whole, and the Kinlochs creditors to him in the personal obligement, and there were numberless transactions of that sort every day both by real securities and sales, that is, the creditor or purchaser infeft and part of the money paid, and for the remainder either bills granted or an obligation to pay to a list of creditors, or to pay to the debtor or seller upon demand, or on drawing precepts. The President admitted, if bills were granted it would be good, or in the case of sales obligations might be taken,—and we insisted, that if lands might be so sold then so might an annualrent or wadset proper or improper, and we saw no difference betwixt giving bills and other personal obligements payable on demand. On the vote it carried by the narrowest majority to prefer Dempster for the whole. *Pro* were Minto, Strichen, Dun, Shewalton, *et ego*. *Con.* were Haining, Justice-Clerk, Murkle, and Drummore, who was reporter, and the President, but he had no vote. —13th June The Lords altered, and found my Lady preferable as to all except the L.8000 advanced. *Renit.* Dun, *et me.*

No. 14. 1750, Nov. 20. FRASER'S CLAIM on the ESTATE of LOVAT.

LORD LOVAT in beginning of 1741 executed a strict entail of his estate to his eldest son Simon Fraser and heirs-male of his body, whom failing to Alexander and heirs-male of his body, and then to his third son, and then to his next heirs-male, &c. reserving to himself the liferent of the far greatest part of the estate, and to manage and administrate the whole during his life, and with a power to set tacks and grant feus and wadsets and to contract debts, and even to direct the application of the rents after his death for payment of his debts,—and 16th January 1741 the tailzie was recorded in the Register of Tailzies, and in April thereafter in the Books of Session. In 1746 Simon the eldest son was attainted by act of Parliament, and in 1747 Lord Lovat was attainted by judgment of the House of Lords and executed. Pursuant to the late vesting act, the Court of Exchequer caused survey the estate as forfeited by Lord Lovat; and the two younger brothers claimed it upon the entail for themselves and their heirs. After a long hearing at the Bar and full Informations, the case was this day decided. There were some objections they made to the claim which were generally thought immaterial in this question, whatever they might be if the estate should afterwards be surveyed as forfeited by Simon the eldest son, such as that there was reason to believe that in Lord Lovat's marriage settlement there were clauses providing the estate to the heirs-male of the marriage, and therefore he could not limit him; 2dly, That by the act 1685 only such tailzies were allowed where the limitations were engrossed in charters and sasines, &c. and consequently where the right was completed which this tailzie was not. Lord Advocate also insisted, that it was void or fraudulent in prejudice of and to defraud the forfeiture on 13th Eliz. Cap. 5. and on the common law, for that Lovat had been contriving his treason as early as 1740, as appears by the evidence on this trial,—and quoted Hale's pleas of the Crown and other authorities. But the claimants produced other two strict entails in 1739 and 1740, to show that he always intended such entail, and as the Lord Advocate had no instant evidence of his allegations, he waved at present the objection. But the chief point was, whether the tailzie not being completed so that the feudal right remained with Lovat, and as he had so ample powers over the estate to feu wadset and contract debts,—he was not to be considered as fiar,—that it was *usus fructus causalis*,—that the son was only

in a manner heir of tailzie,—and adjudication could even after his death be led on his debts to be contracted,—and as nothing that a man could not alienate could be forfeited, so *e converso*, whatever could be alienated might be forfeited; and the most part were of that opinion. On the other hand I thought, as did also Kilkerran, that this tailzie was void by the Clan Act, and therefore moved that that point should be decided separately from the other, for 1st, if the Court thought it was not, then by all the judgment I could form of the law of England from their books and precedents, whereof no less than four were quoted, I thought the lands were not forfeited; that Lovat had no more than a liferent with powers indeed very great, but which could not forfeit, and if they could they could only be exercised *in forma specifica* by feuing, wadsetting, or contracting debt, and not at all after his death,—that in these precedents a power to revoke on delivering a ring or a pair of gloves was in three cases found not at all forfeited;—and in a fourth though it was found forfeited it was because the condition was to deliver by himself or another, but found that even that must be performed during his life,—and yet so much was that judgment disliked that to prevent its being reversed on a writ of error an act of Parliament was made to confirm it;—and in another case the person attainted had express power reserved not only to alter but to dispose of the subject at pleasure by any writing before two witnesses, or by his last will and testament;—and in one of these cases the person attainted was himself also in the fee, that is was trustee for the use of himself for life, and then of his first, second, and third sons in tail;—that a disposition delivered which is an incomplete real right, has always since the Union been held good against forfeitures; that in this case nothing was wanting but what goes of course, the expeding a charter and sasine, which the son could have done without the father's consent and against his will, and the father's legal powers over the estate were no greater before expeding the charter than after it;—he could neither revoke nor alter, nor alienate the *dominium directum*, and although he could, that is not a right; but *potestas alienandi* which is not forfeited says Chief Justice Hale;—and in all these cases the persons attainded had more powers than Lord Lovat; that he was in every construction of law only liferenter and his son fiar by this entail; that in case of *usus fructus causalis* the property remains with him during his life and must be taken by service; but here the son required no service, nor could any of the heirs serve to the father, for no inquest could retour that he *obiit in feudo*, but the service must be to the son, and had infeftment followed, as the father could feu and wadset by his reserved faculty, the son could feu or wadset or sell as proprietor, which would be good against all mortals but the heirs of tailzie and even good against Lovat. The President agreed that powers and faculties could not by the law of England forfeit; and had this tailzie been completed by charter and sasine, it seemed to be his opinion that the estate would not forfeit by Lord Lovat's attainder; but he thought that since the feudal right still remained in him, and that he had so great powers, that gave him such a right to the lands, that they might be forfeited by his attainder, and it carried six and the President to five that the estate is forfeited by his attainder, which superseded the other question on the Clan Act. *Pro* were Milton, Minto, Justice-Clerk, Monzie, Shewalton, Leven and President. *Con.* were Drummore, Kilkerran, Dun, Murkle *et ego*. Strichen declined himself as a substitute heir of entail, and Haining was absent. 5th March 1751. I have reason to believe that the judgment

had been appealed, had it not been that the Counsel in England, that were advised, were of opinion, that the settlement was void by the Clan Act.

No. 15. 1750, Nov. 30. ATTAINDER of the ESTATE of PERTH.

IN this case, we found by a considerable majority, that the estate of Perth might forfeit by the attainder of John Drummond, commonly called Lord John, though his elder brother James died 11th May 1746, and his attainder, if he did not surrender on or before 12th July, was by the act drawn back to 18th April; *2do*, That there was no sufficient evidence that the trust-disposition by James to the claimant in 1743 was a delivered evident, and refused to allow him a further proof before answer;—and therefore, *3tio*, disallowed and dismissed the claim.—*Vide* (*supra*) the decision 18th July 1749, where the question was touching the attainder of James, in which decision the Crown acquiesced. What gave occasion to the first point, was a subtility in the law of England pleaded for the claimant, that if a succession devolves of lands after the attainder of the nearest heir, he is incapable of succeeding, and cannot even take by succession, but the lands become escheat *ob defectum hæredis*, and fall to the King if he is superior, if not to the subject superior, and here the succession devolved after the 18th April, from which time he is declared attainted;—and as only the English treason laws and forfeitures for treason are extended to Scotland, but not escheats *ob defectum hæredis*, the estate is not forfeited; and as to that, both the President and I thought, that if the estate is not forfeited by the treason, there was no law in Scotland that would give it as escheat to the Crown; and he admitted, that in estates held of subject-superiors in England the law was such, but doubted if the law of England was such in estates held of the Crown;—but as I knew nothing of that law but by authorities quoted, I saw no foundation for that distinction; and it seems by that law an attainted person can take by purchase, but cannot hold, and therefore it forfeits to the Crown; but he can neither hold, nor even take by descent, and therefore it does not forfeit, but becomes escheat to the superior *ob defectum hæredis*. But what removed my difficulty here was, that the condition of the attainder was suspensive, and on the very same principles that we found James not attainted because he died May 7th, though he did not surrender before 12th July, upon the same Lord John was on May 11th and indeed to 12th July capable both to take by succession, and to hold, and might even have been served heir and infeft; therefore though on his not surrendering before 12th July, the attainder was drawn back to or near to the grand act of treason committed at the battle of Culloden, so as to void all intermediate acts of his, yet that did not avoid the succession devolved to him May 7th. As to the delivery, as Mr Graham was ordinary lawyer of the family, and advised and corrected this very deed, I thought his possession was his client the granter's possession, especially that the deed was intended immediately to denude the granter of both property and possession, having reserved only a small annuity of L.200,—and yet he retained possession three years till his death, and the trustee owned he never saw it before giving in this claim; but then the claimant offered to prove that it was sent to Mr Graham, with orders to take infeftment and registrate it, which I thought would be relevant if there were satisfying evidence of it;—but I wanted a more special condescendence, since the papers were only sent him with these instructions, Whether it was only a