1752. *June* 30. WILSON *against* BRYSSON.

A SOCIETY of Seceders, calling themselves the Associate Congregation, did contribute among themselves, and purchased a piece of ground, upon which they built a meeting-house. This house they disponed to one Wilson and one Baine, under a back-bond, declaring that the ground was purchased and the house built "for the behoof of Mr Adam Gib, ordained minister of said Associate Congregation by the Associate Presbytery, and his successors in office, and the members of said congregation, and obliging themselves to denude thereof in favour of any person or persons whom the said Mr Adam Gib and his successors, and the other members of the said Session and their successors, members of the said Associate Congregation, and the said contributors, shall, by a plurality of voices, nominate in a meeting to be called for that purpose, and intimated from the pulpit of the said congregation, at least ten days before the said meeting." In consequence of the power granted to the congregation by this back-bond, they made choice of other trustees, who pursued the said Wilson and Baine to denude.

The Lords found, That the Associate Congregation, being no body corporate, could not hold lands or tenements, either by themselves or trustees, nor could not sue or be sued; and therefore denied action to these new trustees against the old. This was contrary to the opinion of Lord Elchies, who thought that by this decision the rights of several other societies, such as the Musical Meeting in Edinburgh, were greatly affected.

This interlocutor adhered to November 15, and a like decision was said to have been given in the case of a lodge of freemasons pursuing an action.

1752. *July* 14. LOGAN *against* DRUMMOND.

[Elch. No. 17, *Provision to Heirs.*]

AN aunt disponed to two nieces certain heritable and moveable subjects, "to them and the heirs of their body, and, failing of any of them by decease without heirs of their body, to the survivor of them two, and the heirs of her body; whom failing, to A. B., and his heirs and assignees whatsoever;" and with this farther limitation, "that it should not be in the power of the grantees, or either of them, to alter or prejudge the order of succession to the subjects generally and particularly before-mentioned."

One of these ladies entered into a post-nuptial contract of marriage, by which certain settlements were made by the husband upon her and the children that should be of the marriage, and she on her part made a general disposition *omnium bonorum* in favour of her husband. She died without heirs, and the question was, Whether by this disposition her share of the subjects given by the aunt was conveyed to the husband, in prejudice of the other sister?

The Lords were all of opinion, 1*mo*, That the clause prohibiting the alteration of the succession excluded all gratuitous alienations of the subjects; 2*do*, That it did not exclude alienation for onerous causes: so that the only question was, Whether or not the marriage and marriage-settlement upon the lady and her heirs was such an onerous consideration as would defeat the substitution, fortified by the prohibitory clauses above-recited? It was said that the provision stipulated in this case by the husband was elusory, because he was worth little or nothing; but the President was of opinion that the marriage itself was an onerous consideration sufficient; and therefore, without inquiring into the husband's circumstances, he was for sustaining the conveyance in his favour: and this was the opinion of the majority. Elchies said, That it was a *quæstio voluntatis* what was the intention of the donor; that in the case of parents giving provisions to daughters not otherwise provided, it will be presumed, notwithstanding of any such prohibitory clause, that they intend not to hinder their daughters from conveying their portions in contracts of mariage, and thereby procuring to themselves husbands; but in cases of provisions made by strangers, or more distant relations, or even by parents to daughters otherwise provided, such clauses have received a more strict interpretation, so as to bar conveyances to husbands in marriage-contracts; and he quoted some late decisions where this was found, even where there was only a clause of return to the granter, which only implies what is here expressed by the clause prohibiting to alter the succession. Elchies also made a distinction betwixt a disposition *omnium bonorum*, of this kind, and a particular conveyance of the subject in question; for he thought that the general disposition carried the right, with all its qualities and conditions, and particularly with the condition that, if the disponee died without heirs of her body, the subjects should fall to the next substitute.

This interlocutor adhered to, November 27th, 1752; *dissent.* Elch. and the decisions: See June 11, 1740.

1752. *July* 15. MINISTER OF CUSHNEY *against* HERITORS.

[Elch. No. 34, *Teinds.*]

THIS was a case in the Court of Teinds, where the Lords found, That of 500 poultry payable out of an estate of 2000 merks a-year, in the shire of Aberdeen, 400 were to be accounted rent and a teindable subject, and the remaining 100 were to be accounted as ordinary custom paid for the maintenance of the laird's family. In this case they made no distinction whether the poultry was valued or not, or, if valued, whether the option belonged to master or tenant; instances were mentioned where the rents of whole estates were paid in fowls, or feathers, or fish, or some such subject not teindable, and yet there would be no doubt but teind would be due out of such estates; and, if it were otherwise, many great estates in Scotland would escape paying teind, where the rent, though paid in money, is entirely made out of sheep and cattle, which