The same decided 29th November 1758, *Hepburn of Smethon* against ———, but by a very narrow majority.

1758. *July 5.* CLAIM on the ESTATE of ———.

A BILL was drawn, payable to the drawer, who was named in the body of the bill, but he did not subscribe it, only there was a blank indorsation by him upon the back.

The President was of opinion that the bill, as wanting the subscription of the drawer, was altogether informal, and therefore no bill or *literarum obligatio;* but the rest of the Lords thought that this want was supplied by the subscription on the back, which showed that the drawer accepted of the offer of the money by the debtor in the bill, which completed the mutual contract.

1758. *July 5.* IN COURT of TEINDS.

IN a valuation of teinds the lands were under a long tack, which expired in the year 1763, for payment of 600 merks of tack-duty, for stock and teind; but the lands were subset for twenty years for 1000 merks; and there was no doubt but the lands would set at the same rate, or a higher, upon the expiration of the lease. Nevertheless, the Lords unanimously found, that "the constant fixed rent which the lands pay or may pay," in terms of the Act of Parliament, was the rent paid to the master, viz. 600 merks.

1758. *July 28.* EARL of HOME *against* The CROWN.

[Kilk., *eodem die*; and *Fac. Coll. II.* No. 129.]

IN this case it was controverted, Whether there could be any prescription of the right of patronage?

LORD KAIMES said, that there could be none, because there was no continued possession; but in this opinion he was singular. And it was answered by the other Lords, that there were several acts of possession of patronage,—such as the uplifting vacant stipends, drawing the teinds, administrating the benefice by consenting to tacks; and in this way the President observed that a right of patronage could be possessed even while the Act 1690 subsisted, because that act only took away that part of the right which consisted in presentation. It was farther said, that the possession of the beneficed person was, in law, the possession of the person who presented him; so that one single act of presenta-

tion, with forty years' possession by the person presented, completed the prescription; nor was there any hardship in this, because the real patron might bring his declarator, at any time within the forty years, against the person who usurped his right.

There was another question in this case, Whether or not the Crown could prescribe a right to patronage? It was not disputed but that the Crown had the benefit of the statute 1617, as well as a subject; but the question was, Whether the Crown could prescribe a right to patronages as to lands upon no other title than *jure coronæ;* for it was observed that there was a great difference betwixt lands and patronages. The Crown had originally a right to all the lands of Scotland; and no man could have a right to lands in this country that was not derived mediately or immediately from the Crown; but that was not the case of patronages, the greater part of which were originally in the subjects, either by building the church, giving the ground, or endowing it, according to the common brocard, *Patronum faciunt dos, edificatio fundus*; and, therefore, a man in Scotland may have a very good right to a patronage though not derived from the Crown; and my Lord Auchinleck observed, that in the most ancient charters there was no express grant of patronages, but they went along with the lands upon the ground of which the church was built. However, the majority of the bench seemed to be of opinion that the Crown was to be presumed patron *in dubio*, and where no other right appeared.

But the case here was, that this patronage appeared to have been originally the property of the Earls of Douglas, one of whom, in the year 1451, granted a charter disponing the same to a predecessor of the Earl of Home, which charter was confirmed by a charter under the Great Seal, in 1458. As, therefore, the Crown appears never to have had any right to this patronage, or, if it had, being divested by the charter of confirmation above-mentioned, and never afterwards reinvested, it was pleaded that the Crown had no title of prescription.

It carried by a majority of one in favour of the Earl; but, as there was a question about the interruption of prescription, it is difficult to say upon what point the Lords put their opinion,—whether upon the defect of title in the crown, or the interruption.

1758. *August 2.* CLAIM upon the ESTATE of CROMARTY.

IN this case the Lords unanimously determined, that, if a man gives a disposition of his estate, with full powers to alter, innovate, charge with debt, &c. or with the power of redemption upon payment of a rose noble, after the old fashion, it is not in the power of such disponee to contract debts; but the debts so contracted will fly off upon the disposition's being revoked or the faculty of redemption exercised.
