

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 excresce 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 excrescent duty of £35 yearly ; which, being deducted annually these forty years bygone, will absorb and exhaust the principal sum. ANSWERED,—That excresce 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 excresce behoved to be deducted off the wadset ;

but, whether it should default yearly, or only *in cumulo* from the date of using the order, the Lords ordained the parties to debate, *a quo tempore* it should commence, and if it was a proper or improper wadset ; seeing, by the ignorance of the notary, who is the writer, it seems to participate something of the nature of both.

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1704. *January 4.* ALEXANDER PIPER of NEWGRANGE *against* SCOTT of HEDDERWICK.

THE said Alexander having, at the roup, bought the lands of Newgrange, formerly belonging to Sir Francis Ogilvie, he raises a reduction and improbation against sundry of the creditors, and particularly against Hedderwick ; and, seeking out certification against them, for not production, the creditors apply to the Lords by a bill, complaining, That Mr Piper had taken a very unusual method to pay them, in seeking to annul their rights ; and that a purchaser at the sale of bankrupts' lands could not pursue reductions and improbations, but only a multiplepoinding, in which he may call the creditors ; and, after they have debated their preferences, and are ranked conform to their respective interests and shares in the price, he may either consign or pay accordingly ;—and that they had produced their adjudications and registrate bonds ; but he was insisting against them for not producing the principals, and the grounds and warrants of their decreets, such as the summons and executions, &c. in which he had no interest ; and the production they had made was sufficient to exclude him.

ANSWERED,—He was necessitated to follow this course ; for Sir Francis, the former heritor, kept up the writs and charter-chest from him ; and thir creditors were not in the decret of ranking ; and he had paid out already a great part of the price, and ought to be secured in his purchase.

The Lords thought this remedy of pursuing the creditors by a reduction somewhat extraordinary, he having granted bond and caution to pay them according to their preferences ; and, to take the advantage of a certification, would be ill payment. But, remembering that William Hay of Drummelzier, who bought the barony of Dunse at the roup of Sir James Cockburn's estate, had pursued such an action of reduction and improbation, they desired to be informed, ere they proceeded farther, whether the act of roup was in his title in that process, or the real creditors' rights which he had transacted and bought in ; for, though such a pursuit, *qua* purchaser at the roup, may be unequal, yet, if the process be as assignee constituted by the creditors to their debts, that may be a sufficient title *ad fundandam litem*. And, how far a decret of sale may be the title, the Lords resolved to consider the same after a hearing.

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1704. *January 27.* EUPHAME CUNINGHAM *against* ALEXANDER CUNINGHAM of CULLELLAN.

By contract of marriage, in 1658, betwixt Mr William Cuningham, Minister