1747. *November* 18. SIR JOHN KENNEDY *against* ——.

[Elch., No. 13, *Heritable and Moveable;* Kilk., 3, *ibid.;* Falconer, No. 215.]

THE Lords found that a bond, taken by the late Sir John Kennedy to himself and heirs, (excluding executors,) and assigned by him to his eldest son and heir, and his heirs, descended to the heir of that son, and not to the executor. *Dissent. Drummore.*

The Lords who voted for the interlocutor, put their opinions upon different principles. Tinwald thought that such a bond assigned continued still heritable in the person of the assignee, in the same manner as a bond with a clause of infeftment, or a bond bearing annualrent before the 1661. But Arniston thought that it was the assignation in such a case that determined the succession of the assignee, not the bond, which only regulated the succession of the cedent; and that a bond made heritable by a clause excluding executors, differed very much from a bond heritable *sua natura*, which was heritable in the possession of whomsoever; whereas the other bond is heritable only by the private destination of the creditor with respect to his own succession, who intended in this manner to divide his effects among his children, but cannot be supposed to have meant to regulate the succession of any third party, nor of his own heir; with respect to whom, such division of his effects, by giving so much to his heir, might be very irrational, and it would be absurd to suppose that such a clause should make a tailyie of a moveable sum, to last for ever till it was altered; and therefore he rejected the decision, in 1725, *M'Kay* against ——, collected by Home, by which it was found that a bond of this kind, taken up by the heir, descended to his heir, and not to his executor. But, from the particular style of this assignation to heirs, and not to executors, joined with the nature of the bond assigned, he presumed it was the intention of Sir John that it should descend to his son's heirs and continue in the family. But Elchies, on the other hand, rested his judgment on that decision, and said that the son's taking the bond by this assignation was a sort of *præceptio hæreditatis*, which had the same effect as if he had taken it by a service to his father. See *January* 11*th*, 1745, *Duff* against ——.

1747. *November* 27. —— *against* ——.

A FATHER disponed his estate to his second son, (his eldest having been engaged in the Rebellion 1715,) with the burdens of provisions to his younger children, and with a power of redemption for a rose-noble reserved to himself, or to any body he should name. Accordingly he named his eldest son, by a deed under his hand, who came home at the end of the three years, got the estate from his second brother, (the father being then dead,) and possessed it all the days of his life, upon the title of apparency. After his death the

son of the third brother took up the estate as heir to his grandfather, and the question was, Whether he was liable for the provisions of the younger children.

The Lords found that these provisions were a burden upon the land, which accompanied it even after the redemption by the eldest son, and that, though he had chosen to make up his titles as heir, yet he would nevertheless have been liable for these provisions, because the title, *si quis omissa causa testamenti, &c.*, takes place in our law; and, because these provisions affected the land, they found it was not sufficient that the younger children had got the value of their provisions out of the executry of their uncles, the first and second son, for they thought the provisions were a debt upon the estate and the possessor of it.

1748. *January* . CLAIMS of JURISDICTIONS.

[See Elch., *voce Jurisdiction*, No. 41, &c.; and Falconer, No. 225, &c.]

FOUND, in the case of *Lord Morton*, that a regality could not be split by the lord of regality disponing part of the lands over which the regality extended, *cum libera regalitate*, and the disponee getting a charter of resignation in the same terms; reserving to future consideration, how far such a title, lame as it is, could be validated by possession. The *ratio decidendi* was, that a subject could not create a lord of regality, and that the charter of resignation was the deed of the Barons of Exchequer, and could give no more than was given by the disponer.

The Lords were unanimous in this interlocutor, though it was formerly decided in a case, observed by Durie, that part of a barony being disponed *cum libera baronia*, and a charter of resignation expede in the same terms, a new barony was constituted in favour of the disponee. What the effect of a *novodamus, cum libera regalitate*, in favour of the disponee, would have been, was not determined; but such a clause in the disposition, and charter of resignation following thereon, was understood to import no more than an exemption from the lord of regality's jurisdiction, in the same manner as a clause *cum molendinis et multuris*, in a disposition and charter, gives only an immunity from thirlage. It was understood that the regality, notwithstanding the alienating a part of the lands, continued over the rest; and in fact it often happens that the jurisdiction is exercised even over the lands alienated, (without the clause of *cum libera regalitate,*) by giving infeftment, holding courts, &c. It was likewise understood, that, if the whole regality was alienated, the right of regality would go to the purchaser, as well as the lands, and in the same manner to an adjudger; but *quære*, If a whole regality was sold in parcels, who would be lord of regality?

In the case of *Lord Sutherland* it was found that the Duke of Gordon, being made heritable bailie of the church regality of Spinzie, might grant an herit-