And as to the third point, the Lords had no doubt but that the heirs of entail might lawfully contract debts not exceeding the half of the value, but, nevertheless, were not of opinion that the sale would proceed unless the debts within the half of the value, with the annualrents growing thereon were to such amount as would render the estate bankrupt, for that the expired legal would not sustain the sale. The creditors might, indeed, pursue declarator of expiration of the legal as accords, but a sale they could not pursue, though the legals were expired, unless they could say bankrupt by the debts which the heir of tailyie might validly contract: for, by the act 1681, even where the legal was expired, the creditors could not pursue a sale without consent of the debtor, till that was altered by an after statute in 1685. And the bar, to whom this had not occurred, not being prepared upon this point, the interlocutor was pronounced on this point in the following general terms, Find that the heirs of entail were empowered to contract debts not exceeding the value of the half of the estate, and remitted to the Ordinary to proceed accordingly."

N. B.—A reclaiming petition was presented against this interlocutor, which, on being advised with answers, was refused.—*Nov.* 21, 1753.

1753. *December* 14. ELSPETH STEWART *against* AARON GRANT.

THE facts of this case are stated by *Elchies, (Dam.* and *Int.* No. 3, and more fully in his *Notes.)* The following is Lord KILKERRAN'S note of the opinions of the Judges:—

"On the advising this state, Nov. 22, 1753,—

"KAIMES.—That the *inscriptio in crimen*, by the Roman law, was a most unreasonable constitution, and effectually put a stop to all private prosecuting. In England, their Grand Jury is a right thing, for where they find a bill, the private party prosecutor can never be decerned calumnious. In Scotland, it were to be wished that no warrant were granted for commitment before some previous inquiry, which should have the like effect, though that does not seem to be the practice.

"After this said, he doubted if the action lay in any court for expenses of process, where the same had not been brought. I mean the demand made in the Court itself, where the trial was carried on, and that, at the time of the trial, as no other Court could so well judge whether the prosecution was malicious; and if the action lay, inclined to think the defence in this case good.

"DRUMORE.—Thought the action lay and the defence not good.

"JUSTICE CLERK.—That the action did not lie, and if it did, the defence was good.

"After so much said, it was proposed by *Elchies* to put the question. This was opposed by *Kilkerran*, who thought it was a complex question, wherein some might think the action did not lie, and yet that if it did, the defence was not good. And how could any one who was of that opinion vote on that complex question? That though it may be true that different votes are not to be put upon every different argument, yet it was never heard that a complex question was put upon the competency of the Court, and relevancy of the defence.

" 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