoun was twice married; of his first marriage he had a son, afterwards Sir George; and of the second marriage, a son named Mungo.

In his contract of marriage with Mungo's mother, he had bound himself, 'That all and whatsoever lands he should happen to conquest and acquire dur-'ing the marriage, he should take the rights thereof to himself and her in life-'rent, and the heirs to be procreated of her body in fee.'

But, disregarding the right of his eldest son, under antient investitures of the estate, and certain other rights in his person, and likewise the right of his second son under the contract of marriage, he, in the year 1727, disponed his estate to trustees, for the use and behoof of the heirs, male and female, to be procreated of Mungo's body. Soon thereafter he died.

At Sir Robert's death, Mungo had a son, Robert Maxwel, then an infant.

Mungo lived and died a papist; but the *formula* having never been presented to him, he had no opportunity of refusing to take it.

Upon Sir Robert's death, there were the following parties who had claims to his estate, Sir George, as eldest son, Mungo, as heir under his mother's contract of marriage, and Robert, under Sir Robert's trust-settlement; but a contract of agreement betwixt Sir George and Mungo was entered into in the year 1727, whereby Sir George agreed to accept of one part of the estate, and Mungo agreed to accept of the other. In this deed, Mungo signs for himself, and, as taking burden for his son Robert; he accepts, in full satisfaction of all