fect, any more than a commission of lunacy issued in England, or the probate of a will in the ecclesiastical courts there; but it was agreed to remit the matter back to the Lord Ordinary to be more fully considered of.

1766. *November* 18. ROSS *against* MONRO of NEWMORE.

[*Fac. Coll.* IV. No. 45.]

IN this case the Lords found that an heir of entail, who was obliged to bear the name of the family, under an irritancy, and who had wilfully given up that name and taken another, in order to qualify himself to enjoy another estate, entailed under the condition of bearing a particular name, and that only might be restored against the irritancy incurred, upon his offering at the bar, when the declarator of irritancy is insisted upon, that he was willing to reassume the name he had quitted; *dissent. tantum* Auchinleck, who thought that at this rate he might lay down and take up the name as often as he pleases, and whenever the irritancy was pursued against him he had no more to do but to offer to purge at the bar. And no doubt this would be the consequence if the law be that a conventional irritancy such as this may be purged at the bar as well as a legal irritancy. But I think the decision can only be defended on this principle,—that the Court has exercised its *nobile officium*, and interposed *ex æquitate*, to do, what indeed the Court has never done in any instance before, but which may appear equitable, namely, to forgive the first offence, though wilful and premeditated, without the least pretence of error or mistake. But several of the Lords declared that they would not have the same indulgence for a second offence.

1766. *November* 19. GORDON *against* FARQUHAR.

THE Lords in this case were all of opinion that a personal bond granted by a married woman was not null *ipso jure*, but only *ope exceptionis*, and therefore might be by her homologated.

The bond in this case was a bond of annuity for L.15, and the Lords found that it was homologated to the full extent by the payment only of L.10 sterling for some years. It was referred in this case to the oath of the creditor in the bond, whether she did not grant a deed of restriction of it to L.10 sterling, in case of her marrying a second husband, which accordingly happened. She acknowledged she did so, but she said the debtor in the bond did afterwards agree that the restriction should only take place during her, the debtor's, life, but should not be good to her heir. It carried by a narrow majority, that this was an extrinsic quality in the oath, and the same thing as if a man should acknowledge that he was debtor to another, by bond, in the sum of L.100 sterling, but, says he, the creditor, some time after,

promised that he would not exact the money, or part of it; *dissent.* Auchinleck and Kaimes.

N.B. This was afterwards altered, and the quality found intrinsic.

1766. *November* 20. CAMPBELL *against* M'NEILL.

IN this case the Lords found, that a man bound, by his contract of marriage, to give his estate to his eldest son, could not give such additional provisions to his wife and children as would have obliged the heir to sell the estate, although by doing so he might have raised a sum of money which would have paid the additional provisions, and afforded a considerable reversion to the heir; *dissent. tantum* Pitfour.

1766. *December* 19. WEMYSS *against* HIS MAJESTY'S ADVOCATE.

THIS was a question about the interruption of the prescription of a bond due by the Earl of Cromarty, who was forfeited for his accession to the rebellion in 1745.

This bond was not made a claim upon the Earl's forfeiture, in terms of the vesting Act; but afterwards, and as late as this year, 1766, a new subject of the Earl's was surveyed, *viz.*—The money given for the heritable jurisdiction belonging to the Earl, and a claim for this bond was entered in due time after this second survey. The fact was, that, at the time of the forfeiture, and when the estate was vested in the Crown, the prescription was not run, but it was run before the first survey was made in the year 1749.

The Lords were unanimously of opinion, that till the forfeited estate is surveyed, the creditor not being *valens agere*, the course of the prescription must stop, as in the case of minority; and that, therefore, in this case the prescription stood still from the time the Earl's estate was vested in the Crown till the survey; that the claimant, by not entering his claim within six months after the first survey, was barred from claiming payment out of the subjects then surveyed; but that, with respect to the subjects not then surveyed, the prescription stood still, so that the whole time, from the estate being vested till the second survey, was to be deduced from the prescription. This appears to me to be a very new decision in point of prescription, as it makes a different prescription for every different subject which the debtor may be possessed of; for here, with respect to the lands there was one prescription, and with respect to the jurisdiction money there was another, and till these subjects were discovered and surveyed, the prescription did not run with respect to them. It was therefore the same case as if there had been two debtors in this bond,—the one possessed of the lands, the other of the jurisdiction. The prescription, with respect to the one debtor possessed of the lands, would run only from the time of the survey of the lands, and the prescription with respect