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

are not teindable subjects; so that the rule will not hold generally, that where the subject is not teindable there is no teind paid, but only in certain cases where the greatest part of the rent is paid for a teindable subject, such as corn, and only a small part of it for subjects not teindable, such as moss, cot-houses, &c.; and this I take to be the foundation of all the deductions allowed in valuations of tithes.

1752. *November* 16. STIRLING, &c., Merchants in Glasgow, *against* ———.

[Elch. No. 12, *Society*, and No. 28, *Bankrupt.*]

IN this case the Lords reduced, on the Act of Parliament 1696, declaring notour bankrupts, a payment made by a debtor to his creditors, by delivery of goods to them in place of money, after which the debtor within 60 days became bankrupt, in terms of the statute: This the Lords did with great unanimity, though they had found, in January last, in the case of *George Forbes*, merchant in Aberdeen, that payment made by a bankrupt in money does not fall under the statute. The reason of the difference seems to be, that money in the debtor's pocket cannot be affected by any form of diligence known in our law, and he may squander it or do with it what he pleases; so that by giving it in payment to one creditor he is not supposed to prejudice the rest; whereas goods in the debtor's possession may be carried off by poinding, so that the debtor by giving them away in payment to one creditor is understood to give him a partial preference,—which falls within the meaning of the statute, though not within the words, for these only mention *deeds*, such as dispositions, assignations, &c.

In this case the Lords also found, but only by a majority of one vote, *dissent.* Elchies, that a private trading company could be properly cited by citing only the principal person whose name the company bore, and that the process might go on, even though he should die, without calling his heirs or anybody else.

1752. *November* 18. FULLARTON of KINNABER *against* STRAITON of KIRKSIDE.

[Elch. No. 3, *Salmon-fishing;* Kaimes, No. 33.]

THE said Fullarton of Kinnaber stands infeft in the salmon-fishing of the river of Northesk, *tam intra fluxum maris quam extra,* in every part of the said water opposite to his lands of Kinnaber, with the whole fishing on the sea-coast from the river of Northesk to the river of Southesk. Kirkside is infeft in his lands of Kirkside, *cum piscaria salmonum infra limites dictarum ter-*