The following opinions were delivered :—

KAIMES. An apparent heir has no right to the estate till his predecessor's debts are paid. The creditors have an inherent right to the estate, and I would prefer them.

GARDENSTON. The Act of Parliament gives a right of selling to the apparent heir. He can have no interest to retard the sale, for his only hope is from the reversion of the price. It is plain that the renunciation of the apparent heir, a necessary measure, and always followed, cannot bar him.

KAIMES. An apparent heir, by delaying the steps of sale, may have an opportunity of picking up debts, and of procuring compositions.

MONBODDO. If the creditors see any tergiversation, they may take up the sale; so that the only objection which remains, is that of the heirs having renounced, which is nothing in the present case.

COVINGTON. I incline to the plea for the apparent heir. In that case the estate is sold before the ranking, which is a great advantage.

KAIMES. Gave up his opinion on the consideration mentioned by Lord Covington.

ELLIOCK. This is the first time that an apparent heir ever pretended to oppose a sale brought by the creditors of his ancestor. The statute in his favour does not repeal the statute 1681.

KENNET. There is nothing in the renunciation; for an apparent heir always renounces, in order to prevent the constituting of debts against himself. Every inconveniency dreaded may be avoided by the creditor's taking up the sale, in case the apparent heir protracts matters. The sale at his instance is more expeditious and cheaper than the other.

On the 5th March 1776, "The Lords preferred the sale at the instance of the apparent heir."

Act. J. Swinton. *Alt.* A. Elphinstone.

Reporter, Kennet.

1776. *March* 6. JOHN HENDERSON, Younger of Fordel, *against* CAPTAIN HUGH DALRYMPLE.

MEMBER OF PARLIAMENT—SASINE—WADSET.

1. What to be accounted such a wadset as to entitle to a vote for a Member of Parliament. *Sale sub pacto de retrovendendo.*
2. Found no objection to a sasine, that the person said to have appeared as attorney was, in the clause of delivery, by an obvious mistake, stated *to have given* sasine to the party said to have appeared as bailie, the characters being reversed.

[*Faculty Collection, VII. p.* 201 ; *Dict., App. I., Mem. of Par., No.* 2, *and Supp. V.* 586.]

N.B. In this celebrated cause I make no observations on the manner of

splitting the vote, by which, in the end, the qualification of Captain Dalrymple was found good, while, if the question had been put, whether is the qualification good or not? the Court would have divided *seven* "not good," against three "good."

As to the question whether the sasine was regular or null:—

HAILES. This sasine is null. At the beginning we have A. B. as sheriff, and C. D. as attorney. In the end we have C. D. as sheriff, and A. B. as attorney. How are we to know *who* was sheriff and *who* attorney? It appears from the sasine that both were attorney and both sheriff. *This* may have been from the error of the notary, in using one name instead of another; but all errors in public instruments are owing to the errors of those who draw them up. If we overlook the error of the notary in this case, *where* are we to stop? And must we not sanctify every error in sasines? This will not be disagreeable to those who are tired of feudal forms, but if we once become indifferent as to feudal forms, we lose our own law, and we know not what we must assume in its stead. The cases quoted in support of this blundered sasine are not in point. That of *Cheyne*, in Lord Dirleton, was not properly a decision. As, however, the judges gave their opinion, I shall suppose it to be a decision. There the same person was held forth as the bailie or sheriff throughout the whole sasine, and the only error was that in the clause of tradition. The bailie A.B. was said to have infeft the foresaid attorney A. B. [Instead of C. D.] This is merely a slip of the pen, for still the bailie was exactly designed. In the case of *Captain Livingston*, a name was given to one of the officers of the law, different at the end of the sasine from what it was in the beginning. But he was described so as to prevent any ambiguity; and the bailie, the other officer of the law, was distinguished from him in every part of the instrument. As to the case of *Chalmers*, the Court varied in opinion, and was greatly divided, even to the last. There, however, there was no contradiction nor ambiguity; there were only some words left out in transcribing, which the Court thought might be supplied. I did not; and still continued in the first opinion of the Court. If such monstrous errors are permitted in sasines, an instrument of sasine will be a superfluous ceremony, and the notary, in time to come, has no more to do than to certify that sasine was given.

MONBODDO. The objection to the sasine is not good. Here is merely a misnomer; the word *dictus* explains the whole, and leaves no ambiguity.

KAIMES. I cannot get over the objection to the sasine. We must either quit sasines altogether, or support the law as to them. Would this sasine be held good in competition among creditors? How do we know that earth and stone were delivered to a *certain* attorney. A sasine must be perfect in itself; it can neither be cut down nor supported by collateral evidence. The instrument is our evidence, and we cannot go beyond it.

COVINGTON. I am not clear to find this sasine null, because I cannot reconcile such a judgment with the former decisions of the Court, particularly in the case of *Captain Livingston*. [He said that the sasine was blundered.]

KENNET. As to the sasine I am not clear. I do not think that a sasine can be mended by witnesses; but I think that sasine was *here* given, and that the only error is in putting one man's name instead of another.

ELLIOCK. The objection to the sasine is unanswerable. If we sustain *this*, it will put an end to all instruments of sasine.

ALVA. Thought that the objection to the sasine was good.

On the 6th March 1776, "the Lords repelled the objection to the sasine."

Diss. Kaimes, Elliock, Alva, Hailes.

Quær. Whether there was here a proper wadset?

MONBODDO. This is a right to a superiority, which is, if properly constituted, a good title for voting. The question then is as to the nature of the right. It is only a proper wadset, of all redeemable rights, that gives a title to vote. A good deal of argument has been used to prove that other redeemable rights than proper wadsets are better rights, and better entitled to vote than proper wadsets; but *this* I cannot understand. *A proper wadset* and *a sale under reversion* are different rights by the law of Scotland. In *Reg. Mag.* a wadset is just what is called *vadium:* our word *wad* is derived from *vadium.* It is explained in our ancient law to be *a right of pledge, vadium rei mobilis aut immobilis.* In the Roman law, the one is *pignus*, the other *hypotheca.* This is quite different from a sale under reversion, or *pactum de retrovendendo. Vadium* is truly an impignoration of land for debt. In later practice a wadset and sale under reversion have been often confounded. But in *Reg. Mag.*, and long after the date of that work, there was no confusion of the terms; for in those times a sale under reversion was not known. It appears from Act 28th, Parl. 1469, that sales under reversion was then a new invention; see Lord Kaimes's note on that subject. Craig observes the same thing; *de regressu nulla fit mentio*, says he. A wadset is a debt, and implies a clause of requisition. In a proper wadset the rents go for payment of *annualrent.* Does not this imply a debt? For, if there is no *sors*, How can there be *usuræ?* The question is, Whether, in the statute 1681, the two things *pactum de retrovendendo, et vadium*, were confounded? If a man had disponed an estate redeemable for a rose noble, Would that have given a right to vote? I think not, because there was no debt. The Act 12mo Annæ was meant to set aside trusts and conveyances redeemable for an elusory sum. The former was obviated by the trust oath; the latter by providing that no redeemable rights but proper wadsets should give a right to vote. There are no other words in the statute which can do this, if they are not the words now under our consideration. The present right is plainly a sale under reversion, and not a wadset of any kind, and therefore is no proper qualification.

KAIMES. I have heard it said from the bar (by Mr George Wallace,) that wadsets were introduced as appanages for younger children. It may be so; but I never saw any such appanages. It would have been better had the counsel told us what was a wadset by the Act 1681. The terms of that statute suppose that all wadsets, proper and improper, are securities on land. I think that a proper wadsetter was entitled to vote, from the nature of the thing: all the lands in Scotland held of the king. A proper wadset, to be held of the reverser, gave no vote; but if held of the king, it did, there being a charter from the

king. In such case the reverser was not proprietor; for the wadsetter was the king's vassal. An estate sold with a clause *de retrovendendo*, is different from a proper wadset. I need no books to tell me this. When a man sells under reversion, the money that he gets is not a loan. I think that, by the statute 1681, a sale under a power of reversion gave a vote: thence the evil arose of elusory sales: this was remedied by the statute of Queen Anne. Perhaps that Act went too far, by declaring that no redeemable right, except a proper wadset, should entitle to a vote, whether the price was elusory or not.

COVINGTON. I will not say that there is no difference between a sale *sub pacto de retrovendendo* and a proper wadset; but, in this case, there is a perpetual redemption, which I never saw in a *pactum de retrovendendo*. [It is certain, however, though Lord C. did not recollect it, that there are such rights.] In an actual sale, the term for redeeming is always limited. When the term expires, there is an absolute property: and so it is just the same thing as the case of apprisers and adjudgers. Wadsets were originally intended as a security for money; but even then a clause of requisition was not insisted for by the creditor, because he generally got a most lucrative bargain. The letter of reversion was a separate obligation in favour of the debtor. Numbers of wadsets, especially of late years, have been granted where there was no borrowing of money mentioned. Particularly, in the case of *Lord Balcarras* and *Scotstarvet*, there was no mention of borrowing of money: *that* was only collected from circumstances. It must be from the circumstances of the case that we can know whether a wadset or a sale under reversion is intended. It is not essential to the establishment of a proper wadset in modern practice, that either a loan should be mentioned, or a power of requisition. I cannot conceive a reason for the legislature distinguishing a sale under reversion from a proper wadset in matters of voting. In the reason of the thing, the man having a right to lands by sale under reversion, has rather a better right than a wadsetter. [Perhaps, about 1681, sales with the *pactum de retrovendendo* were so conceived as to make the lands to be held base, and therefore they would not fall under the eye of the legislature in a question as to crown vassals.] I do not see that the Act 12mo Annæ meant to go farther than the Act 1681. The statute of Queen Anne must not be literally interpreted: its intendment must be inquired into. I will illustrate this by some obvious examples: a *revocable* right is not a redeemable right; and therefore it falls not under the words of that statute, but it falls under the Spirit. A sale redeemable after an 100 years, is a redeemable right; but not from me. It will never subject me to the caprice of the person having so distant a power of redeeming. It is under the words; but not under the spirit of the Act of Parliament. Thus, it appears that the statute 12mo Annæ must not be literally interpreted: that Act confirms what the Act 1681 confirmed. We must consider *quid actum et tractatum*. The purpose of parties was to create a freehold qualification. If the right is of a dubious nature, we must presume that *here* there is a proper wadset; for such right was necessary for making a freehold. How can we suppose that the one would give, and the other take, a right which could serve no purpose.

KENNET. We must judge by the enacting words of the statute; and we cannot limit such words by ——— to the narrative. The question is, Whether is this a redeemable sale, or a proper wadset? I think it is a redeemable sale:

there are no words which point it out to be a proper wadset. If a redeemable sale had been intended, the words could not have been other than they are. The meaning of the parties will not do in matter of votes. Though such inquiries are sometimes made in matters of property, in constructing of votes, the parties must take care that there be no dubiety. The law does not call upon us to aid them. The case of *Culcairn*, quoted for the respondent, was too strong a decision, and cannot be drawn into precedent. The case of *Galbraith* was rightly judged; for *there* the right was clearly a proper wadset, though it contained no clause of requisition,—which clause was found to be unnecessary. In the case of *Colquhoun* against *Hamilton*, the Court thought that there was not a proper wadset. It was in its circumstances much like the present case.

GARDENSTON. I cannot make out this to be a proper wadset. The Act 12mo Annæ is our text. A proper wadset is essentially different from a redeemable sale. A wadset is a pledge for money advanced in loan; but *here* there is a price. In the one there is a *pledge;* in the other a *sale.* Wadset, in its nature, implies a power of requisition; while, at the same time, it gives a better security than personal. There can be no requisition in a sale. As to the distinction, that here there is a perpetual right of redemption, and therefore a proper wadset, I think that the right becomes the more elusory, because redemption is perpetual.

ALVA. Whatever may have been the original difference between a wadset, and a sale under reversion, I am afraid that practice has departed from it. Though I disapprove of such votes as this, yet I cannot distinguish this case from a case of property; and, in case of property, I should think that here there is a proper wadset.

AUCHINLECK. Here is a picture; and the only question is, Whether it has been well drawn? There has been great bungling *here* in a matter of *the highest consequence.* I do not know what to make of it. I think the picture is ill drawn.

On the 6th March 1776, "The Lords found that this right was a proper wadset, not a sale under reversion."

Diss. Gardenston, Kennet, Kaimes, Monboddo, Hailes. [This vote was carried by the casting vote of Lord Auchinleck in the chair, who thought *the picture better drawn,* upon nearer inspection. *Omnia fert ætas, animum quoq.*]

The general interlocutor came to be—"dismiss the complaint;" yet of the eleven judges present, *seven* gave their opinion that Captain Dalrymple's vote was not good, and four only that it was good.

Not good,—Kaimes, Gardenston, Kennet, Alva, Elliock, Monboddo, Hailes,—7.

Good,—Stonefield, Covington, Ankerville, Auchinleck, (in the chair)—4.

There was a reclaiming petition given in, but the cause was never advised.

Act. J. M'Laurin, Ilay Campbell, Advocate. *Alt.* A. Rolland, D. Rae, R. M'Queen.