1749. *November* 23. LORD BOYD *against* The OFFICERS of STATE.

[*Rem. Dec. No.* 113.]

THE late Lord Kilmarnock, father to the claimant, obtained a tack of the estate of Callender from the York Building Company, for the space of thirty years, to him and lady, and the survivor of them two, and the heir of such survivor. The Lord Kilmarnock was attainted and beheaded, and his lady survived him; she is now dead, and Lord Boyd as heir to her claims this tack. It was objected, that by the words above-mentioned, the father was fiar, the lady only liferenter, and her heirs only heirs of provision to the father; because it had been often decided that a fee could not be *in pendente*, but must be in somebody; that in this case it was in the father, as had been often decided in the case of such like destinations.

Lord Elchies answered, that the maxim that a fee could not be *in pendente*, would not apply in this case, where there was no fee nor right of property, not so much as a *feodum pecuniæ* or right to a bond, but only a right of possession and reaping the fruits of the ground; that the husband had the exercise of this right *durante matrimonio*, but he could not dispose of it without the consent of his wife any more than she could without his consent; that the power of alienation, to whom it belonged, whether to the man or the wife, as also to whose heirs it went, was only determined by the event, by which in this case the lady, being the survivor, is determined to have the power of alienation and transmission to her heirs. And upon these principles the case was determined; though many thought the distinction betwixt a right of property and a right of tack very subtle, and that the decision would have stood better upon this foot, That the man and wife had, during their lives, both a right to the tack, each *pro solido*, and *partes faciebant concursu*, and upon the death of one of them the survivor had the whole *jure non decrescendi*.—This is agreeable to the civil law, and to some decisions of the Court. Vide *November* 21*st*, 1740, and *June* 23*d*, 1739, *Ferguson* against ———. Besides, in this case it was probable that the tack was granted by the York Building Company on account of the lady, who represented the forfeited family to whom these lands belonged.

1749. *December* 1. EWAN M'PHERSON *against* The LORD ADVOCATE.

[Elch. No. 11, *Forfeiture*.]

THE question here was, Whether this claimant, Ewan M'Pherson, was properly attainted under the name of Ewan M'Pherson of Clunie, his father being alive, in fee and possession of the estate of Clunie? And the Lords found he was, *dissent. tantum* Easdale. It was admitted in this case by the advocate, 1*mo*, That the addition *of Clunie* related to the lands and estate, by the custom of Scotland, and not to the place of abode, according to the custom of England. 2*do*, That though no addition was necessary in an act of attainder,

yet a wrong addition, such as did not belong to the person, would vitiate an attainder; but he said there was here no wrong addition, for the claimant was certainly *of Clunie*, whether elder or younger, that is, proprietor or apparent heir, was not expressed, nor was it necessary; for if it is not necessary to give any addition, it is certainly not necessary to give a full addition, and the amount of the objection here is, that the addition is not full. But Lord Easdale thought that, by the language of this country, *of Clunie*, without more, denoted positively proprietor of that estate, and therefore that the proprietor was not attainted. Others of the Lords said, that this was a name of reputation, which was very often applied to those that neither were in fee nor possession; as in this very act, Alexander Gordon is designed *of Glenbucket*, though he has been many years denuded of that estate.

1749. *December* 4. BINNING of WALLYFORD *against* M'LEOD.

[Kilk. No. 1, *Litigious.*]

IN the year 1694 a second adjudication was led, within year and day of the first completed by infeftment. In the year 1696, a process of maills and duties upon this second adjudication was commenced, and kept alive till the year 1699, when, upon an objection by the debtor to the grounds of debt, it was allowed to drop. Thereafter, in the year 1706, an heritable bond was granted by the debtor, whereupon infeftment was taken. In a competition betwixt this voluntary right and the second adjudication, the Lords unanimously preferred the voluntary right, and found that the adjudger here was *in mora*, and so could not compete with the heritable bond, though within year and day of an adjudication completed by infeftment, which the Lords found only gave him a preference among adjudgers, not in competition with voluntary rights; though the Lord President declared he wished the practice had been otherwise, and that a second adjudger could be considered in every respect as if his debt were contained in the first adjudication. As for the doctrine of *mora* in this case, see Dict. *tit. Litigious*, by which it would appear that this point is not quite settled yet. The Lord President objected, that unless the two adjudications were considered as led for the same debt, the ranking of these three creditors would be inextricable; for the first adjudger would be preferred to the annualrenter, he again to the second adjudger, and yet this second adjudger would come in *pari passu* with the first, and so be preferred to the annualrenter; which makes an inextricable circle. But the solution of this difficulty, as the practice now is established in rankings, is as follows:—Suppose, as Lord Stair does, that the subject is six, and each of the debts four; the first adjudger is ranked first, and takes four; then the annualrenter, to whom there remains two; but, says the second adjudger to the first, as it is not reasonable you should lose by this annualrent that is preferable to me, so neither ought you to profit by it; if it had not existed you would have drawn but three,—therefore let me have the one that you have above that number; so you neither