in so far as he had paid 1700 merks in prosecution of it, which was a clear owning and acknowledging the said mortification.

ANSWERED,—He had paid it, *qua* patron; and so it was ascribable to another title.

The Lords, in 1702, on the report of the Lord Phesdo, sustained the homologation as sufficient to elide the reason of deathbed and to exclude him from insisting therein.

This interlocutor being reclaimed against by Disblair, the Lords, upon bill and answers, gave them a new hearing; wherein it was ALLEGED by Disblair, —That he was not only patron, but was also left heritable chamberlain and collector of the rents, and the haill customs and casualties of the lands appropriate to himself; and what he paid was nowise in prosecution of the mortification, but in obedience to a charge; and though they be all contained *in unico contextu*, so that he cannot both approbate and reprobate the same writ, yet homologations are never inferred where they can be attributed to another right; as here he does. Yea farther: the paying one article of a decreet-arbitral has been found not to homologate other parts of it, nor to preclude him from quarrelling them in a reduction; *24th July* 1661, *Jack*; *22d November* 1662, *Primrose*; *27th February* 1668, *Chalmers*; where a minister's accepting a tack-duty of teinds did not hinder him to insist in a reduction of that tack, as if it had been homologated by him; and, *12th March* 1684, *Archbishop of St Andrew's* against *Beton*, it was found, That the Archbishop's accepting the canon or feu-duty of the charter granted by a former bishop, changing the holding, did not exclude the Archbishop from quarrelling that charter; and that his acceptance of payment did not infer homologation.

ANSWERED,—That there could not be a more positive and express deed of homologation, the 1700 merks being paid out of the specific lands of Disblair, as the discharge bears; so the application is as particular as if he had consented, under his hand, to the mortification; which would have elided this process *ex capite lecti*.

The Lords, by a plurality of seven against six, repelled the homologation as not sufficient to debar him from quarrelling the mortification, *ex capite lecti*; and altered the former interlocutor.

The Town alleged his paying *qua* patron could never defend him, seeing patronage is *jus indivisibile*, and must be ascribed to the whole right, and can never rescind from any part of it; and Disblair urged, that *nemo præsumitur donare vel suum temere jactare*, and therefore a dubious homologation ought to be so interpreted as not to infer his passing from his lands of Disblair, without some just, necessary, and onerous cause for the same. *Vol. II. Page* 302.

1705. *December* 29. JAMES SCOT *against* ALEXANDER BELCHES.

THE cause betwixt James Scot and Alexander Belches, the two sheriff-clerks of Edinburgh, was debated, but the decision of it was prevented by a transaction and agreement betwixt the parties; yet, the case being new and singular, I have shortly abridged the heads of the debate.

The said James Scot, being sheriff-clerk of Mid-Lothian, by a gift *ad vitam*,

was, in 1696, accessory to the slaughter of one Philip Alexander, and thereon fled. The Relict, and King's Advocate, raised an indictment against him before the Lords of Justiciary for the crime; where he neither finds caution to sist himself, nor does he appear at the diet; and so, by an act of adjournal, he is denounced rebel and fugitive. The secretaries, looking on the said office of sheriff-clerkship as vacant, there is a commission and gift of it expede in favour of Alexander Belches that same year, 1696; and, in farther security, he obtains the gift of the said James's single escheat, and gets it declared. After eight years' absence, Mr Scot procures letters of slayns on an assythment paid to the nearest of kin, and then obtains her Majesty's remission in 1704, and gets himself relaxed from the fugitation; and, on the production of his remission, the diet is deserted in the criminal court: and then he raised a declarator against Belches, that he had the sole right to the said office, and had not lost it by his retiring and being denounced; and likewise craving a reduction of Mr Belches's gift. This moved Mr Belches to raise a counter-declarator; which being called, James Scot insisted on thir two reasons of reduction: *1mo*, That Alexander's gift was null, as not bearing the *modus vacandi*, which is essential and necessary to all gifts of places. *2do*, That there was truly no ground, cause, or manner of vacation, seeing a criminal denunciation takes not away any liferent-office, but only his moveables; and he might have served by a depute: and so the place not being vacant, there was no *jus quæsitum* to the secretaries, nor any room for a new gift.

Answered for Mr Belches,—That the expressing the *modus vacandi* in gifts was a thing very decent and convenient, and borrowed from the canon law in their conveyances of church-benefices, but was not of that necessity as that the omission thereof inferred a nullity: and is only requisite where a declarator is in law to proceed thereupon; as in gifts of escheat, nonentry, and the like. And none will think a charter null, though it want the clause of *quæ quidem terræ*, which is the *modus vacandi* where they come into the superior's hand by resignations if the procuratory and instrument be clear. And how many gifts are there bearing no such clause! And the nomination of the Lords of the Session several times does not express the *modus vacationis*, by the decease of such a person, and yet none will plead the nomination is therefore null.

Replied,—That it has been oft sustained to be essentially necessary. So that, on the *20th of December* 1628, *Weston*, a gift of escheat was cast in a declarator, because it did not express a particular horning by which the escheat had fallen, albeit the donatar offered to support his gift by producing a horning and denunciation anterior to his gift. And, in the competition for teinds betwixt *Sir Robert Sinclair of Longformacus* and *Home of Wedderburn*, *24th February* 1666, the Lords preferred Sir Robert's gift, because it expressed the specific *modus vacandi*, *viz.* the titular's demission, which Wedderburn's did not.

Then Mr Scot insisted on his *second* reason of reduction, That denunciation for a crime inferred only confiscation of moveables, but nowise deprivation and amission of liferent offices: yea, denunciation for statutory treason of matricide was only found to reach moveables, *22d January* 1663, *Yeaman*: and that offices *ad vitam* do not fall under a criminal escheat, is evident from this, that when the law intends it should extend to liferents, it requires a special statute; as appears by Act 118, Parl. 12, and Act 219, Parl. 14, James VI, where committers of slaughters within kirks or church-yards, and the assaulters and wounders of per-

sons during the dependence of actions betwixt them, after denunciation, are declared to lose their liferent of all lands, possessions, and offices. Now, if the simple denunciation, of itself, operates that, these acts were both ridiculous and unnecessary; and the certification in the act of fugitation is no more but that he shall lose his moveables; and penal laws are not to be extended. Yea, a a liferent-office will not so much as fall under a liferent-escheat; which will, indeed, carry the perquisites, emoluments, and profits of the place, but does not forfeit the office itself. And, though he retired for a while, that does not always infer guilt, where he has to do with powerful persons, who are ready to translate the crime of themselves upon others.

ANSWERED,—That the committing a capital crime will not, *ipso facto*, infer the loss of an office because it may be latent; and, though it be known, yet it must be legally cognosced by some judicial procedure before it can have effect in law. But, where the criminal is either convicted, or, on his contumacy for not appearance, is denounced fugitive, he loses his office, till either he be purged and acquitted by an assize or restored *per modum justitiæ*; none of which Mr Scot pretends. For a person so denounced for a capital crime becomes *servus pœnæ*, and, in construction of law, is reputed *civiliter mortuus*, and so rendered incapable to exerce any office, being infamous, *et maxima capitis diminutione minutus*; and, having his office *ad vitum et culpam*, his life, *fictione juris*, is at an end, and the *culpa* is incurred and declared; and so his right to the office is clearly forfeited and terminated. Yea, our law permits any denounced for a criminal cause to be slain *impune*, if they resist at their taking; and, by the Roman law, such a person was *infamis et intestabilis*, and had this sentence pronounced, *adnotetur requirendus*, and had all his goods sequestrated. And, by the law of the empire of Germany, *proscriptus vel bannitus* is put under the *bannum imperiale*, and out of the protection of the law. And, by the customs of England, if a crime be found against one by a grand jury, he is outlawed; and, if he do not compear within the year to undergo his trial, he may be executed, whenever apprehended, as a felon. And that a sheriff-clerkship falls in the King's hands by rebellion, for a capital crime, was already decided by the Lords betwixt *Mr Harry Kinross* and *James Drummond, 27th July* 1615; as Hope, *tit.* Hornings, observes; and Stair, *tit.* Of Confiscations. And the Lords, on the 6*th of February* 1686, *Archbishop of Glasgow* against *Logan, Commissary-clerk of Dumfries*, found, by his denunciation for a civil cause, his office did not vake. But he gives this reason for it: because the denunciation was *sine crimine*; which clearly implies, *a contrario sensu*, that, if it had been for a crime, he might have forfeited his place. And, as to the pretence that, though he could not exerce personally, yet he might serve by a depute, that is impossible; for he being civilly dead, and legally incapable, the depute had no principal to answer for him, and pay the party's damages if he malversed, as our law requires: and that a civil death has all the effects of a natural, see Annæus Robertus, *lib.* 4. *Rer. Judicat. cap.* 16. And whereas he denies the crime; the same is notour, not only by his flying and denunciation, but his taking letters of slayns and a remission, which Sir George Mackenzie asserts to be a clear confession and acknowledgment of the guilt.