1684. *February.* MURRAY *against* HOPE.

No. 17.

IN an action of poinding the ground, at the instance of Sir Patrick Murray against Mr. Archibald Hope, the Lords found a sasine of an annual-rent null, because it did not bear the delivery of the symbols contained in the precept, viz. the ground of the lands and a penny money, as use is; but only, in general, that the bailie had given state and sasine, conform to the tenor of the precept.

Fol. Dic. v. 2. fi. 363. Sir P. Home, MS. v. 1. No. 578.

1743. *December* 21. MARGARET MACKENZIE *against* JANET BUCHANAN.

No. 18.
Objection to a sasine, that it was not conform to the warrant or precept.

WILLIAM BUCHANAN of Sound, *anno* 1697, granted an heritable bond for £1900 Scots, on his estate, on which sasine followed on the precept. In an action of poinding the ground, at the instance of an assignee, it was objected by an adjudger in possession, that the sasine was void, as disconform to the precept, which runs in the following terms:

Whether duly recorded by the proper officer?

"Attour to my lovits, I will and require you, that ye pass, and deliver heritable state and sasine, actual, real, and corporal possession of the said annual-rent of £114 yearly, to be uplifted forth of, &c. to &c. by a deliverance of a penny money, in name of the said annual-rent, and earth and stone of the ground of the said lands, as use is, redeemable always," &c.

The bailie executed the precept of sasine thus, "Gave and delivered heritable state and sasine, actual, real, and corporal possession, of all and haill the lands of, &c. to &c. by deliverance of earth and stone of the ground of the said lands, and a penny money, in name of the said annual-rent, as use is, after the form and tenor of the heritable bond, and precept of sasine, in all points."

The objection, therefore, to the pursuer's sasine, was, That the precept was a warrant to give sasine of one thing, viz. a certain annual-rent to be uplifted furth of the said lands; and sasine is actually given of another thing, viz. of the lands themselves, and is therefore void and inept, consequently cannot maintain this action of poinding the ground; nor does it remove the objection, that the sasine bears the proper symbols to have been delivered, that were fit and suitable for giving an infeftment of annual-rent, in these words, "By deliverance of earth and stone of the ground of the said lands, and a penny money in name of the said annual-rent, as use is, after the form and tenor of the said heritable bond, &c. in all points;" for the question is, What was it the bailie gave and delivered by means of these symbols? The answer to which is plain from the principal words of the instrument of sasine, which recite the *res gesta* to have been, that the bailie gave and delivered heritable state and sasine, of all and haill the lands of , and haill parts, pendicles, &c. thereof;—so that he erred in the substance, by de-

No. 18. livering the thing that he was not authorised to deliver, and neglecting to deliver the thing he was authorised to deliver. The delivery of the sasine is a solemnity that must be specifically performed, and must be taken to have been celebrated as in the instrument itself is set forth; and as that is plainly disconform to its warrant, it cannot mend the matter, what is afterwards set forth, viz. "That the same was done after the form and tenor of the precept of sasine."

2do, It was objected, That the sasine was not registered conform to the act 16. 1617, in so far as it bore to be marked on the back to be registrated in the register, appointed for that effect, in the country of Orkney; "By me Thomas Brown, notary-public, in absence of Thomas Stewart, notary-public, clerk-substitute, and keeper thereof," &c. which was pleaded to be no registration, in so far as it did not appear that Thomas Brown had any substitution from Thomas Stewart, clerk-substitute, to officiate for him in his absence, or that Stewart had any power to substitute another in his place; and that Brown's being a notary-public, gave him no more power to act as a keeper of the register of sasines, than any other man in the kingdom. In short, the present case was no better than if any person should find a proper opportunity to cause his own servant write over the sasine in the register, which certainly could never be held a due registration against third parties, in terms of the act.

To the first objection, it was answered, That, strictly speaking, there could be no such thing as delivery of land, far less of an annual-rent out of land; delivery applying only to moveable, not heritable subjects: That there might be occupation, or possession, but not, in any proper sense, delivery; and that to talk of delivery of an annual-rent, *a jus incorporale*, was still farther out of reach; at the same time these were common expressions, and the meaning thereof very well understood, and imported no more than that the bailie should deliver a proper symbol, representing in the imagination the subject itself. Thus, if a bailie is ordered to deliver an annual-rent out of the lands, he performs his commission, when, standing upon the land, he delivers earth and stone, and also a penny money. These things premised, it is plain the bailie did execute his commission here in the most regular manner, by delivering the proper symbols of an annual-rent right, viz. earth and stone, and a penny money, which was acting in the precise terms of the precept, which, in appointing delivery to be made of the annual-rent right, condescends at the same time upon the manner in which the same was to be made.

To the second, it was answered, That, as the sasine was on record, the statute which appoints registration does not require the same to be certified by the proper officer, under the pain of nullity. The only use of the certificate is to give evidence of the recording; and if the fact be otherwise known, or agreed upon, it is not a farthing matter whether there be any certificate or not. *2do*, A sasine is not null, by the act 1617, though not recorded; recording is only of use to give preference in a competition; here there is none. The defender's infeftment is prior in time, and therefore preferable, unless the pursuer had an objection against it, viz. That an infeftment upon an adjudication, within the years of prescription, can never be an available right, without the grounds thereof, which is not yet pro-

duced; with regard to which point, it is of no earthly consequence whether the pursuer's sasine be recorded or not. Recording would not prefer it to the defender's prior infeftment; and supposing it not to be recorded, yet it is a real right, and a good foundation for a poinding of the ground. No. 18.

The Lords repelled both the objections.

N. B. It is said the ground on which the second objection was repelled, was, that putting these words, "in absence of Thomas Stewart, notary-public," in parenthesis, then the attestation bears to be by the clerk-substitute, and that Thomas Stewart was the depute.

Fol. Dic. v. 4. p. 263. C. Home, No. 253. p. 407.

1750. *June* 19.

SIR ARCHIBALD GRANT *against* The other CREDITORS of TILLIFOUR.

No. 19.
Where more creditors are contained in one and the same heritable bond, one sasine for the whole is good.

A CASE is marked 10th of November 1748, between the above parties, No. 71. p. 949. *voce* BANKRUPT, where infeftments, granted by Tillifour to his other creditors were reduced upon the head of Fraud, to the effect, to bring in Sir Archibald Grant *pari passu* with them upon his infeftment, which was in date posterior, at which time the whole circumstances of the case were laid before the Lords.

It was nevertheless now pleaded for Sir Archibald, that tho' the nullities under which the other infeftments laboured were mentioned in that debate, yet the interlocutor had proceeded solely upon the fraud, and supposed the validity of the infeftments in point of form, and that it was still competent for him to object any nullity to the sasines, whereby his infeftment should become the preferable infeftment. And the nullity he insisted on was, that the sasines being in number three, one proceeding on an heritable bond, granted to James Smith and thirteen other creditors, in security of the several sums, wherein they were respectively creditors by personal bond, another proceeding on an heritable bond, granted to six several creditors, and a third on a bond to two creditors, were not taken by delivery of symbols to the creditors severally for their several interests, but by delivery of one symbol to a procurator for the whole creditors contained in the bond on which the sasine proceeded; which was said to be a nullity in the several sasines, as in the opinion of some of the most experienced writers to the signet, symbols ought to have been delivered to a procurator for each creditor in whom it was intended to create a separate right of annual-rent. 2*do*, That the sasines which were taken in a hurry, after sitting up the whole night to frame them, in order to prevent Sir Archibald Grant's getting the start, had been taken without authority from any of the creditors, who were not privy to the contrivance.

Answered for the creditors, That this matter was already *res judicata*. The whole circumstances of the case, particularly the nullities now insisted on, were laid before the Lords in 1748, and had considerable effect in procuring the interlocutor then pronounced; whereby all the effect was given to them and the other circumstances, which they were thought to deserve. 2*do*, Were the objections