

## No 15.

A deliverance on a bill of summons craving warrant to cite in general, was sustained as a sufficient warrant to cite a person out of the kingdom.

1747. July 22. LORD BRACO *against* BRODIE Lord Lyon.

IT was objected to an adjudication craved against the Lord Lyon, That the defender was cited as out of the kingdom, for which there was no warrant in the bill of summons, but only to cite in common form.

THE LORD ORDINARY, 14th instant, 'on advice, repelled the objection, and the LORDS refused a bill and adhered.'

*Fol. Dic. v. 3. p. 185. D. Falconer, v. 1. No 202. p. 273.*

1759. February 13.

ALEXANDER ORME, Writer to the Signet, *against* NEIL MACVICAR.

## No 16.

A summons of furthcoming was raised and signeted before executing the arrestment upon which it was to be founded. The Lords agreed that it was an irregular practice, but as no prejudice was alleged done to any person by it, they dismissed a complaint against the arrester, and found expenses due.

THE affairs of Robert Baillie merchant in Edinburgh, and Robert Fisher of Newhall, who had become cautioner for him, having gone into disorder, the greatest part of their creditors consented to trust-rights granted by them to certain trustees for behoof of the whole creditors. Neil Macvicar, late writer in Edinburgh, being creditor to Baillie for 2000 merks, pursued a separate course of diligence, and adjudged for his own behoof. At the same time he used several arrestments against the subjects of both the common debtors, and brought furthcomings thereon. A complaint was given into the Court against the said Neil Macvicar by the other creditors, charging Macvicar, and the messenger who executed one of these arrestments and furthcomings, with an irregular and illegal procedure in the execution thereof, viz. That the summons of furthcoming had been executed at the same time with the arrestment, on the afternoon of the 24th May 1757, at nine miles distance from Edinburgh; so that it was not possible that a summons libelling on these arrestments should have been taken out from the signet on the 24th of May, (as the signet-summons bears), after the execution of the arrestments; and therefore the narrative in the execution of the summons of furthcoming was evidently false, as the warrant for the citation could not be in the messenger's hands at the time.

*Answered* for Macvicar, The summons of furthcoming was signeted upon the forenoon of the 24th of May 1757; and the messenger carried it from Edinburgh, along with the horning expedite 20th November 1755, and had both in his custody when, upon the afternoon of the said 24th May, he gave the copies of citation in the furthcoming immediately after laying on the arrestment; so that the simple fact is, That a summons of furthcoming was taken out before using the arrestment.

This method, though perhaps somewhat irregular, is however justified by practice, now grown constant and inveterate. Nothing wrong was or could be meant by it in this case; and the only intention of it was, to save the expense

of sending the messenger a second time to execute the summons of furthcoming; from which no harm whatever could arise to the complainers, or to any other person. This very objection was over-ruled as far back as the 7th Jan. 1704, *voce* ARRESTMENT, No 15. p. 686. ; from which it appears, that the like custom had even then taken place, and was authorised and approved of by the Court, upon very just grounds, recited in the decision; and as no contrary decision has occurred, and the same reasons of expediency, from the saving of expenses, and the conveniency of the subjects, do still subsist without any damage arising therefrom, this complaint must appear to be groundless.

*Observed* on the Bench: The procedure was most incongruous, as the summons of furthcoming is plainly made to narrate a fact not true; and this practice ought not to be allowed, although it may save the expenses of double execution. The single decision above mentioned will not make law; and, in a later case, similar to the present, Creditors of Strichen, 1706, *voce* LEGAL DILIGENCE, the LORDS found, That a libelled and signeted summons, before it was executed, did not make a depending action; and therefore did not sustain arrestments raised and executed thereon; although there was likewise, in that case, a clear proof of the constant practice of taking out the arrestment at the same time with the summons which made the dependence. But as the custom with regard to the present case had been inveterate, and there was no prejudice here done to any body, this was not a proper subject for a summary complaint.

‘ THE LORDS dismissed the complaint, with expenses.’

Act. *Arch. Murray,*

Alt. *Montgomery.*

*N. B.* THE LORDS appointed a committee of their number to draw up an act of sederunt relating to this matter.

*Fol. Dic. v. 3. p. 186. Fac. Col. No 169. p. 301.*

1764. November 16. JAMES PATERSON *against* ADAM ANDERSON of Kestock.

MR ANDERSON having become very much distressed in his circumstances, and unable to pay his debts, James Paterson, a preferable creditor of his, commenced a process of sale of his estate; during the dependence of which, a sequestration was also applied for to the Court.

In opposition to the sale, it was *pleaded* by the defender, That no sale of the estate could proceed, as the summons was irregularly executed, being not only signeted blank as to the names of the whole creditors meant to be called as defenders, but also returned into Court in the same state; from which it was evident that the executions of the messenger were destitute of a warrant, as they called persons whose names the summons did not contain, and whom he had

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The Court, in a process of ranking and sale, repelled the objection, that the names of the creditors were not filled up: before the execution of the summons.