

the more favourably received. This allegiance was repelled, because the sasine bore, "the same to be given and done according to the solemnities used in such cases;" and the Lords would not annul the sasine for this defect alleged. And the defender alleging further, That the ground could not be poinded for the years betwixt the time of the pursuer's predecessor's decease and the pursuer's sasine, because the same, during that space, was in his hands, as superior, by non-entry; and the pursuer replying, That he could not be heard to allege non-entry, because, by the contract of alienation made betwixt him and his umquhile predecessor, he was obliged to pay the said annual-rent, as well infest as not infest; the Lords found, That this contract might be a ground to produce personal action, or execution thereupon, against the defender; but that they would not thereupon sustain this action to poind the ground as a title thereto.

Act.

Alt. Gray.

Clerk, Hay.

*Fol. Dic. v. 2. p. 362. Durie, p. 585.*

No. 15.

1682. January. LADY LAMERTOUN against HOME of Polwart.

ALEXANDER HOME, of Halyburton, having granted a bond to Alexander Home of Huttonhall, and Elizabeth Home his spouse, and longest liver of them two, for an yearly annuity of 600 merks, and, for security thereof, did bear an obligation to infest, and precept of sasine, for security of the same, out of the lands of Greenlaw; which being assigned to the Lady Lamertoun, and she having pursued a poinding of the ground against Sir Patrick Home of Polwart, now heritor, and the tenants and possessors of the lands; alleged for Polwart, That the sasine is intrinsically null, because it wanted the necessary solemnities and symbols requisite by law and custom, and could not be looked upon as the sasine of annual-rent, because it did not bear delivery of a penny money, nor as a sasine of the lands, because it did not bear the usual symbol of delivery of earth and stone; nor did it bear the usual words, of giving real, actual, and corporal possession; nor was the tenor of the precept engrossed in the sasine, but was of an universal style, that the notary gave liferent sasine, by delivery of the ground, as use is; so that there being a concurrence of nullities in that sasine, and sasines being *actus legitimi*, which require several solemnities, the want of any of these solemnities makes the sasine null; just as the execution of a horning, comprising, or other legal diligence, should want the three *oyesses* in the execution at the market-cross, or six knocks at the most patent door in the execution at a party's dwelling-house; and the like will make the execution null; and law and custom do not allow these solemnities thereafter to be supplied, albeit it were proved that these acts were truly done; much more ought a sasine, that wants all the formalities abovementioned, be found null. And Hope, in his Larger Practicks, Precepts, and Instruments of Sasine, observes, That sasines has several symbols, according to the different nature of the thing for which sasine is to be taken; as a sasine of lands is *per*

No. 16.

A sasine, in which the particular symbols were not mentioned, sustained on account of a general clause.

No. 16. *terræ et lapidis traditionem*; and of an annualrent, *per denarii traditionem*; and of an house, *per ostium apertionem et clausuram*; and of mills, *per traditionem lie clapt*. So that if any of these symbols which are proper to the subject are wanting, it makes the sasine null; and if any person should take sasine of land by the symbol of tradition of the clap of a mill, the sasine would be null; or if he should take infeftment of a mill by the symbol of a penny money, the sasine of the mill would be null, as being done not for the proper symbol. So that, by the same parity of reason, this sasine of an annual-rent, being taken by delivery of the ground, which was not the proper symbol, is *ipso jure* null; and by an express decision, the 22d December, 1612, No. 20. p. 14326. the Lords found a sasine null, because it wanted these words, “*quia vidi scivi et andivi*;” and these words, “of giving actual, real, and corporal possession,” which is wanting in this sasine, is as necessary to the validity of a sasine as these words, *quia vidi scivi et andivi*; for without the giving of actual, real, and corporal possession, there can be no sasine at all: so that this sasine, being intrinsically null by the concurrence of so many nullities, it ought not to be sustained against Polwart especially who is a singular successor, and who stands infeft in the lands. Answered, That seeing the sasine bears the delivery of the ground of the lands, which can be of no other but of earth and stone, it is sufficient; and there is no necessity that it should be a symbol of penny money, because it was an infeftment of property. And seeing it bears that the notary gave liferent sasine, by delivery of the ground, and that heritable state and sasine was given, that does comprehend actual, real, and corporal possession; and it were but a tautology for the notary to have said, that he gave sasine by delivery of the ground of the lands, and likewise that he had given actual, real, and corporal possession, seeing the former does always include the latter. And albeit the sasine does not bear the precept fully ingrossed, yet it expressly relates to the precept, and that all things were done conform to the same; and that the words, “*vidi scivi et andivi*,” are effectually requisite to the validity of a sasine, because, unless the notary had been actually present, and seen, heard, and understood what was done, he could not testify of the verity of the sasine. And these nullities being formerly objected in the process at the pursuer’s instance against the Laird of Blackater, Polwart’s author, the same were repelled, and the sasine sustained, as appears by the interlocutor.—The Lords repelled the hail nullities proponed against the sasine, viz. that the same wanted the delivery of a penny money, in respect it was an infeftment of property; and that the precept was not ingrossed in the sasine, in respect the same was ingrossed; and that it did not bear delivery of earth and stone of the ground of the lands, in respect it did bear delivery of the ground of the lands; and the allegiance, that it wanted these words, “actual, real, and corporal possession,” in respect it did bear that heritable state and sasine was given, conform to the precept of sasine; and therefore sustained the sasine; but declared they would deprive the notary if he were alive.