

It was *alleged* for Sir John Harper, the forfeited person's immediate superior, That his casualty of non-entry was declared before the forfeiture, whereby he had right to the mails and duties till he got a vassal presented.

*Answered*, The King could not be a vassal, and the lands being annexed to the Crown, he could not validly present. Again, the King being seised *jure coronæ*, the running of the non-entry should stop, as when a vassal is infeft, or a charter offered to the superior.

*Replied*, The King cannot supply the place of a vassal, by whom the casualties of non-entry, escheat, &c. cannot fall, as by vassals infeft.

THE LORDS preferred the superior.

*Fol. Dic. v. 1. p. 315. Harcarse, (FORFEITURE.) No 496. p. 137.*

1736. July 8.

JOHN WALKINSHAW Merchant in Glasgow *against* His MAJESTY'S ADVOCATE.

In the process, at Mr Walkinshaw's instance, against Messrs Crawford and Corbet, merchants in Glasgow, to account for the profits of a rope-work company, whereof he was a partner, the defenders moved this *objection*, That, by an act of the first year of the reign of his late Majesty, Wakinshaw of Scotstown, the pursuer, was attainted of high treason, whereby he had lost his interest in the company,

*Answered* for the pursuer; If that act was intended to attain him, it was defective in several particulars; *1mo*, In the surname, his name being Walkinshaw, and not Wakinshaw. *2do*, In the designation of the place where he lived, which was Glasgow. *3tio*, In the want of the addition of his mystery or calling, which was merchant in Glasgow.

And, with respect to the first of these, it was *observed*, That, by the English law against treason, which is extended to Scotland by the act *7mo Annæ*, the greatest exactness and certainty is requisite in attainders; nor is any thing left to be supplied by implication, in so much that the omission of a single letter has been found fatal to indictments. Thus, in Rastal's Entries, fol. 279, there are two instances of small misnomers, which yet were sustained to cast the indictments; the one was Royle in place of Ryle; the other Comfry in place of Comfrees. And, in the same place, it is remarked, that an outlawry was reversed, because the surname was wrote Fee and not Fy, which was the pannel's true surname. In the trial likewise of Francis Francia, Henry Greenway was called as a juryman; and, upon its being objected, that his name was Greenaway, he was set aside, State Trials, vol. 6. p. 59. All which apply directly to the case in hand; as the pursuer's surname is not Wakinshaw, but Walkinshaw, which are as different from one another, as Brodie is from Bodie, Leith from Leitch, or Willison from Wilson; in which the omission of a letter makes a different name.

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It was found no misnomer in an act of attainder for high treason, that the person was attainted under the surname of Wakinshaw instead of Walkinshaw, and that he was designed of Scotstown though not infeft in any lands at the date of the attainder.

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In the *second* place, The attainder is informal with respect to the designation ; in so far as, by the act 1st Henry V. cap. 5. it is necessary, that unto the name of the person indicted, must be united the addition of his estate, degree or mystery, and the shire, town, or hamlet where he dwells ; otherwise the indictment is void. Now, if by the words ' of Scotstown ' be meant his stile, it does not apply to the pursuer, as he was not infeft in any lands at the date of the attainder ; and a stile without infeftment is only courtesy, which is insufficient to support an indictment ; *ex gratia*, an Earl's eldest son is, by courtesy, a Lord ; but, if he should be attainted under his common name of Lord, the attainder would be null ; and, if the words ' of Scotstown ' are intended to mean his place of residence, it does not apply, because, at that time, he resided in the town of Glasgow.

*3tio*, By the above act of Henry V. the addition of the pannel's mystery or trade must be united to the name of the person indicted ; otherwise any process thereon is void and null ; from whence it follows, that as the pursuer was a merchant in Glasgow at the date of the attainder, the addition of his mystery ought to have been mentioned, otherwise it cannot legally have any effect against him. See the case of Sir William Hicks in Ventry's Reports, p. 154.

To which his Majesty's Advocate, who appeared in behalf of the Crown, *replied* ; That there is a material difference betwixt a misnomer, where the description of the person attainted does evidently not suit with the person against whom it is made use of, and an accidental slip in spelling. In the first case, where the name and surname does not belong properly to the person against whom it is used, but might justly apply to another, the attainder may not be effectual against him to whom it is not so properly adapted ; but, in the latter case, where these belong to the party, and none else, inaccuracy in writing or spelling can make no material error in the attainder, if such mistake does not vary the sense or description of the party. Now, as to the pretended difference in the surname Walkinshaw, *scil.* That it was written in the act of Parliament without an l, that is surely too slight a reason for evading an attainder ; seeing it is wrote in the act as it is usually pronounced in this country, where the letter l is never used before a k ; and inaccuracies of this sort have been often overruled. Thus, in the trial of the regicides, Henry Martin having pleaded the act of oblivion, out of which he was excepted by the name of Henry Martin, on pretence that he was not the person excepted, his real name being Harry Marten, the Judges paid no regard to that plea ; *quia constitit*, that he was the person described, and was commonly called and known by the name of Henry Martin. And, in the trial likewise of Christopher Lawyer, exception being taken that his christian name was written Christopherus, whereas it ought to have been wrote Christophorus, the objection was overruled. And, if such topics were to be listened to, it would be impossible to prosecute any offender, until with certainty it was discovered how he usually wrote his name, which even varies among persons of the same surname. With respect to the instances adduced for the

pursuer, where the addition or defect of a letter makes a considerable difference in the surname, they are not to the point, as such alteration changes the word from one surname to another, which is not the case betwixt the words Walkinshaw and Walkinshaw.

To the *second* observation it was *answered*; That his father William Walkinshaw of Scotstown being dead before the attainder, the addition of Scotstown was a proper description of him according to the common usage in this country; as he was his only son, and which, by the established custom, is always given to the eldest son after his father's decease, without regard to his being infest or not; so that, it is believed, it would have been an error in the attainder, if he had been described by the addition of merchant in Glasgow, as he more properly belonged to the class of landed men.

To the *third*, it was *answered, imo*, The meaning of the statute is no more than to make the person certain, by describing the man by his name, surname, and estate, if a landed person, so as one man might not be troubled for another. *Vid.* Coke's Instit. part 2. p. 270. *2do*, Whatever operation the statute may have upon outlawries, it cannot apply to a parliamentary attainder, where the authority of the legislature dispenses with all forms, and must be confessed to make the same absolute, wherever the person is sufficiently described; but, at any rate, these objections come too late; as the pursuer has not only allowed his estate to be seized and surveyed, but likewise has obtained a pardon from his Majesty, whereby it is evident he understood himself to be described by the act.

THE LORDS found there is no misnomer of the said act, with respect to the name and designation of John Walkinshaw of Scotstown; and therefore repelled the allegiance founded thereupon.

*C. Home, No 30. p. 56.*

1751. December II.

SUTHERLAND of Meikletorboll *against* MONRO of Auchany.

ROBERT SUTHERLAND of Meikletorboll, arrested in the hands of William Monro of Auchany, as debtor to Alexander Mackenzie of Ardloch his debtor, in the value of certain cattle carried off his grounds by him, and pursued a furthcoming.

*Answered*, Ardloch was concerned in the rebellion, and information being given to the Earl of Sutherland, sheriff and lieutenant of the county of Sutherland, that he was in May 1746, in the neighbourhood of his own estate, in that county with a body of men in arms, the Earl ordered Auchany to drive away these cattle, to distress him and the rebels, which he did; and the cattle being disposed of by the Earl's order, the defender is liable to no action for what he did

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The Lords found that no action lay at the instance of a creditor of a rebel, who was comprehended in the act of indemnity, for the value of goods taken from him during the rebellion.