

1713. *June 23.*AGNES COLQUHOUN, LADY MONTBODDO *against* The LAIRD and LADY NEWMAINS.

No 35.

A person who inserted in a summons days of compearance that fell within the Christmas vacation, allowed to amend the wrong days filled up.

IN a process of mails and duties, count, reckoning and payment, at the instance of the Lady Montboddo against Newmains and his Lady; the pursuers having inserted the first and tenth days of January last, which fell within the Christmas vacation, for the days of compearance in her summons; the LORDS refused to cast the process upon that head, but allowed the wrong days filled up to be amended. Albeit it was *alleged* for the defenders, That such a favour used only to be indulged, when a summons given out blank in the days is filled up by the adverse party with wrong or unlawful days.

Fol. Dic. v. 2. p. 179. Forbes, p. 687.

1713. *July 23.*GORDON and OSBURN *against* JEAN CAMPBELL and OTHERS.

No 36.

Title to pursue on citation to compear on a day in the vacation sustained where the party had the full number of days allowed for his appearance, in respect the citation bore with continuation of days, which is understood to be the most lawful day thereafter.

IN a reduction *ex capite lecti*, of a disposition whereupon infestment had followed, pursued by Gordon and Mr Harry Osburn, deriving right from Robert Gordon in the kingdom of Ireland, as apparent heir to James Gordon of Newark, against Jean Campbell and others; the LORDS repelled this dilatory defence, that the first day of compearance, to which the defenders were cited, was in the vacation-time, in respect errors in filling up of days of compearance, can be amended at the bar; and the defenders have the full number of days allowed by law. And where the day of compearance happens to be an *unlawful* day, the citation, which bears continuation of days, is understood to be *next* to the lawful day thereafter; but the LORDS found no process, unless Robert Gordon's propinquity to James Gordon be instructed by a service as heir to him, or otherwise. Because, though naked apparency of a person known and born in the country, is sustained to found process, yet action is not sustained at the instance of one born out of the country, unless some document be produced, cognoscing and trying his propinquity of blood to the person whose apparent heir he pretends to be, December 17. 1627, Donaldson *against* Brown, No 9. p. 4647. See TITLE to PURSUE.

Fol. Dic. v. 2. p. 179. Forbes, p. 708.

No 37.

The most irregular charge may be turned into a libel.

1715. *July 30.* ANDREW M'READY *against* MATTHEW CRAWFURD.

ANDREW M'READY having a bill upon Matthew Crawford, payable upon sight, but neglecting to protest the same within the six months, he thereafter

protests and registrates; which being suspended, it was *alleged* for the suspender at discussing, That the protest and registration being unwarrantable, as being without the six months, the letters behoved to be *simpliciter* suspended, reserving action *via ordinaria* for payment as accords; and this, because a bill so negotiated can neither be the ground of a charge nor a libel.

Answered for the charger, That he was willing to turn the charge into a libel, which cannot be refused; for though the charge be unwarrantable, yet the ground of action remains; and as soon as it is turned into a libel, the parties are in an ordinary action, & *frustra fit per plura, &c.* And this has been always admitted, though a decreet were never so absurd, and proceeded even without citation of the party, &c. which is still allowed *ad abbreviandas lites*.

THE LORDS turned the decreet charged on to a libel, and found no necessity of a new libel.

For the Charger, *Macdouall.*

Alt. —

Gibson, Clerk.

Fol. Dic. v. 2. p. 180. Bruce, v. 1. No. 136. p. 178.

1738. February 7. GEORGE OCHTERLONY against SIR GEORGE MACKENZIE.

OCHTERLONY having raised a process of sale against Sir George, executed the same on the 2d of November 1737, warning him to compear upon the days contained in the said summons, which were the first and last of November.

Objected, 1mo, That the execution was null, seeing the first diet of compearance ought to have been twenty-one days after the date of the execution; whereas here the defender was cited to compear to a day, *de facto*, past, when the summons was executed, thereby not only abridging him of the common *inducia*, but likewise commanding him to do an impossible thing, *2do,* The pursuer's title being a naked decreet of adjudication, without either infeftment or charge against the superior, could not, by the act 17th Parliament 1681, entitle him to carry on this process, as that law requires the creditor to have a real right, which an adjudication is not; the same being only a legal disposition in security, which makes a good assignation to the mails and duties, but is no real lien upon the land until it be followed forth by infeftment.

Answered to the first, That the summons (as is customary, where there are several defenders) was left blank when it was executed, and, after it was returned, the pursuer's doer, by mistake, filled up the first and last days of November, instead of the 24th of that month, and 2d of December thereafter; but the mistake could be of no avail; for, as the defender had the full *inducia* before the cause was called, the pursuer should be allowed to mend his libel. And, as to the *second,* it was *answered,* That the term real right, in the act, means an adjudication, without either charge or infeftment; as is evident from the words, 'Our Sovereign Lord considering, that, when the estates and lands

No 37.

No 38.

A pursuer may mend his libel, though the days of compearance are wrong filled up, if the *inducia* are elapsed before calling the cause.