Lord Mackenzie. There appeared to me a topic raised, if not an important argument in the cause, that had not been sufficiently dealt with in the Court below, as far as I was favoured with the opinions of the Judges who decided the cause, and I postponed advising your Lordships to affirm till I examined the reasons given to support that view of Lord Mackenzie's. I will not say that the result of my reading upon the point, and looking into the authorities upon it, has entirely removed the difficulty from the way, or taken the doubt out of my mind which the views of Lord Mackenzie were calculated to raise. Nevertheless, though he certainly still may be said to have raised a difficulty, it is not so insuperable as to overbalance the authorities which I find on the other side, and although this is a question of strict Scotch law conveyance, and upon a question touching the rights of real property, if I found that their Lordships had taken a view that was contrary to the best opinion I could form upon balancing their own reasons, and upon examining the authorities upon which they assumed to be bottomed, I should, as I stated before, have had no hesitation conscientiously to give that difference of opinion in favour of the party entitled to the benefit of it, and have advised your Lordships to reverse the judgment below; yet as I do not see that the difficulty is insuperable, I shall humbly advise your Lordships to affirm the interlocutor appealed against. Sept. 23, 1831.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

RICHARDSON and CONNELL — MONCRIEFF, WEBSTER, and THOMSON, Solicitors.

JANET and ELIZABETH KIBBLES, Appellants.—*Mr. Murray*—*Dr. Lushington.* No. 42.

JOHN STEVENSON and others, Respondents.

Sasine.—*Writ.* 1. Found (affirming the judgment of the Court of Session), that a precept of seisin is not exhausted by an unrecorded infeftment. 2. What discrepancy between the signature of a witness to a marriage contract and the name in the testing clause held not to invalidate the contract, or, on that ground, to render null an infeftment taken upon the contract.

JAMES STEVENSON married Marion Spreull, the eldest of three sisters, heirs portioners and infeft in the lands of Braehead Sept. 23, 1831.

1ST DIVISION.
Ld. Mackenzie.

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of Thornly. By her he acquired one third of these lands, and the other two thirds he acquired by dispositions from the co-heiresses, with consent of their respective husbands, on which he was infeft, his wife remaining infeft in her own portion. His son, James Stevenson, married Janet Johnstone; on which occasion James Stevenson senior, with his wife Marion Spreull, became parties to the contract of marriage, inter alia, disponing, assigning, and conveying "to and in favour of the said James "Stevenson junior, and the children to be procreated of the "said marriage, whom failing, his nearest heirs and assignees "whomsoever, all and whole the thirteen shilling and four-"penny land of Braehead," &c.; and in consideration of 200*l.* sterling, or such other sum as Janet Johnstone might bring from her father's succession as tocher, during her marriage, James Stevenson the son became bound to pay her an annuity of 15*l.* sterling from the rents of Braehead. The deed farther contained an obligation on James Stevenson the father and Marion Spreull to infeft James Stevenson the son in fee, and his spouse Janet Johnstone in life-rent, and in security of their respective provisions, with procuratory of resignation and precept of sasine.

The testing clause bears the contract to have been subscribed by Janet Johnstone and Alexander Speir, one of her trustees, before James Stevenson in Corseford and James Stevenson in , but the subscription is "James Stven."

Sasine was taken on the contract in favour of James Stevenson and Janet Johnstone, but it was not recorded in terms of law. A second infeftment was taken (25 Dec. 1793) on the same precept in favour of James Stevenson and the children of the marriage in fee, and Janet Johnstone in life-rent security of her annuity, and the sasine was (22d Feb. 1794) duly recorded.

The issue of the marriage were James Stevenson the eldest son, Janet Stevenson the wife of Robert M'Nair, and John and Robert Stevenson.

James Stevenson (the eldest son) on attaining majority in 1817, disregarding the contract of marriage, entered into possession, and expede a service as heir in special to his grandfather and grandmother, obtained a precept of Clare constat from the superior, and took infeftment; he also expede a general service as heir to his father, proceeded to make up titles, passing by his father, as if he had died in a state of apparency. He contracted

large debts, for which, with advice and consent of his mother, he granted heritable securities for 3,350*l.* sterling. These, by original contraction or by assignation, came into the possession of Janet and Elizabeth Kibbles. Sept. 23, 1831.

Having become still more embarrassed in his circumstances, the Kibbles contemplated availing themselves of the powers of sale contained in their securities; but the debtor's brothers and sisters made up titles under the contract of marriage, 10th Aug. 1793, which they insisted excluded the titles made up by James Stevenson the eldest son, and consequently the heritable securities granted by him. The Kibbles thereupon raised an action of reduction of the marriage-contract, and maintained, in point of law,—1. That the marriage contract was null and void, in respect that one of the witnesses is not designed at all, the designation being left blank, and the subscription being apparently by a person of a different name. Of consequence no sasine could validly be taken upon the deed. 2. And that the sasine alleged to have been taken in August 1793, not being duly recorded, can have no effect in competition with third parties, and it was incompetent to take a subsequent sasine upon the same precept; and consequently the sasine said to have been taken on the 25th December 1793, and to have been recorded on the 22d of February following, was null and void.

On the other hand the Stevensons contended,—1. That James Stevenson tertius, who was son of the marriage, and served heir to his father, having no right to make up titles in disregard of the marriage-contract, and not being entitled to pursue a reduction of that contract, the pursuers, who derived right solely from James Stevenson tertius, were in like manner barred from pursuing a reduction of the contract. 2. That they were further barred from pursuing a reduction by their homologation and acknowledgment of the contract, appearing from their having taken their bonds from Janet Johnstone, who had no right whatever except under the contract and her husband's infeftment thereon. 3. That the pursuers, being in the knowledge of the contract, and being certiorated by the record that infeftment had been taken thereon, and this infeftment showing the right the defenders had to the lands, were not in bonâ fide to take securities from James Stevenson, in defraud and prejudice of the defenders' rights. 4. That the incompleteness of the testing clause of the

Sept. 23, 1831.

contract, in so far as regards the subscription of Janet Johnstone cannot at all affect the validity of the disposition by James Stevenson senior and Marion Spreull, contained in that contract. Even as to Janet Johnstone's subscription, the competency of objecting to the imperfection of the testing clause was removed by the rei interventus of the marriage. And 5. that the objection to the validity of the sasine taken in December 1793 was not well founded in law, there being no incompetency in taking a second infeftment where the first has not been recorded, particularly if it be defective in the solemnities required by law, and altogether void and null, as is the case with the unrecorded sasine.

The Lord Ordinary sustained the defences, assoilzied the defenders, and decerned, with expenses, adding in a note, that "he does not rest upon the objections to the pursuers' title; he "decides the case upon the merits, but thinks it best to leave "the whole cause together."

The Kibbles reclaimed to the Second Division of the Court, but their Lordships, May 25, 1830, "adhered to the interlocutor "submitted to review so far as it sustains the defences against the "plea of the pursuers, founded on the objection to the testing "clause in the contract of marriage, and to this extent refuse "the desire of the reclaiming note, and decern. But as to the "second objection against the validity of the infeftment produced by the defenders, upon the ground that the precept upon which it proceeded had been exhausted by a prior sasine, and in "order that this point may be finally settled, appoint the record "and cases for the parties to be laid before the Lords Ordinary "and the Lords of the First Division of the Court for their "opinion."

The opinions * of the Lords of the First Division and of the Lords Ordinary having been returned, and a majority of their

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* *Lords President, Gillies, Meadowbank, Mackenzie, Corehouse, Newton, Fullerton, and Moncreiff.*—The question on which our opinion is asked is certainly one of considerable nicety, and various difficulties and anomalies occur in whichever view it is considered. But, on the whole, we are of opinion that the precept of sasine was not exhausted by the unrecorded sasine, and that it was competent to execute that precept of new by taking and duly recording a second sasine. The difficulty arises from the peculiar terms in which the act 1617 is worded, as it does not, in a single word, declare that a sasine not duly recorded "shall be null," but that the same shall "make no faith in judgment, by way of action or exception, in prejudice of a third

Lordships having concurred in opinion with Lord Mackenzie, the Second Division, December 18, 1830, adhered to the interlocutor complained of. Sept. 23, 1831.

" party who hath acquired a perfect and lawful right to the said lands and heritages; " but prejudice always to them to use the said writs against the maker thereof, his " heirs and successors." But we are of opinion, that, in fair construction, this does amount to a declaration of nullity. The exception as to the maker, and his heirs and successors, appears to be mere surplusage, for a charter or disposition would be good against the granter and his heirs, even though it did not contain a precept of sasine; or, perhaps, this exception was added ob majorem cautelam, lest it should be supposed that without it a man might object to a deed granted by himself; and we cannot possibly suppose that it could be the intention of the legislature to make a distinction in this respect (when none exists in reason and expediency) between sasines and resignations ad remanentiam. We are the more inclined to this opinion because all the difficulties of the case were fully considered by both Divisions of the Court in the cases, 16th June 1814, Kibble v. Sir John Shaw Stewart, in the Second Division, and that of 2d December 1818, Baxter v. Watson, in the First Division; and to the same effect there is the case, in 1818, of Dr. Keltie, decided by the Second Division, and that, too, in a competition with creditors. Therefore, on the whole, as we think that the act 1617 is capable of this construction, and as this interpretation of it is certainly the most expedient and analogous to the undoubted law in the case of resignations ad remanentiam, we are of opinion that the second sasine in this case is not null by reason of the precept having been exhausted by a prior sasine not duly recorded.

Lord Medwyn.—After the opinions which have been given, it is with great diffidence that I express the doubts which I still entertain. But when I contrast the terms used in the act 1617, c. 16, with those in prior and subsequent statutes, which, in brief and apt terms, declare a nullity; and, further, when I consider the interpretation put upon them by the judges who were contemporary with the enactment, I have great difficulty in holding that an unregistered sasine is null to all intents, and that a proprietor in that situation has nothing more than a mere personal right like a disponee uninfeft. Thus, by 1555, c. 29, it is declared, that a writing or instrument, bearing or containing a reversion, " sall mak na faith bot gif it be insert" in the register; and, by 1599, (vol. iv. p. 184, new ed.), sasines, &c. are to be registered within forty days of their dates, " otherwise to be null, and to mak na faith in judg- " ment nor outwith, and the said nullity to be resavid be way of exception;" and after appointing local registers the act concludes, " and that nane of the saids evidents be of " force, strength, or effect to ony intention, bot to be null and of nane avail, except the " same be registrat as said is." Between these statutes, which import absolute nullity, and the act 1617, c. 16, there is the most marked distinction, implying, as it would seem, an intention not to make non-registration an absolute nullity, but only that, as a latent right, it should not stand in the way of a competitor claiming by a sasine duly recorded; for it provides that, if the writs shall not be registered within sixty days, they are "to make no faith in judgment by way of action or exception." If the clause had stopped here, the nullity would have been absolute against all, except, of course, the granter and his heir, who could not refuse to fulfil an agreement lawfully entered into, whether infeftment had followed on it or not; and here I think it would have stopped, or would have adopted the phraseology already known and recognised in

Sept. 23, 1831. The Kibbles appealed. Their legal arguments, as well as those maintained by the respondents, were founded on the pleas

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the strong and unambiguous language of the act 1599, or the more abbreviated form of 1555, if absolute nullity had been intended; but, instead of doing so, it proceeds to define and limit those against whom an unregistered sasine is to bear no faith, viz. " in prejudice of a third party who hath acquired a perfect and lawful right to the " said lands and heritages, but prejudice always to him to use the saids writs against " the partie maker thereof, his heirs and successors." It has been said that the terms used import merely that an unregistered sasine is null, but that there is a personal exception against the granter or his heir pleading the nullity. But I do not think that this is the correct interpretation of the statute, for, in construing a statute, I understand these rules of interpretation should be observed; 1st, As far as possible to give effect to every material word of the statute; 2d, That where, in the same enactment, or in enactments on the same subject, a variation in the phraseology occurs, attention should be paid to this variation; and, 3dly, That the contemporaneous interpretation of lawyers and judges should be adopted, rather than any more recent, as most likely to discover its genuine meaning. Now, it seems not disputable that the judges who probably framed the act 1617 did not interpret it so as absolutely to nullify an unregistered sasine, but to a certain extent gave effect to it, even when not used against the granter or his heirs. On 25th March 1623 Durie reports this case: " In an action pursued by the Laird of Dunipace contra his tenants, " wherein the pursuer's sasine being quarrelled for not being registered in the clerk " register's books within the space of sixty days after the date thereof, the Lords " repelled that allegeance, because they found no person had interest to propone that " nullity, but a third person who had a lawful right to the lands standing in his " person, as the words of that act itself purport, viz. the act of parliament 1617."—Mor. p. 13538. And again, 24th March 1626, " A purchaser, though his sasine " was not registered, was found preferable to the seller's creditor arresting the rents " in the tenant's hands, for the same was a real right with regard to the seller and his " creditor, and consequently against the tenants, who did pretend no right to the " property."—Mor. p. 13540. It may be remarked, in passing, that Lord Haddington, who became President of this Court in 1616, did not resign that situation till February 1626. He was also Secretary of State, and no doubt was the author of the improvement upon the secretary's register introduced by the act 1617, as he is known to have been of the acts passed in Parliament 1621. He was also the first keeper of the new register, and cannot be supposed ignorant of the meaning of the act, or to have put a wrong interpretation upon it; yet, in the first of the above cases, decided, when he presided in the Court, the person entitled to object want of registration is clearly defined in terms of the act, not that the sasine is null; and by the second the same is held good, not because of the personal objection against the seller, or those in his right pleading it, but it is distinctly held to be a real though qualified right. In like manner, in Lord Cranstoun v. Scott, 18th February 1631, an allegeance was repelled, " because a sasine not registered makes a real right, though " it will not give preference in a competition."—Mor. p. 13545. In Rowan v. Colville, 21st July 1631, to an unregistered sasine of a mill, with the multures of the defender's lands, the defender could not object nullity, as he had no right to the mill.—Mor. p. 13546. At a later period the same view was taken, and a superior's sasine, though not registered, was found a good title in a declarator of non-entry against the

in law relied on in the Court of Session, and these were respectively supported by the authorities mentioned below. Sept. 23, 1831.

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vassal, "who did pretend no right to the superiority."—June 12, 1673, Faa v. Lord Powrie, p. 13551. Again, it was found that "a sasine unregistered was not absolutely null, but may be an active title in an improbation of other rights on that land."—November 14, 1678, Dalmahoy v. Ainslie, p. 5170. Thus, for more than half a century after the passing of the act 1617, the interpretation put upon it was uniform, and not importing a total nullity, as is prescribed by the act 1599; and as the object or motive of these two acts, as indicated in their preamble, was different, this may account for their different effects. The act 1599 was to prevent injury by the forging of private writs, "the same being kepit obscure, quile the moyane of the tryale of "the falset of thame be taken away;" hence they were to be registered within forty days, otherwise to be null, as if they had been forged. The act 1617, again, was to prevent an evil of a different kind, the mischief arising from double alienations "by "the fraudulent dealings of parties, who, having analzied their lands by their unjust "concealing of some private right made by them, render the subsequent alienation "done for great sums of money altogether unprofitable." Hence it was provided that the specified writs should be made public by registration, and if they remain private, in consequence of not being registered, they are not to bear faith against the party to whom the lands are analzied, "having acquired a perfect and lawful right to "the lands." To remedy the evil to be provided against it was not necessary to go farther, and accordingly the enacting words appear expressly limited to the object in view, and the interpretation put upon the act during a century at least did not extend its meaning. The authority of Stair is referred to as importing the absolute nullity of a sasine unregistered, where he says, "they are null." Considering the numerous cases in his own time where effect was given to such a sasine when not used in competition for the lands, it would have been singular if he had so laid down the law; but he clearly means null, in terms of the statute, against third parties; for, in treating, in a previous page, directly of the subject of sasines, he mentions the necessity of registration as required by 1617, c. 16, and recites the precise terms of the act and it is only when he comes to discuss the question, what would be the effect if a sasine were given in to be recorded, and the keeper were to mark the same registrate, but yet not insert it in the register, that he uses the above terms, importing no more than the nullity, so far as it goes, by the act; and accordingly when, at a subsequent part of his work, he treats of competition, he says, "Sasines, inhibitions, and inter-"dictions are ordained to be registrate, as before expressed, or otherwise they are "null as to any who have a complete right, who thereby are preferable." Again, instruments of resignation ad remanentiam were, by 1669, c. 3, to be registered within sixty days, "otherwise the said resignations to be null." It has been said that there was no reason for making any difference between the consequence of not registering this instrument and the writs mentioned in 1617, and therefore as this was declared null, so it must be understood that the others were held to be so too. But, as the resignation could not be quarrelled by the granter or his heirs, if creditors and singular successors were guarded against their ignorance of this transfer of the property to the superior, there was no other party against whom the superior, having the radical right in him, required to use such a title, and therefore the qualification of nullity only against third parties having lawful rights in the lands was not necessary to give the full benefit of the act of resignation to the

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Lord Chancellor.—My Lords, in this case I pass over the defective execution of the contract of marriage by the bride, for the husband

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superior, without injury to the singular successor of the resigner. But whether we can now discover a sufficient reason for the difference of expression, the difference is obvious; and it must be recollected, that at this very time the Court was giving effect to a sasine unregistrate, and not holding it an absolute nullity. If the object of 1669 had been precisely the same as that of the act 1617, and if the simple declaration that it was null was equivalent to that enactment, it is singular that, in subsequently providing for the registration of burgage writs, the same expression was not adopted; but, on the contrary, there is an anxious repetition in 1681, c. 11, of the nullifying clause in 1617, declaring the same "to make no faith "in judgment be way of action or exception, in prejudice of a third partie, who hath "acquired a perfect and lawful right to the said tenements, but prejudice always to "them to use the said writs against the parties makers thereof, their heirs and suc-"cessors." There are statutes besides those already noticed in which nullity, without any exception, is prescribed for want of registration. Thus, as to letters of horning and relaxation, and inhibition and interdiction, by 1579, c. 75, and 1597, c. 268; and I cannot conceive why this simple expression should have been abandoned, if an absolute nullity was meant to be the effect of non-registration of sasines. Therefore, looking to the very precise and guarded expressions of the acts 1617 and 1681, I have great hesitation in giving them such an interpretation as to infer absolute nullity, instead of holding that one possessing under such a title is a feudal proprietor, all whose acts and deeds will be effectual as such, except against those who have obtained a complete competing title to the lands on the faith of the records showing no other sasine over them. Why should not an unrecorded sasine be good (as has been found) in favour of a purchaser against tenants, for removing them, or for pursuing them for rents, or a good title for multures, and even for reduction-improbation of other rights over the lands? A superior, on such a title, has pursued a decree of non-entry; and to these, let it be remembered, there are no contrary decisions. Such a title has never been found ineffectual for those purposes. I should also think, that if a party has granted double conveyances, and sasine has been taken by both disponees, but the last disponee is first infeft, neither sasine being recorded, in a competition between the two the infeftments would be good, and the first would be preferred; the act 1693, c. 13, only supplying an omission in the act 1617, and regulating the preference of those which are recorded. If a purchaser neglect to record his sasine, would a creditor of the seller, arresting the tenants' rents, be preferable, having merely a personal right? If a proprietor, possessing upon an unrecorded sasine, give an heritable bond to a creditor, or a locality to his wife, would these not be effectual against his personal creditors, and preferable to them? and would not the widow be entitled to a terce in virtue of an unrecorded sasine against the personal creditors of the deceased husband? And I conceive, that although a disposition by the husband, or an heritable bond, without infeftment, would not hurt the terce, yet that, if infeftment followed, although not recorded, they would exclude the terce, and be good in favour of the grantee; and when the doctrine of recognition was a part of our law, I cannot conceive that, in the case of alienation by the vassal to a stranger, it would have been a good defence against an action of recognition that the disponee was only possessing on a sasine unrecorded, which certainly was good against the granter, and effectually alienated the fee from him, although the casualty would not be incurred if the

executes it, the two disponees execute it, and it is only to the attestation of the bride's execution that there is an objection; but that leaves no doubt in my mind, for the bride performed her part by marrying her husband; and I agree, therefore, with the learned Judges in the Court below, that the contract is complete and valid. The material question is one of feudal law, whether the precept of sasine contained in this contract has been exhausted by an unrecorded

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disposition was not completed by sasine, or the sasine was null. Further, I would hesitate to hold that an adjudication without infeftment would be a sufficient title to insist in a reduction of a right founded on a disposition or heritable bond upon which sasine has followed, though unrecorded,—see Dundas against Wallace, 10th November, 1683, p. 13283; or that a general service would be sufficient to carry right to a disposition on which infeftment has been taken, and where the only objection is, that it has not been duly recorded, as if it had been merely a disposition without infeftment, or with infeftment on a precept a me, unconfirmed by the superior.—See Douglas against Somervell, 10th July 1713. In short, I must still hesitate about holding that one who is possessing upon a sasine, valid in all respects except that it has not been recorded, has nothing but a mere personal right in the lands, as if his title were a simple disposition; and although I am aware that the opinions indicated in two recent cases tend that way, till the matter is settled by a decision directly in point, I incline to hold by the doctrine so expressly laid down by Erskine, B. 2, t. 3, sect. 40.

Lord Balgray.—I concur in the opinion of Lord Medwyn, as it appears to me to lay down the principles of our law as applicable to the present question, and as derived from our practice, and supported by our best authorities. It is vain to dispute or deny, even at this moment, but that an unregistered sasine must be sustained and must be held as creating more than a mere personal right, when directed against certain persons. This being the case, it is quite contrary to every feudal principle to hold, that the delivery of an heritable subject, viz. the sasine, can be partly given and partly not given. The mandate is given, and the public officer who executes it cannot qualify his own act. The difficulty which has occurred can be very easily remedied by a most obvious and simple legislative interposition. It is not surprising that a diversity of opinion should arise upon the present question, particularly when it may be affirmed, that, ever since the case of Kibble v. Stewart, in 1814, the undoubted understanding of practitioners has been to hold an unrecorded sasine as null, and so to take a new infeftment upon the original precept. Property to a great amount is held at this moment on the faith of that judgment and a subsequent one. This case stands in a most unfortunate predicament. The strict and correct principles of law stand in one way, and the expediency and propriety of a court of justice adhering to their judgments, particularly in matters of form, stand directly opposed on the other.

Lord Craigie.—It seems of importance in this case to consider the effect of a second instrument of sasine, taken upon the same precept with the first, and liable to challenge on other grounds than those introduced by the statute 1617. It is to be observed, that a precept of sasine generally is of the nature of a mandate, and "cannot reach to what has been already done."—See Stair. But, along with the instrument of sasine which follows, it is also of the nature of an actus legitimus,

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sasine, and consequently whether the exhaustion of that precept shall operate to the defeasance of a subsequent sasine. Now, upon this question there appears to have existed considerable doubt at one time, and in consequence of that doubt it is that this case was sent for the opinion of the other judges. Eight of the judges have given an unanimous opinion in favour of the judgment, proceeding upon the principle, that an unrecorded sasine did not exhaust the precept, that the unrecorded sasine was null and void to the intent in question, and was indeed to be passed by as an absolute nullity, and that the precept might be validly executed by a subsequent sasine. Now, in opposition to the opinion of these eight judges, there is first the opinion of Lord Medwyn, who says not one word upon the recent cases, though he says a good deal upon the old cases, no one of which is on all-fours with the present. There is also Lord Balgray, whose doubt it was that gave rise to the

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which cannot be performed in parts or at different times, but at once and without repetition. Where different estates or parcels of land are conveyed in one deed, with a precept of sasine properly adapted to the circumstances of the case, the result is the same as if there were so many different conveyances and precepts, and of course an error or defect, as to one of the estates or parcels of land, cannot affect the validity of the conveyance as to the rest; but where the conveyance or precept of sasine specifies one estate, or one of several parcels of land, by a particular name or description, and infeftment follows in the same lands, or in one of the different parcels of land, under a different name and description, it will not be permitted, in a separate and subsequent infeftment, taken on the same precept, to correct the blunder. In the same matter, if the instrument of sasine is lost or cancelled by the party having right to it, it must be incompetent, in virtue of the same precept, to give a new infeftment; and so, if the instrument of sasine omits material words, or if the notary's docquet has been abridged or altered in the record, the result, it is humbly thought, must be the same. In the case which has been referred to, of Grey against Hope, in 1790, where certain lands contained in the conveyance and infeftment had been omitted in the record, it was unanimously held, although the question occurred in a court of freeholders, that the feudal title was inept; and it surely will not be said that a new infeftment could have been taken, or was attempted, for establishing the right. From all this it seems to follow, that if an instrument of sasine, at one time valid according to the authorities that have been quoted, shall become in part, or to a certain extent, ineffectual in a question with certain individuals, although not as to others, (which is truly the case with an infeftment not duly recorded,) such infeftments cannot be cured by making out another instrument on the same precept; either a new precept must be obtained, or, if that cannot be done, there must be an adjudication in implement of the conveyance, in the same manner as if there had been no precept in the deed. And holding, as it is indicated by the interlocutor of the Second Division (21st May 1830), that the point is yet unsettled, it cannot be thought expedient or just, in virtue of the determinations referred to, to subvert the general law. This could only lead to farther and more dangerous relaxations in the established forms, while, by multiplying infeftments on the same warrant at different times, great confusion would arise in the titles of landed property in Scotland.

hearing in presence in the case of Baxter, and he refers to Kibble v. Stewart in 1814. Lord Medwyn neither refers to that nor to Baxter's case (or at least so generally as to be no reference at all), nor to another case of which we have no account—I mean that of Keltie. But the weight I should otherwise give to the opinion of Lord Medwyn is very greatly impaired by the remarkable fact of his not taking any notice of what appears to have staggered Lord Balgray himself, albeit Lord Balgray, generally speaking, concurs with him. It seems singular enough that the old cases which do not bear upon the point half so much as Kibble v. Stewart have been much commented upon, and that Kibble v. Stewart, which is, as far as the opinions of the judges go, a direct authority in the present case, is in a manner passed over; but I should wish to know whether, upon a question of pure Scotch law,—a practical question of conveyancing, upon which it is of the utmost importance that the rule laid down by decided cases, and followed since those judgments were known, and upon which a vast amount of property is held at this moment,—it would be a judicious thing for your Lordships to unsettle that rule upon the subtlety of the argument contained in some parts of these papers and the authority of Lord Medwyn, who gives these decisions the mere passing observation of being "two "recent cases" indicating opinions adverse to his, and who takes no notice of the still more important fact of their forming the rule to practical men by which conveyancing has been carried on for the last seventeen years? My Lords, when you look at the authority of Lord Balgray on the other hand, he agrees with his learned brother generally; but he says, that ever since the case of Kibble v. Stewart "the undoubted understanding of practitioners has been to hold an "unrecorded sasine as null, and so to take new infeftment upon the "original precept"—that is to say, that the original precept was not exhausted; if it had been exhausted upon the first sasine, a new infeftment could not validly have been taken; and he adds, "Pro-"perty to a great amount is held at this moment on the faith of "that judgment and a subsequent one:" meaning the case of Baxter. Lord Balgray was the only judge who differed with his learned brothers in Baxter's case, they holding that a precept was not exhausted by an unrecorded sasine. That judge raised the only doubt upon the subject, and in consequence of his Lordship's doubt a hearing in presence was ordered, but the parties chose to have the case settled out of Court. No doubt, we are told that the opinion of a most learned counsel, the dean of faculty (Ross), was in favour of the precept being exhausted; but if his opinion had been of any great weight, as set against the decision of the judges in Kibble and in Baxter, we have the explanation of a learned judge who referred

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to that opinion, and says, that it rather proceeds on the special consideration, that the title there was so doubtful that a purchaser could not be compelled to accept of it. Dr. Keltie's case has also been referred to, but we are not informed of its circumstances. Such is the predicament in which the present question stands.

Now, this gives rise to the natural question, whether the law was altogether changed by Kibble v. Stewart, followed by Baxter v. Watson, or whether it did more than declare, for the first time, that which had before been the law?—and I take upon me to say, on the showing of Lord Medwyn himself, though some of the cases he quotes support his general doctrine, that none of them comes up to his position; namely that they are contrary either to the decision in Kibble v. Stewart or to the decision in Baxter v. Watson, or negative the decision pronounced by so great a majority of the judges in the present case; not one of those former cases could be cited as upon all-fours with those two, or with the present. Well, then, I look to Kibble v. Stewart, and to the very learned authority of the late Lord Meadowbank, and the most acute argument he holds upon that case, which is delivered with the greatest precision, and with the most unhesitating confidence. This is of the more importance, because, although a great feudal lawyer, with all the qualities a judge should have, he was very prone to question and to doubt. They were all learned doubts, and deserving of attention, but still this was the temper of his mind; nevertheless he lays it down with the greatest decision, that an unregistered sasine is null and void; but he adds the very important observation, that there may be parties who cannot set up the nullity; for instance, the granter and his heirs, tenants and others claiming through him; and this shows the little value of some of the cases quoted, because what signifies it to show, that in an action of removing brought by a landlord against a tenant, fraudulently or otherwise misconducting himself, the tenant was not allowed to set up the nullity? But does it follow that the nullity in the title does not exist—that the title may not be absolutely annulled, though the tenant may be estopped by this tenure to dispute his lord's title? I take that to be the rule of law in Scotland, that the tenant cannot set up an objection to the landlord's title; the landlord may remove him, and the tenant is the last person who can say that the landlord's sasine is a nullity in itself. Therefore, all the cases going upon estoppels, by which certain persons are barred from setting up a certain objection to the title of another, are, in my mind, of extremely little avail in the present argument. There is no doubt as to the statute which mentions resignations and the statute which deals with sasines; the one uses the expression of "no effect," and

the other says, " make no faith in judgment." But upon looking into the text books referred to on the other side—Erskine for instance, (and I have the greatest deference for his works, particularly his first work, which had his own revision when it passed through the press,) I think it is not difficult to show that the doctrine contended for is somewhat repugnant to the doctrine as it is there stated, and to Lord Bankton's a little more so. But it is said that Professor Bell, in his valuable Commentaries, gives token of his opinion being the other way: yet it is fit to observe, that under the very head of exhausting the precept of sasine, (I do not cite him as any authority, for a living author cannot be cited in a court of justice, but as evidence of the understanding and practice of conveyancers, and so far affording a strong reason for standing by the later current of decisions, between which and the former decisions I can see nothing like a direct contradiction,) he says, " There is no case " which in all respects can be considered a precedent to settle this " important point; but the weight of authority and of judicial " opinion seem to authorize the conclusion, that the precept in such " a case is unexhausted ;" and he cites Baxter and Kibble, the opinion of Lord Meadowbank, and a manuscript collection of Lord Pitfour's opinions. Now, if all that is to be said in derogation of Professor Bell, as bearing witness to the sense of conveyancers upon the subject, is, that till the case of Kibble v. Stewart he held the rule to be one way, and now holds it to be another way, this, instead of operating against him, is an argument to show his sound sense, for what can be more rational than taking a new view, if the thing has become new? Nevertheless I see no ground for holding any novelty to have been introduced. The case of Kibble was only collecting what had been floating in opinion, affixing a judicial character to what had not before obtained it; but even if it had been an overturning of old decisions, can any thing be more judicious than for the learned professor to lay it down that he can no longer teach his pupils and the world that the law was so, or that the practice of conveyancers ought to be so; but that, since those decisions, the weight of judicial authority and the weight of learned opinions are decidedly the other way? I hope we shall not have this question mooted again, because some learned judge doubts and says, " Let us " have it heard," or because some barrister doubts, and dies before he makes his award. I have mentioned what detracts from the value of Lord Medwyn's opinion. He has taken an unilateral view of the decisions, totally neglecting the cases which did bear upon the point, and relying upon those which did not; that takes away very much from the weight of his authority, and shows that it is a theoretically biassed opinion upon the subject. As to Lord Craigie,

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he is not open to that observation, but he does not venture on so strong an opinion, and Lord Balgray in effect coincides with the majority of his brethren; for whatever his vote may have been, what stronger reason could he give for adhering to the course of decisions, which for seventeen years have been regarded as making the law, than that a great amount of property is held by no other law, and by titles invalid if those decisions are wrong? In conclusion, I earnestly hope that this case may, upon the weight of its own authority, (not merely upon the weight of your Lordships' sanction of that authority,) be held to fix the law upon this important subject; and though it may have been as well that this should be appealed here, I cannot help thinking that, to bring up such a case—nearly an unanimous decision, founded on previous decisions and the practice of conveyancers, with no direct decision the other way—was resorting to your Lordships with a question which it could not be expected your Lordships would reverse, and which it was infinitely more probable you should affirm. Nevertheless the case has come here, and it is necessary you should deal with it; but I should hold that I had not well discharged my duty to your Lordships if I had cast a doubt upon the question by going so far as hearing the respondents' counsel, thus throwing parties into a state of anxiety whose titles have been founded for the last seventeen years to so large an amount, as Lord Balgray says, upon the cases cited. No encouragement or tolerance will be given to any persons who, with any theory upon this subject, shall seek to upset those titles; and any one seeking to upset them in a court of justice, who shall find judges still doubting on the law, will, if they come to your Lordships' House, receive very little countenance to their endeavours. I therefore move your Lordships to affirm the interlocutor complained of.

The House of Lords ordered and adjudged, That the interlocutor complained of be and hereby is affirmed.

Appellants' Authorities.—Creditors of Dick, 20th July 1744 (5721); Bell, 5th Dec. 1707 (16,888); Graham, 26th Dec. 1752 (M. 19,902); Russel, 17th Dec. 1766 (16,904); Archibald, 17th Dec. 1787 (M. 16,907); Douglas, Heron, and Company, 28th Nov. 1787 (M. 16,907); Abercrombie, 15th July 1787 (M. 17,023); Lockhart, 16th Feb. 1815 (F. C.); 1 Bell, 579, 696; stat. 1817, c. 16; Keith, 17th Dec. 1703 (——); Gray, 24th March 1626 (M. 505); Rowan, 21st June 1638 (M. 13,546); Lord Cranstoun, 18th Feb. 1631 (M. 13,545); Faa, 12th June 1673 (M. 9307); Dalmahoy, 14th Nov. 1678 (M. 5170); Lord Dunipace, 25th March 1623 (——); Marshall, 13th Nov. 1623 (M. 6840); Simpson, 28th June 1678 (M. 13,555); 1 Bell, 579, 696; Duke of Montrose, Feb. 1728 (——); 3 Ersk. 3, 49; 2 Mackenzie, 3; 3 Ersk. 3, 40; 2 Ross's Lectures, 210; Bell on Titles, 245.

Respondents' Authorities.—Cheap, 6th July 1626 (M. 17,014); Nisbet, 10th Dec. 1630 (5,682); Bready, 1st July 1662 (M. 5683); Sinclair, June 1582 (——;) Home, 4th Feb. 1629 (——); Lauder, 15th Feb. 1637 (——); Wemyss, 35th July 1661 (——); Bonnack, 22d June 1748 (M. 1,695); Home, 4th Feb. 1629 (M. 15,280); Lauder, 15th Feb. 1637 (——); 3 Ersk. 8, 48; Kinloch, 4th Jan. 1678; Lord Glenlee in Duncan v. Robertson, 9th July 1813 (——); Waddle, 19th June 1828 (——); Wemyss, 10th Nov. 1768 (9174); Rowan, 21st June 1638 (13,450); Davie, 2d June 1814 (——); Keith, 17th Dec. 1703 (——); Creditors of Earnslow, 29th Nov. 1705 (——); 2 Stair, 2, 11; Kames's Elucid. Art. 35; 1 Bell, 696; Kibble, 16th June 1814 (F. C.); Baxter, 15th May 1818, 1 Bell p. 692—6; Stat. 1,617. c. 16, 1695 c. 18. Stair, 2, 11, 11; Logan, 1628 (13,342); 1 Bell, p. 692—6.

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ALEXANDER DOBIE—M'DOUGALLS and BAINBRIGGE,—
Solicitors.

GEORGE BRODIE, Appellant.

No. 43.

WILLIAM SINCLAIR, Respondent.

Expenses.—A party raised an action for 219*l.* 10*s.* 3¼*d.*, and the defender offered payment of 11*l.* and 10*l.*, with interest, but subject to such qualifications as did not amount to a tender; decree was pronounced against the defender for those sums, with interest amounting to 42*l.*, and the pursuer was found liable in expenses:—Held (reversing the judgment of the Court of Session), that the pursuer was not liable in expenses.

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2D DIVISION.

IN 1827 George Brodie raised an action against William Sinclair for 219*l.* 10*s.* 3¼*d.*, being the amount of an alleged account. The defender denied the debt, with the exception of 11*l.* and 10*l.*, which he offered to pay, under deduction of a counter-claim of 17*l.* The Lord Ordinary (24th June 1828) sustained "the defences as to all the articles in the account "libelled, except the cash payments on 8th and 9th February "1810, for the sums of 11*l.* and 10*l.*, and decerns for these sums, "with the interest due from said dates, till paid; but in respect "that the expense of litigation in this case had been mainly, "if not altogether, occasioned by the pursuer insisting for the "other items in the account which have not been sustained, "finds the pursuer liable in expenses to the defender, and "authorizes the defender to retain, out of the sum decerned