PRESIDENT. That is owing to a blunder in the statute (drawn by Mr Hume Campbell;) there should not have been any distinction.

STONEFIELD. There is an intentional difference in the statute between the two nations, for the penalty is double in England from what it is in Scotland.

On the 6th February 1783, "The Lords found that the prisoner was not entitled to an aliment."

For Lesley, R. H. Cay. *Alt.* A. Murray.

Reporter, Stonefield.

1783. *February 22.* MR JAMES MURDOCK *against* ALEXANDER GORDON of Culvennan.

PATRONAGE.

Found, that the Patronages of Churches came not under the general Act of Annexation in 1587.

[*Fac. Coll. IX.* 147; *Dict.* 9942.]

BRAXFIELD. In the times of popery, there was no presentation or collation to the churches belonging to monasteries: the charge was supplied by the monks themselves to whom the church belonged. In 1587, the church in question had no patron: such churches were rendered *patromate* by the statute 1592; and hence it follows that this patronage was not annexed in 1587. As to the general question; patronages are not comprehended under the Act 1587, neither in the words nor in the spirit of the law. These patronages, that formerly belonged to the Romish clergy, fell to the Crown as *bona vacantia*. The statute meant to prevent dilapidation of the Crown's patrimony, but patronages had no patrimonial value. Yet some patronages might have been annexed by the Act 1587, as, when patronages, belonging to churchmen, were annexed to baronies, then they would go along with the baronies and continue annexed. It is said, "that there is no warrant for the charter;" the Crown has no right to grant away an estate in competition with other claimants, but no warrant is necessary when the Crown grants away a right of its own. The charter is under the great seal: a charter, proceeding on a *cachet*, gives no new right, for the Exchequer cannot alienate the Crown's patrimony. This charter bears date prior to the Union of the two crowns. In those days there was no cachet; every charter was signed by the king. When I see a charter in 1593, I conclude that it must have proceeded on a sign-manual. Possession

has followed, so far as regards the *lands* resigned. It is said that there has been no possession: *That* is a mistake; for the charter grants the feu-duties owing by Douglas to the abbey, and makes him vassal of the Crown, paying the *reddendo* due by the abbey to the Crown: the only thing not possessed was the patronage, and of that there are many examples. The next question is, Supposing this to have been annexed property, *query*, Whether was it properly dissolved? The charter 1621 ought to be laid out of the question: if the grant 1593 be good, there is no occasion to resort to the charter 1621. I think that the subsequent dissolution in 1617 is good. The Legislature resolved that the dissolution should be previous to the grant, but the Legislature could not bind up itself. In this case there was *will* and there was *power*. In the case of the jurisdictions in the year 1748, some claims were sustained on jurisdictions granted contrary to the prohibitions in the statute of James II., because they had been confirmed in Parliament. The ratification is useless as to private parties: if it is not good as to the Crown, for what purpose was it obtained?

JUSTICE-CLERK. At the Reformation the whole patrimony of the Romish church fell to the king; hence there resulted a right of presenting, for the king could not serve the cure in person. I always thought that patronages fell under the act of annexation, as being a temporality capable to be enjoyed by laics as well as ecclesiastics. The Act of Annexation, 1587, holds all the clauses in the Act of James II., concerning the annexed property, to be repeated in it: to make a dissolution good, there must be a *previous* decreet of Parliament. Strange if the Legislature annexed the rights of the Romish church to the Crown, and yet omitted patronages which it has always been anxious to reserve to the Crown. I think that the grant 1593 is void, as being of annexed property: How is it supported? By an Act 1617, which is called an act of *dissolution*, but which bears to be a *ratification*. It is a private, not a public act,—not capable of hurting the Crown. The Act 1621 is sufficient to clear the subject of any demand for former casualties; but it is no farther valid. Nothing can show the sense of the nation more strongly than the applications occasionally made in Parliament for obtaining previous dissolutions of the annexed property. This patronage, if annexed property, was carried off by the Act 1633. The grant by King Charles I., in 1633, expressly bears this patronage. From that time it became a mensal church of the Bishop of Edinburgh.

MONBODDO. The grant 1593 is of the patronage and of the teinds. This would have been nothing had possession followed on a later grant; but there is no evidence of such possession. As to the act of annexation, 1587, patronages are not comprehended in it. To say nothing of the authorities of lawyers, patronages by religious houses, in the days of Popery, implied cure of souls; but *that* was not the case after the Reformation.

ESKGROVE. All depends on the grant 1593: it is not liable to any exception. Lord Stair, when he speaks of patronages being annexed by the Act 1587, has in view the case of special church benefices annexed, as in the case of *Dunfermline*, in 1593. The Act 1587 goes to emoluments, not to a right of patronage, which has no emoluments. Besides, the act of annexation could

not limit the power of the legislature. It might limit the mode of exercising that power, by making the dissolution precede the grant, and yet not limit the power itself. The Act 1633 only affects grants against law: it had no view to hurt the right of individuals.

On the 22d February 1783, "The Lords preferred Mr Gordon;" adhering to the interlocutor of Lord Ankerville.

Act. Ilay Campbell. *Alt.* R. Dundas.

Diss. Alva, Justice-Clerk, Hailes.

1783. *February 25.* Mrs Margaret Johnston *against* William Dobie and Others.

HERITABLE AND MOVEABLE.

Window-frames, doors, and the like, found within a house, when a-building, but not yet fixed to their proper places, belong to the Heir.

[*Fac. Coll. IX.* 156; *Dict.* 5443.]

Gardenston. We know no moveables that are heritable except heirship moveables. If you give a subject to the heir by implication, you must do the same as to the executors. Thus, a bargain for selling wood would go to the executors, though not a stick sold. Wise men lay in all materials before they begin to build. Do all those materials belong to the heir? In support of my opinion, there are strong texts in the civil law, and a passage of Erskine in point.

Braxfield. I am, in general, of the opinion of the interlocutor. In many cases we get much light from the civil law: but we cannot in a case like this; for the distinction of heritable and moveable was not known in that law. The texts quoted relate to questions betwixt seller and purchaser. The solid principle in the law of Scotland is, that things moveable in their nature may be heritable *destinatione*, such as bonds to heirs and bonds with substitutions. On the other hand, wadset-money, after requisition, becomes moveable, because such is the will of the party. When materials are adapted to a particular heritable use, if they do not go to the heir they may become good for nothing. Here intention is, in great measure, carried into execution.

Eskgrove. Intention alone is nothing; but, wherever there are overt acts, I cannot depart from the sense of the parties.

Justice-Clerk. Materials may be collected, and yet the work never exe-