

*Duncow* against the Earl of Nithsdale, in Stair, 18th February 1672, on the 219th Act of Parliament, 1594.

3tio, It was questioned how far the Lords could judge this case, being capital.

Some affirmed, that if one party assault another in presence of the Lords sitting in judgment, they may cognosce it, though the punishment to be inflicted by law be no less than the pain of death; because a sovereign court has that jurisdiction inherent to vindicate their own authority, and punish any affront or injury offered thereto.

It was argued by others, that, no doubt, the Lords had *mixtum et merum imperium* to make their jurisdiction effectual, where the punishment was either pecuniary or corporal, below death; but if the crime was capital by law, all they could do was to secure the delinquent, and remit him to the criminal court, where he must be tried by an assize; which the Lords cannot do: and this is clear in the case of falsehood, which the Lords cognosce either in the direct or indirect manner; and when they have found it proven, they remit it to the Justiciary, where the decreet of improbation is *probatio probata* to the assize; but the Criminal Court must condemn him, and so the foresaid Act ordains it to be criminally tried. And by a decision in *Dury*, 14th July 1638, *Dumbar* against *Dumbar*, the Lords found, where the punishment to be inflicted is arbitrary, they may impose it themselves; but, if it be capital, they can only remit it to the justices, as the sole judges competent thereto.

Mr Comrie procuring a remission from the Queen, it came, in the fourth place, to be questioned, how far that could liberate him from giving satisfaction to the party by a *palinodia*, and acknowledgment of his fault, and craving him pardon.

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1703. December 22. MR DAVID DEWAR against The EARL of MAR and the TENANTS of ALLOA.

MR David having right by progress to two old infeftments of annualrent, granted by one of the Earls of Mar in 1631 to Sir John and Sir Charles Erskines, his sons, he pursues a poinding of the ground. The present Earl compears, and produces his public infeftment on the estate of Mar, proceeding on an adjudication; and objects against Mr David's authors' rights, that they were only base, and the bonds of provision, the warrants thereof, were not produced, and the seasines were not probative, being only the assertion of a notary. 2do, One of the seasines was null, wanting the notary's sign on the left side of his attest, which bears the knot with his name and motto, and which are specially required by the 76th Act 1540, and Act 79, 1563, where notaries are ordained to register the sign and subscription they are to use in all time coming, and to insert it in the books at their admission; and who does otherwise, they are to be punished to the death, and their notes and instruments to make no faith.

ANSWERED for Mr David,—That now, after forty years, he was not bound to produce the warrants, by the 214th Act 1594, especially he being an adjudger and singular successor, who cannot be supposed to have his debtor's rights; but he produces a confirmation of the charters by the Earl of Mar, with a suspension against the liferentrix, and sundry other documents of possession. To

the *second*,—That the sign and motto is not essential, nor the want of it a nullity ; and the Acts of Parliament are in desuetude, except as to the punishing the notary ; and even the making such an omission death, clearly proves the Parliament's meaning to have been, not for informalities, but where a man falsely assumed the office of a notary without being legally admitted. And every defect in a seasine will not annul it : It is true the attest is necessary : and these words *vidi, scivi, et audivi*, are essential ; but, if a notary shall forget the preface, *In Dei nomine, Amen*, or the like, the seasine will [not] be thereupon null, being duly registrate. And the notary's designation and name being in the attest, and the confirmation, may supply this defect ; and hundreds of seasines want the motto. So to make this a nullity, would lay down a dangerous preparative to brangle many securities in the nation.

REPLIED,—The Act 214, cited, relates only to procuratories and instruments of resignation and precepts of *clare constat*, exonerating from the production of such, but not to dispositions and bonds of provision. And as to the confirmation ; *1mo, Nihil novi juris tribuit ; 2do, A null right cannot be confirmed ; non-entis nuda sunt accidentia ; quod nullum est ratificari nequit.*

The Lords thought the objection against the seasine new, and desired to know how the custom had gone in this case, and if the Act 214 concerned dispositions and bonds of provision ; and, therefore, before determining, they resolved to hear it argued in their own presence.

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1703. December 28. The EARL of STAIR against CANNON of HEIDMARK.

CUNNINGHAM of Drougen wadsets some of his lands, in 1661, to Heidmark, redeemable on payment of 2500 merks ; but, in regard the rental of the lands then exceeded the annualrent, therefore the wadset bears a clause, that Heidmark shall pay or allow £35, as the excesce of the rent above the annualrent. Lord Stair having acquired the reversion of this land, he uses an order of redemption ; and, in the declarator, a long debate followed as to the possession ; but the Lords, abstracting from that, ordained them to discuss the point of right. It was ALLEGED for my Lord Stair, That Heidmark's wadset was now more than satisfied and paid, by the said excescent duty of £35 yearly ; which, being deducted annually these forty years bygone, will absorb and exhaust the principal sum. ANSWERED,—That excesce can never be imputed to extinguish his wadset ; but you ought, in your order, to have consigned the whole sum ; such reversions being *stricti juris*, and to be implemented *in forma specifica*, and not by equipollents ; as has been found by the Lords, 12th of November, 1675, *Home of Plendergeist* against *Home of Linthill* ; and in President Falconer's Observes, 9th December, 1685, *Cunningham* against *Dowie*. REPLIED,—Extrinsic compensations in orders of redemption have been refused ; which is the case of the decisions adduced : but, where they are a part of the wadset-right, *et pars contractus et in gremio juris*, they have been in use to have been sustained. Thus a decret was found equivalent to money in the redemption of a wadset betwixt *Hog* and *Hog*, 2d January, 1667, because it was a debt founded upon one of the articles of the contract, and so was intrinsic.

The Lords found this £35 of excesce behoved to be deducted off the wadset ;