1755

HIS MAJESTY'S ADVOCATE *v.* URQUHART.

it into a proper one; nor does it make any difference that the wadset is part over feu-duties, and not entirely of lands.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutor complained of be, and the same is hereby affirmed.

For the Appellant, *A. Hume Campbell, Al. Forrester.*

For the Respondent, *Wm. Grant, W. Murray.*

His MAJESTY'S ADVOCATE, - - *Appellant.*
WILLIAM URQUHART of Meldrum, Esq., *Respondent.*

House of Lords, 6*th February*, 1755.

DECREE OF SALE.—PATRONAGE.—TESTING CLAUSE.—SASINE.—1*st.* A decree of sale does not cut off the right of or exclude parties not called in the ranking and sale; and the Act 1695 does not protect a purchaser in such a case. 2*d.* A contract as to patronage sustained, though the witnesses' designations to the subscription of one of the contracting parties were not inserted in the body of the deed. 3*d.* Found no objection to a sasine that the notary's docquet did not mention the particular symbols used in passing infeftment, or bear the notary's motto affixed to his signature, the sasine being eighty years old, and possession having followed upon it.

No. 108. THE respondent believing that under the titles of his estate of Cromarty, purchased at a judicial sale, he had good right to the patronage of the church of Cromarty, on the occasion of a vacancy occurring presented a minister to the vacant benefice. But his Majesty's Advocate for his Majesty's interest having disputed this claim, and stated the Crown's pre-

ferable right before the Presbytery, the Presbytery rejected his presentation, whereupon the present action was raised by the respondent. His summons set forth that the Crown had in 1588 given the patronage by grant to William Keith of Delny, who disponed it to Sir Robert Innes, from whom the estate of Delny and patronage of the parish of Cromarty were purchased by Sir George Mackenzie in 1656; and from him and his creditors these were purchased by the respondent conform to decree of sale, which decree he contended must be held to exclude the Crown's right. In defence it was stated, 1*st*, That the Crown had not been called to or made a party to the ranking and sale, and therefore was not bound by it. 2*d*, That the Crown came in place of the Bishop of Ross, who was patron before the abolition of episcopacy; and it was admitted as stated above, that the Crown had, when patronage fell into its hands at the Reformation, executed the grant in favour of Keith in 1588, but patronage being again restored in 1606, the Bishop of Ross, to whom it originally belonged before the Reformation, having claimed the same, an agreement was come to in 1636 with Sir Robert Innes their possessor, to which the Crown and the Bishop were parties, by which the Bishop was to have back the patronage of the church. Accordingly the Bishop received back his patronage of the parish of Cromarty, and in his person it stood vested at the final abolition of episcopacy in 1641, when it again reverted to the Crown. In answer it was maintained by the respondent that the Crown's title was objectionable in many respects. In particular, the agreement founded on, whereby the Bishop, after the restoration, got back the patronage, was null and void, in consequence of the wit-

1755.

HIS MAJESTY'S ADVOCATE v. URQUHART.

nesses to Sir Robert Innes' subscription not being designed in the testing clause.

The testing clause ran thus:—"In witness where-" of all the said three parties have subscribed thir " presents. Whilks are written by John Dick, servi-" tor to John Gilmour, Writer to his Majesty's signet, " day, place, and year of God above written: Before " these witnesses, ——— ——— and John Earl of " Traquhair, High Treasurer of Scotland, witnesses to " the signature of his Majesty, the said sixteenth day " of May. And before Walter Hay, Advocate, and " Peter Bayne, witnesses to the subscription of the said " John, Bishop of Ross. And before John Innes, Mr " William Innes, and Alexander Livingstone, witnes-" ses to the subscription of the said Robert Innes of " that ilk, At the day of the year of " God 1636."*

The witnesses to Sir Robert Innes' signature signed thus:—

JOHN INNES, Witness to Sir Robert Innes of that ilk his subscription.

Mr WILLIAM INNES, Witness to the samen.

ALEXANDER LIVINGSTONE, Witness to the samen.

The contract was signed by nine officers of state for his Majesty, and correctly signed and tested by the Bishop of Ross. The objection applied only to the other contracting party, Sir Robert Innes.

It was also objected that the instrument of sasine which followed on this contract in favour of the Bishop of Ross was null and void, in respect the particular symbols used in infefting in a patronage, namely, the psalm-book and keys of the church, were not used on this occasion, and also that the sasine

* Where the blanks appear, the writing, from age, was worn away.

wanted the seal, and motto of the notary who passed it. 1755.

HIS MAJESTY'S ADVOCATE v. URQUHART.

The Court after full argument "sustained the ob- "jection, that the witnesses' designations are not in- "sert in the body of the contract 1636; but find "that the same may be supplied by condescending "on the designations, and instructing 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 repelled 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. As also repelled 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 repelled the objection, that the precept "under the quarter seal on which the sasine pro- "ceeded, is not produced: And lastly, they repelled "the allegiance founded on the Act of Parliament "1695; and find that the right of the Crown is not "barred by the decreet of sale." July 28, 1753.

On reclaiming petition, the Lords "sustained the "objection that the witnesses' designations are not "insert in the body of the extract 1636," &c. Dec. 18, 1753.

Against these interlocutors, in so far as they sustain the objection that the witnesses' designations are not insert in the body of the contract 1636, the present appeal was brought by his Majesty's Advocate, and a cross appeal by the respondent as to the objections repelled stated to the sasine, and also to those founded on the decree of sale.

Pleaded for the Appellant:—1. At the time the con-

1755.

HIS MAJESTY'S ADVOCATE *v.* URQUHART.

tract in question was executed, neither the common law nor the statute law of Scotland, required that the designations of the witnesses should be inserted in the body of the deed. The Act of Parliament 1579 does not apply, because that act provides for the special case of parties executing deeds who cannot write, and orders two notaries before four witnesses to sign them for him with the view of preventing fraud: That the real meaning and intent of that act was thus special in its nature, no one doubts. When a recent deed lies under suspicious circumstances of having been forged, or fraudulently obtained, the court, in their discretion, might order the witnesses to be designed; but in the case of this deed there can be no suspicion, because the high rank of the parties, and the immediate publication of it in so many records, exclude all idea of fraud. The length of time, too, makes a condescendenceof their designations impossible. Looking, therefore, to the statute 1579, and seeing that it requires only the designation of the witnesses to deeds subscribed by notaries, where the parties themselves cannot write, and also seeing that the present law of requiring the designation of the witnesses was not introduced until 1681, long after the date of this contract, the objection to it on that ground ought to be repelled. 2. In regard to the cross appeal, there are no fixed symbols of infeftments for patronages, and it is sufficient that the Bishop of Ross' sasine bears, that the usual solemnities in like cases were observed, which necessarily supposes that the correct symbols were used. 3. And as to the notary's attestation, it is sufficient that it contains at full length the notary's subscription and attestation; and it was no objection to the sasine, that his motto and cypher are not

copied into the record, as there is no law requiring such to be done, and no invariable practice on the subject. 4. As to the decree of sale, the Act 1695 has nothing to do in the present case. That act secures to purchasers of bankrupt estates every right which the bankrupt or his creditors had; but the appellant is not a creditor. The act never meant to protect such sales against the right of third parties, not called as parties to the sale, and whose estates had been erroneously disponed by the decree of sale. The present patronage belonged to his Majesty, and not to Sir George Mackenzie, the bankrupt, at the date of the decreet of sale, and so could not be carried off by it.

Pleaded for the Respondent:—1*st*, The law of Scotland requires to the execution of all deeds that the names and designations of the witnesses be inserted in the body of the deed. The Act 1579, although apparently applying to those cases only where writs are subscribed by the aid of notaries, has been construed by several decisions, to refer to all other deeds; but, at same time, contrary to the spirit and intendment of that act, a rule had crept into practice, of allowing the designations to be supplied by condescendence. The latter rule was expressly abolished by the statute 1681, which also enacted that in all deeds of whatever nature, whether subscribed by the parties themselves, or for them, by the aid of notaries, that the designations of the witnesses must be insert in the deed, consequently that the contract in question is null and void, without the designations of the witnesses to one of the subscribing parties thereto. 2*d*, As to the respondent's cross appeal, it is evident in law, that the symbols in giving sasine are essential. Here none are mentioned, and

1755.

HIS MAJESTY'S ADVOCATE *v.* URQUHART.

the usual symbols of patronage, being a psalm-book or the keys of the church, these not having been used, the sasine is thereby rendered null. 3*d*, Further, according to the law of Scotland every notary is bound, in passing infeftment, to use a certain motto or sign added to his subscription, the object being thereby to impose a check against forgery and fraud; and in this case the notary not having used such, the same is null and void. 4*th*, If the purchasers at judicial sales were to have their purchases evicted from them, on latent deeds of the bankrupt, or those from whom he derives right, it would entirely destroy the faith and credit due to such sales, which are esteemed the best security in Scotland. By the words of the Act 1695 the purchaser is for ever exonered, and the lands purchased disburdened of the debts and deeds of the predecessor of the bankrupt, from whom he derives right. According to the plain intention of the Act, they ought to be disburdened of the debts and deeds of the author, or first donor, from whom the bankrupt derives right; for the mischief to the purchaser is the same, whether the estate be evicted by the deeds of the one or the other. Besides, he ought to have appeared in the sale, by the forms of which all parties concerned are apprised; and he is not *in bona fide* to say that he was not a party to the ranking and sale.

After hearing counsel, it was

Declared that the want of the designation of the witnesses to the subscription of Sir Robert Innes in the contract of 1636 *is suppliable, and is sufficiently supplied, in the present case, by the subscription of the other parties appearing to have signed that contract, the length of time, and other adminicles, proved in the cause, without any conde-*

scendence. And it is therefore ordered and adjudged that the said interlocutor of the 28*th July* 1753, *and the interlocutor of* 18*th December following, adhering thereto, in so far as they sustain the objection, That the witnesses' designations are not inserted in the body of the contract of* 1636, *and require any condescendence, be, and the same are hereby,* reversed; *and that the said objection of the want of designation of the said witnesses be repelled. And it is further ordered and adjudged that the said cross appeal be, and is hereby, dismissed this House, and so much of the said interlocutor of the* 28*th of July* 1753 *as is therein complained of be, and the same is hereby, affirmed."*

For the Appellant, *W. Murray, R. Dundas.*
For the Respondent, *A. Hume Campbell, C. Yorke.*

Note.—In the Court of Session the judges said, That of necessity the witnesses must be designed. Therefore lapse of time won't free from nullity. In regard to non-use of the proper symbols and the notary's motto, they repelled these objections, the sasine being eighty years old, possession had upon it, and the practice as to these solemnities at the time not being uniform.—M.S. on Sess. Papers.

Lord Kames observes, Dec. p. 80:—" It appears to me a very clear point, that, before the Act 1681, it was not a necessary solemnity in an obligation subscribed by the granter, that the witnesses should be designed, or so much as be mentioned. By the common law, sealing was sufficient. The Act 1540 made the subscription of the party essential, without any other form than that the subscription should be in presence of witnesses. It was not even made necessary that the witnesses should be named. The Act 1579 relates only to deeds subscribed by notaries in place of the party. This is an extraordinary power, and the legislature justly thought that it required extraordinary checks. A deed subscribed by the party himself is in a very different case. Originally sealing was thought sufficient; the subscription of the party was made necessary no earlier than 1540; and in the

1755.

MURRAY
v.
THOMSON.

1579 the subscription of the party was in all appearance reckoned of itself a sufficient security against forgery, without any other check. Therefore neither the words, nor spirit of this statute, comprehend those who are witnesses to the subscription of the party himself."

In this case the general question of the effect of a decree of sale obtained by a purchaser, at a judicial sale, against the right of a person not called in the sale, was debated, and decided to be ineffectual as a bar to that person's right.

This part of the case is founded on by Erskine, B. II. tit. 12, § 63.—Adopted by Professor Bell, 2 *Comm·* p. 321, and recognised in the case of Middlemore, 5th March 1811, *Fac. Coll.*

[M. 7873.]

JAMES MURRAY, Esq., Receiver-General of the Customs in Scotland, and his MAJESTY'S ADVOCATE, } *Appellants.*

ANDREW THOMSON and OTHERS, Creditors and Adjudgers, - - - } *Respondents.*

House of Lords, 24*th February* 1755.

CROWN'S PREROGATIVE.—Crown has no preference for revenue debt over real estate—its preference only extends over moveable estate in Scotland.

No. 109. JOHN BURNET was owing His Majesty's Customs L.2616, being the duties on tobacco imported by him. A writ of extent was issued and certain sums recovered against his personal estate, by which the debt was reduced to L.1578, 13s. 5d. sterling. For this debt the Crown adjudged his real estate, and was infeft; and within a year and day of that adjudication, the respondents, also creditors of Burnet, adjudged in like manner his real estate. The question was, whether the Crown had a preferable right over the real estate to the other adjudging creditors.

The adjudging creditors, subsequent to that of the Crown, maintained, that the Crown had no prefer-