[I do not find any further notice of this case in Lord *Kilkerran's* papers, but it appears, from *Elchie's* report of it, (*Executor*, No. 17,) that the Court adhered to the Lord Ordinary's interlocutor.]

1747. *November* 19. FOULIS *against* The VESTRY OF BLACKFRIARS' WYND CHAPEL.

THIS case is reported by *D. Falconer*, (*Mor.* 6581.) The following are Lord KILKERRAN'S notes:

"*November* 10, 1747.—Altered and found, that in removing the pursuer, the Vestry have not acted arbitrarily, but agreeable to the discretionary powers given by the founder.

"All agreed that the Vestry could not arbitrarily dismiss the minister; and also, that it was not the intention of the founder that they could not dismiss him without applying to a Court of law. They thought, therefore, the Vestry had a discretionary power; and that, if it did appear to the Court that they had not acted arbitrarily, that was enough to sustain their sentence; albeit, neither a legal crime, nor legal proof, should be by them brought; and his conduct was sufficient ground for their exercising their discretionary power; for it was agreed, at advising, that not only had he gone off from the universal concert of the established church, which was not to open their churches, as it might not be safe to pray for King George, and to pray by an ambiguous expression, was what they thought not lawful; but after the Highlanders left the place, he concealed himself in Edinburgh, and would not appear, though sought by the Vestry at his house, and not to be found; nor did he appear till his colleague had returned from England, whither he had retired, and which was long after the ministers of the Established Church had begun to preach."

[Here ends Lord Kilkerran's note on the first petition and answers.]

In a petition against the above-mentioned interlocutor, the pursuer pleaded,

1*mo*, That as this was an establishment for divine worship, according to the form of the Church of England, and as the patronage and other powers were committed to a Vestry, it was important to look to the powers belonging to such a body in similar circumstances in England. Now, by the law of England, the power claimed by the defenders, of censuring or dismissing the minister, belonged not to the Vestry, but to the Ordinary, or Judge Ecclesiastical.

2*do*, The act of dismissal, in the present case, was null, not being the act of the whole members of the Vestry, and no number less than the whole being named as a quorum, by the deed of mortification. By that deed, there is a perpetual succession of seven persons for composing the Vestry, called the ordinary Vestry, even in opposition to certain others, who are to be extraordinary members. Provision is made that when any of the ordinary Vestry even die, or leave the country, their places shall be filled up by the majority remaining in Scotland. The fact is, however, that the Vestry consisted but of five persons, when the act of deprivation in question was passed. And one of these was neither present nor called to the meeting. The objection then is, that when a certain number of per-

sons are named to execute any commission, without mention of a quorum, the power lies in the whole body, to be regulated, indeed, by the votes of the majority, in case of variance of opinion; but still not in any number less than the whole, and far less by a scrimp majority, meeting by themselves, without having filled up vacancies, or advertising the other members.—*Hunter* against *Executors of M'Michael*, 13th February, 1624. *Moir* against *Grier*, 10th February, 1693.

3tio, As to the fault imputed to the pursuer, that he absented himself from the chapel for some time even after the rebels had left the city, he now stated that he had been rendered incapable of doing duty by a disease in his leg.

The petitioner further complained that he had not only been dismissed from his office, but also that his stipend should cease from the 29th of September preceding the date of the act of deprivation, which is dated 23d January; and, besides, praying for an alteration of the interlocutor on the merits, he prayed their Lordships to find that at any rate the stipend is due till the act of dismission.

The petition was refused without answers. The following are Lord Kilkerran's notes on the petition.

"Refuse, except as to the point about the stipend, and that remitted to the Ordinary.

"1*st*, No ecclesiastical superior in this case which distinguishes it.

"2*do*, He does not say he ever acquainted the Vestry where he was the time he kept out of the way; his allegeance now, *ex post facto*, that he had a sore leg, comes too late.

"3*tio*, The decisions upon the point of a quorum which are in private cases have no analogy to a body corporate.

"The single instance of not praying for the King, strictly was a sufficient ground for the Vestry; especially, as he does not lay it on a lapse of memory; but then they join with that his absconding.

"Doubted if we have power to review the judgment of the Vestry; for it is no consequence that then they will be arbitrary, for at that rate, any Court that are judges in the last resort might be called arbitrary. This only stirred as a doubt. But we will be the more cautious in reviewing their proceedings."

1748. *June* 10. CUNNINGHAM *against* WHITEFOORD.

THIS case is reported by *Elchies*, (*Death-bed*, No. 19.) and by *D. Falconer*, (*Mor.* 16119.) Lord KILKERRAN'S note of the reasoning which took place on the bench is as follows:—

"*June* 10, 1748.—Adhered, by the President's casting vote.

"It was argued by the minority, *Primo*, That the heir could not quarrel the deed 1746, further than he was thereby prejudged, and that he was not prejudged, so far as it was the same with the deed 1741, for so far he would have been excluded by the deed 1741, had the deed 1746 not been made.

"2*do*, That he could not approbate and reprobate the same deed; and, therefore, if he founded on the revoking clause in the deed 1746, he could not quarrel the disposition therein made of Whitburn to the defender.