No. 20. 1752, Feb. 8. CLAIMANTS on M'INTOSH'S ESTATE.

THE Lords found, *me referente*, that the claimants were not entitled to expenses of diligence whether on bills or bonds even before 24th June 1745, because by the vesting act they are not entitled to any penalties through failure of payment; 2dly, that no recommendations to the Court of Exchequer for payment of any claims should be made except by the Lords in presence, and then *causa cognita.*

No. 22. 1753, Feb. 9, July 10. FARQUHAR, CLAIMANT.

ELIZABETH FARQUHAR, niece and one of the co-heiresses of Colonel Farquhar, and Stormont her husband, after the sale of the Colonel's estate purchased with her share of the price certain lands, and took the rights to her in liferent, and after her decease to Stormont in liferent for security to him of an annuity of 500 merks for life, and in the event of his surviving all the children a total liferent of the whole lands, and to Francis Stormont the second son in fee. Stormont the father was attainted of high treason, and afterwards got a transportation pardon, and then an act of Parliament was made for preventing these pardoned Rebels return to Britain;—and these lands being surveyed by the Exchequer, two claims were entered, one by Francis Stormont for the fee, concerning which there was no dispute except as to the liferent in case of Stormont's surviving his wife,—the other a claim for the wife of her liferent, and for the possession from the attainder of her husband;—and her Counsel maintained, that by the law of England the husband's *jus mariti* or right to the rents and profits of his wife's estate does not forfeit, and that by that law though he had a freehold in his wife's estate vested in her in fee, yet not in his wife's liferent lands; 2dly, That though such right did forfeit, yet by that law the abjuring the realm or banishing for life, has the same effect as to his wife as his natural death, and entitles her to jointure, and quoted Coke's Institutes, 1, p. 133, the case of Weyland, and therefore she has right to the whole rents, &c. as in the eye of the law he is considered as dead;—he could neither forfeit the annuity nor the total liferent in case of his surviving his wife;—and the Counsel having been heard and given us Informations, we delayed at the claimant's desire till they could bring us further authorities,—and they brought us the opinion of a Chamber Counsel, Mr Carthy, giving the first two points against them; but he thought the act of Parliament confirming the banishment should have the same effect with abjuration;—and on the other hand Lord Advocate read the opinion of the King's English Counsel differing from him. I could not take on me to say which of them was in the right in the law of England, but I thought the argument did not apply to this case, for though the law of England was the rule of judging in forfeitures by *treason*, yet here there was no doubt, that if notwithstanding the banishment the *jus mariti* remained with the husband, that even by the law of England it was forfeited to the Crown, and what rights fell under the *jus mariti*, and how long it subsisted, behoved to be judged by the law of Scotland, for the law with respect to the effects of abjuring the realm, was none of the treason laws, which alone are extended to Scotland, for it obtains in all felonies, and mostly without any conviction, and it was not said that a husband's *jus mariti* determines by his abjuring the

realm by banishment for life by whatever authority it be, and therefore whatever be law as to estates of Englishmen in England, I thought there was no doubt that the *jus mariti* in Scotland continued during the husband's natural life. However, the Court sustained Mrs Stormont's claim *renit. multum* President, Milton, Shewalton, *et me.* Woodhall did not vote. For the interlocutor were Minto, Drummore, Strichen, Dun, Murkle, Kames.—Justice-Clerk in the Outer-House. But without a vote, we found that in case of the husband's surviving, the Crown had right to the liferents provided to him.

No. 23. 1753, July 10. SIR LEWIS M'KENZIE'S CLAIM on CROMARTY.

THIS claimant in 1723 obtained decreet of constitution against the last Earl of Cromarty, for a principal sum and annulrents from 1705, and thereon an adjudication, accumulating the annalrents on the obligement of old Earl George his father,—but there was no penalty. He claimed his accumulated sum and interest from 1723, the date of his adjudication, but Lord Dun, Ordinary, (in respect of a precedent to be after mentioned,) restricted it to the principal and annualrents from 1705, but gave him his necessary expenses. Sir Lewis reclaimed, and at first the Court seemed to think the claim founded in equity, but upon answers reciting a former judgment in a parallel case of Thomas Belshes who in 1733 adjudged the estate of Nairn, we 15th July 1752 gave the like judgment. The Court this day, 10th July, adhered, but it carried only by my casting vote in the chair.—N. B. I had omitted the former decision, being only for advice. The interlocutor was 9th March 1754 altered *nem. con.* The President (who drew the reclaiming bill when at the Bar) was very clear, and at last so seemed Justice-Clerk. I gave no opinion.

No. 24. 1754, Feb. 27. OLIPHANT'S CLAIM on GASK.

BY contract of marriage of Laurence Oliphant the attainted person, he became bound failing heirs-male of the marriage to pay to the daughters, if one, 15,000 merks, if two or more, 25,000 merks at their marriage or age of 16, which should first happen, which they claimed. Answered by Lord Advocate: There is a son of the marriage, and therefore the condition has failed, and the estate being forfeited it can never go to heirs-male. Replied, If the son die before his father, then the provision will become due, and they claim only as conditional creditors in that event. Dismissed the claim. *2do*, Laurence the father in 1731 granted a bond of 9000 merks to James Oliphant his father, which bond the father assigned to the claimant and his sister by assignation of the same date with the bond, but empowering the father to divide it as he pleased, or to give it to any one of his children, and the grandfather was said to have sent this to his daughter-in-law the claimant's mother to keep for the children, and the bond and assignation with the subscriptions to both cancelled now produced with a letter by the grandfather to his daughter-in-law of the same date, that appeared never to have been sealed, recommending to her to preserve the inclosed, without saying what was inclosed: *3tio*, They produced two bonds of provision by Laurence to his two daughters, one to the claimant of 10,000 merks, and the other to her sister of 9000 merks, with a substitution to the claimant of 5000 merks, both dated 17th April 1739, contained a power of revocation and dispensing with the not-delivery; and claimed the first 9000 merks, although the bond was cancelled by their father, which they said he could not lawfully do, and therefore he granted the new bonds, which though they contained a power or faculty to revoke, yet that faculty could not forfeit, and quoted sundry