No 211.

Answered; In all courts of law it is required, that an express mandate from such suitors or claimants as are out of the kingdom should be produced by those who act in their name; Bankton, b. 4. tit. 3. § 25. 26.; February 3. 1681, Stewart, No 17. p. 353. Nor does this requisite seem less necessary in a meeting of freeholders than in other courts.

'THE LORDS found no claim properly entered entitling to be enrolled.'

Act. *G. Fergusson.* Alt. *Alex. Wight.* Clerk, *Mackenzie*

S. *Fol. Dic. v. 3. p. 429.* *Fac. Col. No 120. p. 222.*

1781. *January* 17.

Sir JOHN SCOTT of Ancrum, Baronet, and PATRICK KERR of Abbotrule, Esq. *against* Sir JOHN DALRYMPLE of Cowsland, Baronet.

No 212.
The objections to a claim, that there had been a want of form (not essential) in taking the sasine, that there was a confusion in the description of the lands, and that the writer of the disposition was not properly designed, were repelled.

SIR John Dalrymple claimed to be enrolled at the time mentioned in No 97. p. 8681.; and, as his qualification stood upon part of the same lands with Sir Gilbert Elliot's, the same objection was stated upon the decreet of division, and reference was made to the arguments pleaded for and against Sir Gilbert Elliot. But the three following objections were also stated.

In the *first* place, There is a nullity in Sir John Dalrymple's sasine. It bears to have proceeded upon the precept contained in the charter from the crown in favour of Sir Gilbert Elliot; and, although it mentions that a disposition and assignation was granted by Sir Gilbert Elliot, in Sir John Dalrymple's favour, which might, if properly used, have authorised infefting Sir John under the crown-charter; yet the instrument of sasine does not mention that this disposition and assignation was received by the bailie from the attorney, or that it was delivered to the notary, and, by him, or any other person, openly read and published to the witnesses; or that, after such publication, sasine was given to Sir John, in virtue of the assignation. The sasine, therefore, was given, not only contrary to the uniform practice in all such cases, but contrary to the clearest principles of law and common sense; for it was, in fact, the same as a sasine without any warrant whatever. In order to shew the practice, and make the imperfection of the present sasine appear more evident, a copy was subjoined to the petition, with the omissions printed in Italics.

In the *second* place, The lands of Kaimside-park and Kaimsmuir-park, fall under the lot of Sir John Dalrymple's qualification, but are neither in his disposition nor sasine.

And, *lastly*, The writer of the disposition, by Sir Gilbert Elliot to Sir John Dalrymple, is not designed, and, consequently, the disposition itself is absolutely null and void, by the acts 1593, c. 175. and 1681, c. 5. The writer is called John Scott, clerk to the signet; but there is no such person in existence; so that, if the writer's name be truly John Scott, yet surely his designation is false, which comes to the same thing as no designation at all.

No 212.

In answer to the *first* objection, it was *observed*, That there was a distinction made by our lawyers, between the formalities of a sasine and its essentials; but that the publishing and explaining the assignation of a precept was never said to be even a formality, and much less an essential solemnity of the sasine. It may have been introduced into some practice, *ab majorem cautelam*, but was never necessary; and, so far is the practice from being uniform, as set forth by the complainers, that, in the very book which is put into the hand of every notary, as his guide, called, 'The Art and Office of a Notary Public,' there is no more required than what was done in this case, viz. producing and exhibiting the assignation, without a syllable of reading it over, publishing, or explaining. The form in the Supplement of Spottiswood's Styles differs a little from that now mentioned, but still more from the complainer's form, particularly, in so far as concerns this objection. The rule laid down in act 1693, c. 35. respecting the sasine of an heir or assignee, is clearly to the same purpose.

The *second* objection arises from a mistake in point of fact; for Kaimside and Kaimsmuir are only parcels of Kaims-farm, which is all in Sir John's infeftment; and the reason why they got particular names, was in order to ascertain the rent of them by the oaths of the tenants, when the decree of disjunction was applied for. The farm of Kaimes, all excepting these parcels, was in Sir Gilbert Elliot's own possession.

As to the *third* objection, it is confessed that there is here a trifling omission; for the writer, through the hurry of making out different dispositions, wherein he was designed, 'John Scot clerk to Cornelius Elliot writer to the signet,' had, in this, omitted the words, 'To Cornelius Elliot writer.' But though this might seem to fall under the letter of the law, yet it does not fall under the spirit of it. The acts 1593 and 1681 were meant to prevent frauds in testaments, and other deeds, which appeared after the granter's death, where the strictest precaution are necessary. But here both the writer and granter are at hand, to confirm the authenticity of the deed; and the Court have allowed an omission of this kind to be supplied, in cases of much more importance. This was done particularly, in the case of Duke of Douglas against the Creditors of Littlegill, *voce* WRIT. In that case, which was a ranking of creditors, an adjudication was produced, which proceeded on a doqueted account in 1663. The writer of the doquet was not designed; but the Court allowed that want to be supplied by proof.

Replied on this *last* objection; That the acts are so far from being in any shape limited to testaments, that the very deeds expressly mentioned in them are charters and contracts. And, as to the case of the Duke of Douglas, the decision there went upon a relaxation of the act 1593, or a doubt of its meaning. This is evident from a decision collected by Fountainhall, Maxwell *contra* Earl of Nithsdale, *voce* WRIT, where the LORDS found that the practice had

No 212. allowed the condescending upon the writer, or his designation, till that was discharged by act 1681.

Duplied; The freeholders could not judge of the validity or truth of any deed, which was, *ex facie*, complete, as in the present case; and, even suppose a regular process of reduction had been brought, the acknowledgment and homologation of the granter would have been an unanswerable defence.

'THE LORDS repelled the objections, and dismissed the complaint.'

Act. *H. Erskine.* Alt. *R. Blair, & R. Dundas.*

D. *Fac. Col. No* 15 *p.* 28.

1781. *February* 8. DALRYMPLE of Orangefield *against* CAMERON.

No 213. A CLAIM of enrolment was lodged with the sheriff-clerk of Ayrshire, in the name of Lieutenant John Cameron of the West Fencible Regiment; and a person was enrolled at the Michaelmas meeting of that county, 1780, who, as it afterwards appeared, was not Lieutenant John Cameron, but Lieutenant Duncan Cameron. A complaint having been brought against this enrolment, on account of the misnomer, Mr Cameron *pleaded*, That it could be proved that he had agreed to accept of a liferent qualification in the county; and that he was baptised by the name of Duncan John; that though he held his commission under the name of Duncan, yet the designation of Lieutenant Cameron, of the West Fencible Regiment, would have been sufficient, there being no other officer of the name of Cameron in the regiment at the time; and that the addition of John was no misnomer, for that though not the whole, it was part of his christian name. This ingenious argument, however, had no weight with the Court, for they found, 'That the freeholders had done wrong in enrolling the respondent under the name of Lieutenant John Cameron, and granted warrant for expunging him.'

Supplement to Wight, p. 18.

1783. *January* 25. M'KENZIE *against* MONRO.

No 214. THE claim of an apparent heir to be enrolled, must, in the same manner as any other, be lodged two months before the Michaelmas meeting.

Fol. Dic. v. 3. *p.* 429. *Fac. Col.*

*** This case is No 182. p. 887.