

No 36.

1628. July 30.

MARTIN *against* BIRSS.

It being objected to a pursuer's infestment, that it was null, as proceeding upon a retour whereby the pursuer was served heir before a Sheriff, within whose jurisdiction the lands did not lie; this objection was not received by way of exception, but reserved to reduction.

IN a reduction, Flora Martin *contra* Birss, for reducing of an infestment of two acres of land in Preston, the defender *alleged*, That the pursuer's sasine was null, because it proceeded upon a retour, whereby she is served heir to her father in the lands libelled, before the 'Sheriff of Edinburgh; albeit the lands lies in the constabulary of Haddinton, and so the service should have been deduced before that Judge, and not being so done, the retour was *a non suo judice*, and therefore null *ope exceptionis*; this allegiance was repelled, and the nullity not received *hoc loco* by way of exception, seeing the same consisted *in facto*, and that the retour was not produced in this process, but only the sasine, which bore no such thing of the lying of the lands; and reserved action of reduction against the said retour, as accords.

Act. Mowat.

Alt. ———.

Clerk, Hay.

Fol. Dic. v. 1. p. 172. Durie, p. 395.

1634. June 26.

LO. JOHNSTON *against* E. of QUEENSBERRY.

No 37.

An allegiance that a sasine is null, because the person signing as notary was never admitted regularly to that office, cannot be received in a multiple-poining, but must be pursued by way of action.

IN a double poining betwixt these parties, wherein the Earl producing a sasine for his right, the Lord Johnston *alleged* the same to be null, because it bore in the notary's subscription, to be written *aliena manu*, and it designed not by whom it was written, conform to the act of Parliament 1593; at least the user thereof should yet design the same, seeing he wanted the means of improbation, all the parties therein, and all the witnesses being dead, and the notary. *2do*, He *alleged*, it was null, because the fosesaid notary was never admitted notary, conform to the act of Parliament 1563, anent admissions of notaries, which provides instruments, given out by notaries not admitted, to be null; and this instrument is so, except the party will qualify that he was admitted conform to that act. Both these allegiances were repelled, for it was found unnecessary to design a writer of a sasine, and that sasines came not under the act of Parliament 1593; for these writs are not writs made by parties, as that act of Parliament means, but it is the act of the notary, and not of the party. And as to the second, THE LORDS found, that the party needed not in this judgment to offer to prove, that the notary was admitted conform to the act of Parliament, but reserved to the proponer to pursue that nullity by way of action thereupon, as accords of the law; so these two allegiances were found novelties to be proponed; and if they were received, might produce in all causes great delay, and trouble to parties, which were against reason to sustain.

Act. *Advocatus Regis et Nicolson.*Alt. *Stuart et Cunningham.*

Clerk, Scot.

Fol. Dic. v. 1. p. 172. Durie, p. 722.