" After some argument on this, the Lords appointed that parties should be heard on the previous question, whether the action lay; which is, in other words, on the competency of the Court?

" As, on the one hand, malicious prosecutions are to be discouraged, so, on the other, where there appears any colour for the prosecution, it were hard to saddle the prosecutor with expense, as that would be too great a discouragement to a party injured to seek redress, and might be a screen to the guilty.

" Now, these considerations may have influence even upon the question of the competency.

" A prosecutor has himself to blame, if he seeks not his expenses in the Court wherein he is acquitted, and his not insisting for it there may argue a diffidence in his obtaining it while the state of the fact is recent, and a project to make a better of it at a distance of time before another Court. And upon those and the like considerations, it might be thought expedient that no action lay but in the same Court, and at the same time the prosecution complained of is carried on, as what best answers all purposes, by giving the pursuer access to his demand, and at the same time limiting it to the time and place where the merits of the case is likely to be best understood.

" But before a judgment is formed on the point, it is fit to know what precedents may be.

" Supposing the action to lie, the defence is thought not to be proven, as there is not the smallest circumstance pointing at the person's guilt of the crime charged.

" *December* 14.—The Lords found that no action lay for the expense of process; but found that action lay for damages, and found the defence not proven."

1753. *December* 18. URQUHART of Meldrum *against* The OFFICERS OF STATE.

THIS case was reported to the Court by Lord KILKERRAN. The report is as follows:—

" This is a competition between Urquhart of Meldrum and the Crown, for the patronage of the kirk of Cromarty; and without troubling your Lordships with the preamble with which either party introduce themselves in their informations, in order to put the best face on their conduct, in the managing this dispute, I shall proceed directly to state the different titles upon which they severally found.

" Meldrum is pursuer of a declarator of right to the patronage in question; and, as his title, produces the following progress, a charter, containing a *novo damus*, from king James VI. in 1588, to Sir William Keith, of the lands and barony of Delny, containing an erection of the kirk of Cromarty, and other eighteen kirks therein mentioned, which had formerly belonged to the Bishop of Ross, and his chapter, into parsonages; and granting to Sir William the teinds and patronages thereof; and erecting the whole into one barony, called the barony of Delny, upon which Sir William was infeft that same year.

" *Item*, an act of Parliament, in the year 1592, reciting the said charter, and

declaring the same to be a good, valid, and sufficient right and title in Sir William, for bruiking and possessing the lands, and barony, and others therein contained, heritably and perpetually, after the tenor thereof.

" *Item*, two different charters of alienation of the barony and patronages, from Sir William Keith, to John, his brother, in 1595, the last freeing him of certain limitations he was laid under by the former, with a charter of confirmation by the King, of both, containing a *novo damus* in 1599, on which John Keith was infeft.

" John Keith dispones to James Lord Balmerino, whose son John, after being restored against his father's forfeiture, dispones to Sir Robert Innes of that ilk, in 1631, who, in 1656, was author to the Earl of Cromarty, who dispones to his son Sir Kenneth, to whom Sir George succeeded; and as a part of whose estate this patronage was sold before your Lordships, where the pursuer became purchaser.

" And on this progress, connected by sasines on all the mean conveyances, proceeding on charters of resignation, the pursuer founds as his title.

" On the other hand, the Crown's title is laid thus :—

" Your Lordships have heard, that it was in the year 1588, that the charter was given by King James VI.; and you have also heard, that these kirks formerly belonged to the bishop of Ross and his chapter; and accordingly the charter proceeds on that narrative, *and of his Majesty's concern for the interest of religion, making him incline to put those parishes on a better footing than when in the hands of the bishop and his chapter; and therefore erects them into parsonages*, as has been said.

" And this being the case, it is observed for the Crown, that the pursuer cannot avail himself of this charter to Sir William Keith, on which his whole title depends, for the reasons following:

" That by the Act 1606, restoring bishops to their patrimonies, which by former laws had been much impaired,—bishops are restored to all their ancient rights, under several exceptions, whereof the two following are very material to the present question. The first is, excepting patronages of kirks pertaining to the bishoprics disponed by the lawful titulars, and the King's Majesty, and ratified in Parliament in favours of any person.

" The other exception is of all common kirks, pertaining of old to the bishops and their chapters, in commonty, which are disponed by his Majesty to whatsomever person preceding this act, that is, in other words, says the Crown, that bishops only were by this act restored to their mensal-kirks, but not chapters to the common kirks.

" But then another Act passes in 1617, whereby it is ordained, that all the deans and other members of the chapters of cathedral-kirks within this kingdom, shall be restored to their manses, glebes, rents, and other patrimony belonging to them; but with this *proviso*, that it shall be without prejudice to laick patrons, of their patronages, granted to them by the King's Majesty, with consent of the titulars for the time, albeit the same be not ratified in Parliament.

" So that, you see, there is this difference between the Act 1606, restoring bishops to their patrimony and mensal-churches, and the Act 1617, restoring bishops and their chapters to their common kirks. That, by the Act 1606, the restoration is with an exception of such patronages only as were given away to other persons by the King, with consent of the lawful titular for the time, and

the grant ratified in Parliament; whereas the Act 1617, restoring bishops and chapters to the patrimony of their common kirks, excepts such patronages as were given away to others by the King, being done by consent of the titulars for the time, albeit not ratified in Parliament.

" And the law so standing, it is said for the Crown, that whether this kirk of Cromarty be considered as a mensal-kirk, and the right to the patronage of it to stand upon the footing of the Act 1606; or if it be considered a common kirk, and the right to the patronage of it to be determined on the footing of the Act 1617,—in either case the right to Sir William Keith falls under the rule restoring, and not under the exception, in so far as the grant was not made by the King to Sir William Keith, with consent of the lawful titular for the time, who was the bishop as to his mensal-kirks, and the bishop and chapter in common kirks; and if so, that the bishop and his chapter were restored by the public law, the right by the abolition of episcopacy is now in the Crown; and upon this they say they must rest their cause, though they had no more to say.

But, *2do*, say they,—We have yet this more to say. That Sir Robert Innes, who was author to the Earl of Cromarty, being sensible, that after these statutes, his right, derived by progress from Sir William Keith, could not avail him, enters into a contract in 1636, with the bishop and Lord Treasurer, whereby, on the recital of a process of improbation that had been raised against the bishop, and Sir Robert being willing, to prevent further questions, to resign the said whole twenty-four patronages, whereof, as has been said, that of the kirk of Cromarty in question was one, in the hands of the King, in favours of the bishop, declaring, that the bishop should be at liberty to use either that right, or his ancient right, as he found most proper, the one without prejudice of the other; and on this contract, containing a procuratory of resignation, a charter was expede in favours of the bishop, under the Great Seal, in the year 1636, but no evidence appears of infeftment having followed on it.

" It is further observed, that as, by the presentation by the bishop, of Mr. Bernard M'Kay to that kirk, in 1678, which is the single instance of a presentation to that kirk by one or other; and this is said to be the more remarkable, that it happened while the Earl of Cromarty stood in the right upon which the pursuer now claims, a man known to have been both willing and able to maintain his right, had he understood himself to have one.

" And with respect to this contract, they further observe, that as Sir Robert Innes had, by the contract in 1636, with the bishop and King's treasurer, made over his right to the bishop, it cannot in common sense be supposed, that he would, in 1656, make over the same subject to the Earl of Cromarty, without guarding himself by the clause of warrandice, in such manner as to prevent the Earl from quarrelling the bishop's right, whereby Sir Robert should have been involved in double warrandice; and what the more induces them to think so is, that when the Earl of Cromarty's charter, expede upon Sir Robert's resignation, is looked into, the clause of warrandice is in these words :—' To warrant conform to the tenor of the clauses of warrandice, absolute and personal, respective exceptions and reservations forth thereof, particularly specified and contained in the foresaid letter of disposition, in all points.' And if necessary, say the defenders, they will insist that this disposition be produced; but hope it will not be necessary, as they have sufficient *ad victoriam causæ*, even without the aid of this contract, upon the Acts of Parliament 1606 and 1617.

" In answer to all this, it is said for the pursuer, that his right stands good upon his title above stated, notwithstanding of any thing pled either from this contract in 1636, or from the statute 1606 or 1617.

" And, 1*st*, with respect to the argument brought from 1606 and 1617, it is said, that it proceeds upon an erroneous supposition, as if, at the date of Sir William Keith's charters, chapters were not abolished, and that at that period the chapters were still the lawful titulars; whereas, says the pursuer, it is notoriously known, in point of fact, that at that period they were abolished; and so it is affirmed by the King, in the charter itself to Sir William Keith; and, accordingly, the general plan upon which the King proceeded in granting this charter, is soon thereafter, viz. in 1594, confirmed by public law, whereby it is enacted, that all common kirks be of the nature of other parsonages or wardages, and to be conferred by presentation of the lawful patron; and as chapters were then abolished, the lawful patron could be none other than the King, or such persons to whom the King had disponed these kirks; and if this is so, then plainly the charter to Sir William Keith falls under the exceptions in the Acts 1606 and 1617; as it was given by the King, the lawful patron for the time.

" But then, 2*dly*, says he, be that as it will, and supposing the chapter to have been titular in 1588, the date of the charter to Sir William Keith, yet still it stands good, as having been ratified in Parliament, for this reason, says the pursuer, that when it is statuted that grants of common kirks, made by the king, with consent of the titulars, shall be good, albeit not ratified, supposes grants good, however made, that were ratified, as these ratifications were applied for to supply the want of the titular's consent; that all the act does is to regulate the effect of grants made that were not ratified, that such shall only stand good where they were made with consent of the lawful titular; but it does not follow, that grants that were ratified were to fall on any account, as these ratifications must stand till they be repealed; and there is not the least insinuation in the act that the legislature intend to repeal them, or to repeal the general regulation that was made by the act 1594.

" And as to the contract 1636, between Sir Robert Innes and the Bishop, and charter following on Sir Robert's resignation, the pursuer, after observing that the argument from this contract was inconsistent with their former pleading, as in the former part of the argument they pleaded the chapter to be restored by the act 1617, they now say that it belongs to the Bishop by this contract; I say, after observing this, he answers that, as no infeftment followed on the charter expede upon this contract, it cannot compete with the right thereafter granted on Sir Robert Innes's resignation to the Earl of Cromarty, compleat by infeftment. And as for the Bishop's possession by his presentation to Mr. Bernard M'Kay, though there appears such presentation to have been given, it does not follow that the minister was settled upon it, as the Lord Cromarty may also have given one; and, withal, if any weight were to be laid on the latest possession, as it is too far back to go to 1678 to found a claim *in possessorio*, so that point is with the pursuer; for though there was no occasion to present since 1678, yet, in a modification and locality in 1641, Sir George M'Kenzie has right as patron, and gave in a modification accordingly.

" It was REPLIED for the defender, to the first argument, upon the construction of the acts 1606 and 1617, that, were it true, as the pursuer avers, that the chapters were abolished in 1588, and notourly known to be so, then, indeed, he

should have much to say, that there could be no other patron but the king, or others deriving right from him, and Sir William Keith's grant would be safe, as being in terms of the exception in act 1617, as given by the king with consent of the lawful titular for the time.

" But, say the Officers of State, defenders, it is not true that either bishops or chapters were abolished in the year 1588; and how possibly could it be, when presbytery was not introduced till the 1592? Nor even then were bishops and chapters abolished, nor, indeed, properly speaking, were they ever abolished. On the contrary, the Act 1606 proceeds upon the narrative that bishops were never meant to be abolished by his Majesty, or his estates; that the estate of bishops should in any ways be abolished or suppressed. So far is true, that their patrimony was much impaired, first by the general act of annexation in 1587, by which they were deprived of their lands, lordships, baronies, and others therein mentioned; but not of their kirks, which are not there mentioned; and afterwards by the Act 1594, common kirks are declared to be of the same nature with other parsonages and vicarages, and to be conferred by presentation of the lawful patron, which was the king or others having right from him, which is the first act depriving chapters of their common kirks. But as this act has no retrospect, it remains fixed, say the defenders, that in the year 1588 the common kirks remained with the chapters.

" And, therefore, as the grant to Sir Willlam Keith in 1588, was not made with consent of the lawful titular for the time, the objection to the pursuer's title on that ground stands good.

" And as to the second answer, upon this general point that, supposing the bishop and his chapter to have been the lawful titular in 1588, yet it is enough to support the grant then made to Sir William Keith;

" REPLIED, That nothing can be more contradictory to the statute 1617, which still requires that grants that have been made by the king, with consent of the lawful titulars for the time, though it dispense with the ratification in Parliament which had been required by the Act 1606, restoring bishops, with which it is to say that a ratification in Parliament shall of itself be sufficient. If that had been the intent of the legislature, why should any thing have been required in the Act 1606 but the ratification in Parliament? But that is what the legislature could never have dreamed of, as such ratifications all pass *salvo jure*.

" With respect to the contract in 1636, REPLIED for the pursuer, That the charter following upon the resignation contained in it, needed no infeftment, as being an incorporeal right not capable of infeftment; and upon this you have a long dispute in the papers that I will not trouble you with. It is further said, that there is no answer made to the Bishop's possession following on that charter by his presenting Mr. Bernard M'Kay in 1678; and as to Sir George M'Kenzie acting as patron in a modification and locality pursued in 1641, he says no more but that the Officers of State had not adverted to it."

[Here Lord KILKERRAN's first report ends.]

February 28, 1752.—Upon report of the debate thus made by Lord Kilkerran, the Lords 'found that the pursuer, William Urquhart of Meldrum hath the only right to the patronage of the parish kirk of Cromarty, and therefore prefer him thereto to the crown.'

In a petition against this interlocutor, besides a repetition of the former argument, it was stated, that since the case was last before the Court, it had been dis-

covered from the records, that the Bishop of Ross had been infeft upon the charter following on the contract 1636. The petitioners, therefore, prayed the Court ' to find, 1*st*, That as the kirk of Cromarty is admitted to have been part of the patrimony of the See of Ross, the erection of these kirks into parsonages, and disponing the patronage to Sir William Keith, in the 1588, was void, as the king had no right to dispose of them, in prejudice of the then bishop and his chapter. 2*d*, That the Acts of Parliament 1606 and 1617 restored the bishops and their chapters to all their kirks, whether mensal or common; and that, therefore, the exception in relation to patronages, cannot avail the pursuer, and that though it did, he is not, in terms of the exception, as Sir William Keith's right was not with consent of Mr. James Robertson, the incumbent for the time. 3*d*, That the Bishop of Ross's right from Sir Robert Innes, is preferable to the pursuer's from the same person, both as the first personal transmission, and as now appearing the first clothed with infeftment; and, therefore, to alter the interlocutor reclaimed against, to assoilyie from Mr. Urquhart's declarator, and to declare the right of the crown.'

June 26, 1752.—On advising this petition, with answers, the Court ' remitted the same to the Lord Ordinary, with powers to hear parties procurators on the third point of the petition, whether the Bishop of Ross's right from Sir Robert Innes is preferable to the pursuer's, as also to hear parties on the Act of Parliament, 1695, and do therein as he shall see cause, but refuse the desire of the petition as to the first and second points.'

In pursuance of this remit, parties were again heard before the Lord Ordinary. It was now admitted on the part of the crown, in terms of the previous interlocutors of the Court, now final, that the patronage had been effectually vested in Sir Robert Innes, and the question debated was, which of the two titles derived from him was preferable; viz. that to the Bishop of Ross in 1636, now in the crown, or that of Sir George Mackenzie in 1656, under which the pursuer Meldrum now claimed.

In this debate various objections were stated by the pursuer to the crown's title. The case was again reported to the Court by Lord Kilkerran. His Lordship's report is in the following terms:—

" In the declarator of the right of patronage of the parish kirk of Cromarty, at the instance of *Urquhart of Meldrum* against the *King*, his title was a charter from King James VI. in 1558, to Sir William Keith of Delny, of the lands of Delny, containing an erection of the kirk of Cromarty, and sixteen or eighteen other churches, which had formerly belonged to the chapter of Ross, into parsonages, and granting to Sir William the teinds and patronages thereof, and erecting the whole into one barony, to be called the barony of Delny; and on which charter Sir William Keith was infeft.

" This barony and patronages came by progress to Sir Robert Innes, who, in the 1656, disponed the patronage of the kirk of Cromarty to Sir George M'Kenzie, afterwards Earl of Cromarty, who again disponed it to his son Sir Kenneth, to whom his son Sir George succeeded, whose estate being sold by your Lordships' authority, Meldrum became purchaser of this patronage.

" The objections on the part of the Crown to the pursuer's title, were of two sorts, 1*st*, To the title of Sir Robert Innes, or to the validity of the grant to Sir William Keith in 1558, which I need not trouble your Lordships with. 2*dly*, Supposing the right to have been in Sir Robert Innes, he was, in 1636, denuded

by contract in favours of the Bishop of Ross, in whose right the King is now come, twenty years prior to the conveyance by Sir Robert to the Earl of Cromarty.

" To this second objection, it was ANSWERED for Meldrum,—That the conveyance by Sir Robert Innes to Cromarty, though twenty years posterior, was the preferable right, being clothed with infeftment; whereas the contract 1636 remained to this day a personal right. And to the reply for the Crown, that a patronage being *inter jura incorporalia*, did transmit without sasine, it was duplied for Meldrum, that as this patronage had been annexed to the barony of Delny, and transmitted by infeftment along with the barony, it could not be thereafter transmitted without infeftment.

" Upon advising this debate, your Lordships, upon the 20th February last, repelled the objections for the Crown to the pursuer's title, and found that Meldrum had the only right to the patronage, and decerned in his declarator.

" But the defenders having made a discovery, from the records, that the Bishop of Ross had been infeft upon the charter following upon the contract 1636, they, upon that ground, reclaimed, as also upon the other topics that had been overruled; and, upon advising petition and answers, your Lordships remitted to the Ordinary to hear parties, Whether the bishop of Ross's right from Sir Robert Innes is preferable to the pursuers? as also, to hear parties upon the Act 1695; and refused the petition as to the other points.

" As to the first of these points, which of them have the preferable right from Sir Robert Innes.

" It is objected for Meldrum. 1*st*, That the contract 1636 itself is null; 2*dly*, That the sasine was null; which nullities, with the answers, I am now to state to your Lordships.

" The nullity objected to the contract is, That the witnesses to Sir Robert Innes's subscription are not designed, nor have the defenders pretended to supply that defect by a condescendence on their designations.

" ANSWERED for the defenders,—That there is no statute requiring the designations of witnesses to deeds subscribed by the party. The act 1540, which is the first after sealing went out of use, requires only the subscription of the party and witness, if he can write, or of a notary for him, if he cannot write, without any mention of even inserting the names of the witnesses, and far less of designing them.

" The next act is the Act 80, Par. 1579; and this act does indeed require witnesses to be designed in writs of importance subscribed by notaries; but further, the act goeth not to make any provision concerning deeds to be signed by the parties.

" The next act is the act 1593, which supposes its having then come into practice to insert the names of the witnesses when it requires the writer's name to be insert before inserting the witnesses; but not a word of designing them till the act 1681, which is the first statute the designation of witnesses to a parties subscription is required.

" 2*do*, Supposing the objection good that the witnesses are not designed, and that a condescendence might have been necessary, had the objection been stirred while it was in the nature of things practicable, it were ludicrous in any case to require it at the distance of 130 years; but more especially in this case, where there are so many concurring circumstances to astruct the veracity of the deed.

particularly the after-signatures of the same contract, by the King himself, and by the Bishop; by the charter and sasine, which recently followed; and lastly, by possession had upon it by the bishop of Ross, by the presentation of Mr. Bernard M'Kenzie to the church of Cromarty.

"It was REPLIED for the pursuer,—That the answer would appear to be insufficient, whether the statutes themselves be considered, or the opinion of our lawyers or uniform practice of the Court.

"As to the statutes, the act 1540, when it states that the witnesses shall subscribe, supposes them to be insert; and the next act 1579, requires their particular designations to be added; and it is a mistake to say that this act only relates to witnesses subscribing to deeds signed by notaries. 1*st*, As the reason of the thing is the same in both; and, next, it had been quite improper for the statute to have at all mentioned deeds signed by the party, if the regulation had not been to extend to deeds signed by the party; and, accordingly, the statute has been always so explained in our law books, and by the decisions of the Court, for which Sir George M'Kenzie is appealed to, in his observations on the act; and the Lord Stair, and decisions by him observed, where the objection was made and sustained, that the witnesses to a deed signed by the party were not designed unless supplied by a condescendence, and in some of which, the condescendence made was found not sufficient. And last of all, this rule is supposed by the legislature in the act 1681 itself, while it statutes that the want of the designation shall not be suppliable by a condescendence, which supposes that by the former practice a condescendence was allowed to take off the legal nullity.

"And as to the second, that such condescendence cannot now be required after so long a time, no notice is taken of it by the pursuer; but it is supposed he may say that a nullity cannot prescribe, and the objection could not be made till the deed appeared.

"The second nullity objected to the contract is, that it gives an inconsistent account of the time and manner in which it is said to have been signed. The testing clause begins thus: That all the three parties, the King, Bishop, and Sir Robert Innes, had signed at Whitehall, the 16th May, 1636; thus, that all the said three parties have subscribed thir presents, day, place and year of God above written; and yet in the end of the testing clause, the date of Sir Robert Innes's subscription is thus set at the day of 1634; and to this the information for the pursuer supposes no answer to be made.

"But the answer made is, That the objection is frivolous, as just nothing here but what happens every day, where a deed is to be signed by different parties at different places, whereof a memorandum is kept, filled up in the testing clause when the deed comes to be executed by all the parties; and the latter part of the testing clause corrects what the generality of the first part of it would have imported, and bears Sir Robert Innes's subscription to have been in 1634.

"So much for the objections to the contract. The pursuer next objects to the sasine as null on two grounds; 1*st*, That it bears no symbol of delivery; 2*dly*, That it is not subscribed by the notary.

"Before making answer to these, the defenders recur to their former plea, which your Lordships, by your interlocutor upon the report over-ruled, viz. That the patronage, as other *jura incorporalia*, did transmit by the resignation in the contract and charter following upon it, *Esto* No sasine had followed upon that charter. And here it shall suffice to mention, what is now further said

new upon this point, which consists of two quotations, one from Sir John Nisbet, his title *de resignationibus;* the other from the English law.

" Sir John Nisbet, in his said treatise, delivers his opinion that a resignation accepted by the superior does, without more, simply denude the vassal. The defenders in this case do, notwithstanding, admit that the more just opinion is that delivered by Sir James Stewart, that the resigner is not denuded till infeftment follow on the resignation; but, then, say the defenders, however that may be true in ordinary cases, where the estate, which is the subject of the resignation, was originally and of its nature feudal, which could not be completely vested in the resigner himself without infeftment; yet the opinion of Sir John Nisbet ought to take place where resignation is made simply of a subject wherein the resigner was no otherwise infeft than as it was by the act of the crown annexed to the barony of Delny, from which it was now again separated, likewise with consent of the crown, and restored to its original nature, Sir Robert retaining to himself the lands or barony, which was the proper feudal subject agreeable to the maxim, *quod unumquodque eodem modo dissolvitur*, &c.

" And in support of this, the defenders refer to the other quotation from the law of England, where the doctrine of patronages has been more studied and better understood than with us. It is from Wood's Institutes, who says that *Advowsons are of two sorts, advowsons appendant,* or *advowsons in gross.* Appendant is a right of presentation dependant upon a manor, and pass as a grant of the manor, as an incident. Advowsons in gross, is a right of patronage subsisting by itself, belonging to a person and not to a manor; and then adds, Where an advowson dependant is severed by a deed or will, from inheritance to which it was appendant, then it becomes an advowson in gross, and the application is obvious.

" The defenders next proceed to answer the nullities objected to the sasine, and first to object that the sasine does not bear any symbol of infeftment.

" ANSWERED,—That there is no law nor authority of any law-book ascertaining what the symbol of infeftment of a patronage is. It were, therefore, a strange thing if it were found a nullity in a sasine that the sasine had not a symbol, when no body can, upon any authority, say what that symbol is; and no wonder, considering how modern the invention is to take infeftment in them at all; nor, indeed, is there any thing solid in the objection. The essential provision for security of the lieges is, that it may appear from the records in whose person the right stands; and no body will seriously maintain that the Earl of Cromarty, who saw the bishop's infeftment upon record, proceeding on the charter following on Sir Robert Innes's resignation, to make a second purchase from Sir Robert Innes, because that sasine had no symbol.

" But more particularly, 2*do*, The sasine is good and valid, being taken in the words following:—*Apud Ostium Ecclesiæ Cathedralis de Ros secundum formam et tenorem antedicti precepti et dispensationis juris solemnitatibus in similibus fieri consuetis debitis observatis.*

" Now, that sasines taken in these general words, without expressing any particular symbol have been in use to be sustained, no less than four several decisions are referred to, some of them before, and some of them after the date of the sasine in question, wherein sasines were sustained without making mention of any symbol; but some of them bearing, in general, that the bailie came to the ground of the land, and therein gave state and sasine; others that sasine was given according to the solemnities used in such cases; and some of these decisions say the

defenders conclude *a fortiori* to this case, because they were in the case of sasine in the property of land, and others in the case of salmon-fishings, where the symbols used in giving sasine were fixed and known; whereas, it is not to this hour settled, for any thing the defenders have seen or read.

" True, though the Lords would not annul the sasines, yet they were for punishing the notary, but upon inquiry he happened to be dead.

" The second objection to the sasine is, that it does not bear the subscription of the notary. To which the defenders answer, that it is not true, for that the sasine contains the name of the notary—*Ad longum ego vero Gulielmus Lauder, clericus Sanctæ Andreæ.* But say the defenders, the meaning of the objection is, that the sasine on record does not bear the notary's mark, hieroglyphic, or motto, which is usually subjoined to the principal sasine. But say the defenders, it was not the practice to insert this hieroglyphic in the record, and for this they produce a certificate under the hand of James Ker, keeper of the records in the low Parliament-house, that in the particular register of sasines for the shire of Inverness, from 1640 to 1643, in which record the Bishop of Ross's sasine in question is, the notary's subscription is not insert in any sasine in that record.

" It is for the pursuer REPLIED, that no practice, especially for so few years, can justify a thing so irregular as not inserting in the record, so material a part of the sasine as the notary's subscription; and whereas it is said, the sasine bears the notary's name, and that only it wants his motto or hieroglyphic, which is not essential; it is replied, 1*st*, That whatever might be the case of a sasine wrote with the notary's own hand, and beginning, as this does, '*Ego vero Gulielmus Lauder, clericus Sanctæ Andreæ*,'—I say, whatever might be the case of such sasine, when wrote with the notary's own hand, and only wanted the notary's subscription at the bottom, with his motto, as usual, yet the case is very different when the sasine is wrote *manu aliena* (and which is the present case), for then, without the notary's subscription at the bottom, there is not the least evidence that ever the notary saw this sasine. 2*dly*, Your Lordships are told of a decision in 1731, creditors of Gordonhill, where a sasine wrote by the notary's hand was found null, for want of the notary's signum, as being his proper subscription, which distinguishes him.

" It now only remains to state, in a word or two, the debate upon the Act 1695.

" It was for the pursuer pled, that having purchased this patronage from your Lordships at a judicial sale, he is by the Act 1695, secure from all challenge upon the deeds of any person from whom the bankrupt had right; and, therefore, from the deed of Sir Robert Innes, from whom the bankrupt had his right by progress, and for this appeals to the words of the statute, by which it is enacted, that the purchaser paying the price to the creditors, according as they shall be ranked, or consigning the same in the manner appointed by the Act, shall be for ever exonered, and the security given for the price delivered up and cancelled; and the lands and others purchased, disburdened of all debts and deeds of the bankrupt or his predecessors, from whom he had right; and that the bankrupt, his heirs, or creditors, conceiving themselves to be prejudged, shall only have access to pursue the receivers of the price.

" ANSWERED for the defenders, That the pursuer mistakes and misapplies the very words, as well as the true interest and meaning of the Act 1695. For 1*st*, As to the words of the Act, it is only from the deeds of the bankrupt's predecessors that the purchaser paying the price is exonered, and it had been absurd and

iniquitous to have gone further; whereof no other example is necessary than what the present case affords; for supposing it true, that the King, as in the right of the Bishop of Ross, had a prior and preferable title to this patronage, should it not be very strange, if the law so stood, that by a judicial sale at the instance of the creditors of Mackenzie of Cromarty, the King, who was no party to the suit, should be outed of his right without remedy?

" But *2dly*, That the law never intended such a thing will be plain from comparing the several statutes. Judicial sales of bankrupts' estates were first introduced by the Act 1681, and by that statute it was provided, that the sale being made in the manner by the Act directed, shall be as effectual, upon payment of the price, as if the same were made by the debtor, and all the apprisers, adjudgers, or other creditors cited, who have rights affecting the lands. There is again, by the Act 1690, some further provision for facilitating such sales; but nothing that touches the present question. And last of all comes the Act 1695, for the further clearing the former laws, and whereof the chief view appears to have been to provide in favours of the purchaser, a method by which he may get the price taken off his hand, viz. Consignation, and then follows the clause, which is the subject of the present question; declaring, that the purchaser, paying, &c. or consigning, &c. shall be for ever exonered, and the lands and others purchased disburdened of all debts or deeds of the bankrupt, or his predecessors, from whom he had right, and the bankrupt or his creditors have only access to pursue the receivers of the proceeds.

" That is, in other words, the lands shall be exonered, and the purchaser safe from every deed or debt of the bankrupt or his predecesors; and, if either the bankrupt or his heirs, or creditors, shall not appear, and may be prejudged, they can have no relief from the purchaser, but to pursue the receivers of the price as accords. In all which, the only safety provided to the purchaser is from the bankrupt, his heirs, his predecessors, or his creditors, but not a word of being safe against third parties having collateral rights, which had been absurd.

" It is ANSWERED for the pursuer, that there was the same reason, the nature of the thing, for securing the purchaser, who has paid the price, against third parties, deriving right from any of the bankrupt's authors, as against parties deriving right from any of the bankrupt's predecessors; and these words in the Act, disburdened of all deeds of his predecessors, from whom he had right, appear to be thrown into the statute with a view to comprehend both, and accordingly, says the pursuer, it was so decided in the case of Sir Andrew Myrton, where Sir Andrew purchased the estate of Gogar, at a sale carried on by the creditors of Thomas Chalmers; and John Chalmers, his son, having claimed a part of the estate in virtue of a right derived from Sir John Coupar, his grandfather, by the mother, the last proprietor; but Sir Andrew's defence was sustained upon the Act of Parliament, though Sir John Coupar was none of the bankrupt's ancestors, but his author, from whom he had right."

[Lord KILKERRAN's report ends here.]

July 28, 1753.—Of this date, the Court pronounced the following interlocutor:—" On report of the Lord Kilkerran, the Lords sustain the objection that the witnesses designations are not insert in the body of the contract 1636; but find that the same may be supplied by condescending on their designations, and astructing the same: and find that Sir Robert Innes could not be completely denuded of the patronage in question, in favour of the Bishop, without sasine following in the person of the Bishop, and repel the objection

to the Bishop of Ross's sasine, that the same does not mention the special symbols delivered at taking infeftment, in respect that the sasine bears that the usual solemnities, in the like case, were duly observed. Also repel the objection that the record of the said sasine does not contain the sign and mark used by the notary who attests it; and they also repel the objection, that the precept under the Quarter Seal, on which the sasine proceeded, is not produced. And lastly, they repel the allegeance founded on the Act of Parliament 1695: And find that the right of the crown is not barred by the decreet of the sale; and remit to the Lord Ordinary to proceed accordingly."

The Officers of State presented a petition against that part of the above interlocutor, by which the Court "sustains the objection that the witnesses designations are not insert in the body of the contract 1636."

The following notes, by Lord Kilkerran, are written on this petition.

"The decisions all suppose that designation is necessary and competent, notwithstanding the deed be null by statute, *vid. inter alia, Feb.* 3, 1665, *Falconer* against *the Earl of Kinghorn*, at which time of day it was necessary to condescend upon living witnesses, which we have receded from.

"The petition complains of the interlocutor sustaining the objection to the contract between Sir Robert Innes and the Bishop of Ross, that the witnesses therein insert and subscribing are not designed.

"I will not take up your Lordships' time in resuming the commentaries which the petition and answers severally make upon the statutes concerning the formality of writs from the 1540 to the 1681. It is enough to say that, according as they severally plead their case, the question comes to this, whether any statute before the 1681 requires that witnesses should be designed, and which, in other words, comes to this;—whether the act 1579 is to be understood only of writs signed by notaries, or of writs signed by the parties?

"*December* 18, 1753.—This day the Lords adhered to their former interlocutor, not upon the argument in the answer, that the act 1579 comprehends writs subscribed by the party; for they rather thought that it did not, and was only meant to concern writs signed by notaries, which required a greater solemnity than when the party himself subscribed, as it was a greater trust to allow others to bind a man by their subscription, and, therefore, requires two notaries and four witnesses; and, when it adds, that the witnesses be designed by their place of abode, that was not to be understood as if the like designation was not required where the party signed. On the contrary, it was supposed to be required, *de jure eodem*, or how soon ever witnesses were requisite; and that was as early as writ was used. The witnesses were required to be designed, otherwise they could not be known. The practice in England does indeed require no more but the witness's name, which the Justice-Clerk observed as his reason to believe that so our custom had been before the 1681, which he thought was the first time that designations had been required. But it was said to be no argument for our practice; for in England, though no more is required to be in the writs but the name, yet the deed must be proved, which we know nothing of. It was upon that foundation therefore the Court now proceeded, that the designation of witnesses was necessary *de jure*, but which the practice allowed to be supplied where it was not on the writs; but unless supplied the writ was null before the 1681, and now is null, unless the designation be in the body of the writ."

[Here Lord KILKERRAN's notes end.]

The Officers of State appealed against the interlocutor of *July* 28, 1753, in so far as it sustained the objection that the witnesses designations are not inserted in the body of the contract 1636; and against the interlocutor of 18*th December*, 1753, by which the Court adhered to that finding.

On the other hand, the pursuer presented a cross appeal, complaining of the remaining parts of the interlocutor of 28*th July*, 1753.

The House of Lords "ordered and adjudged that such parts of the said interlocutor as are complained of in the original appeal be reversed, and that the want of designation of the witnesses to the said contracts be repelled."

"Moved also that the cross appeal be dismissed, and that such parts of the said interlocutor as are therein complained of be affirmed."

This case is reported by *Elchies, (Patronage,* No. 5 and 7. *Sasine,* No. 8. *Writ,* No. 28:) also by *Kames, (Mor.* 9923: and in *Fac. Coll. Mor.* 9915.)

1753. *December* 20. THOMAS M'KENZIE of Highfield and OTHERS *against* SIR JOHN GORDON and OTHERS.

"*Nov.* 19, 1753.—THE Lords have now heard this debate. It is upon a very new case, and a very important case, as it concerns the jurisdiction of the Court, though, perhaps, of no difficult decision.

"Mr. M'Kenzie of Highfield, and M'Leod of Cadboll, apply by complaint, setting forth, that on the 28th July last, Mr. M'Kenzie lodged his claim with the sheriff-clerk of Cromarty, to be enrolled upon the roll of freeholders for the shire of Cromarty, as apparent heir to his grandfather; and that in a few days thereafter, the said Mr. M'Kenzie and M'Leod of Cadboll did severally give in objections, in terms of the statute of the 16th of the king, against Sir John Gordon, Mr. Charles Gordon, and Gordon of Ardoch, their being continued upon the roll. That, farther, they were acquainted, by letter from the sheriff-clerk, that the Michaelmas meeting was to be held on the 16th October. That the petitioners having repaired to Cromarty upon the 16th, they were let to know that though the whole of the gentlemen who compose the roll, and who are no other than Sir John Gordon, Mr. Charles Gordon, Gordon of Ardoch, and Leonard Urquhart, were in town, yet there was to be no meeting that day. Thereupon, the complainers required these gentlemen personally to hold the meeting, and the sheriff-clerk to attend, in order that justice might be done as the law directs; with which, nevertheless, on various pretexts they refused to comply; and, therefore, craving your Lordships may take into your consideration the titles on which Mr. M'Kenzie claimed to be enrolled, and the objections made to the persons objected to their continuing on the roll, and to do the justice they were entitled to have demanded of the freeholders, had they met.

"And parties having been now heard upon this complaint, and answers thereto made, the question is, How far it is competent for your Lordships to interpose in this matter?

"It is pled for the complainers, that it is competent for you, as you have not only a jurisdiction by statute in particular cases, but an original jurisdiction to cognosce of and redress all wrongs done to any of the lieges; and particularly in this