

SECT. XII.

Judicial Steps, how far under the Power of Parties, to be retracted, altered, or amended.

1541. February 9. RUTHERFORD against EARL of BOTHWELL.

No 225.

Found that a libel may be amended, altered, or words therein deleted, any time before an act of liti-contestation be passed, notwithstanding that defences and answers have been proposed.

IN William Rutherford's cause against the Earl of Bothwell, touching the reduction of the Earl's infestment of certain husband lands of ———, the LORDS decerned, that the said William might *habere pro deleto* these words of the summons, the 6th of February, which was the date of the charter, which he asked to be produced by the said Earl for reduction thereof, *quia non erat de substantia libelli*, and liti-contestation was not yet made, which uses not to be made of the Lords' practick; nevertheless, in place of it in their practicks, has succeeded the proponing of a peremptory exception, if it be once put to proof, or how soon that ever the matter be put to probation. In the same cause, there were diverse exceptions *dilator*, by reason of the King's respite granted to the said Earl, being out of Scotland, proponed and disputed by the parties and their procurators at the bar, and interlocutor given thereupon by the Lords; nevertheless they by interlocutor decerned, that the said William might mend his summons, and have *pro deleto* the same words, and that *quia de jure ante litem contestatam actor emendare potest libellum, et de practica Scotiae similiter habere pro deleto aliquid quod de substantia libelli non sit ut in causa presenti*. They decerned, that it is not necessary to libel the date of another man's charter, which a man calls to produce for reduction of the same; and albeit Mr Hew Rig, procurator for the said Earl, proponed *per viam exceptionis* against the said William's summons, that he should be assoilzied therefrom, because the charter that he had of the said lands was of another date than was expressed in the said William's summons, and his exception superseded till the month thereafter; nevertheless the LORDS found by interlocutor, That William might mend his summons in that part habendo id *pro deleto*, because that exception was but *dilatoria*, sua videbatur causa esse adhuc in statu ante liti-contestationem ut patet; also, in the said cause, the LORDS decerned the said William's summons irrelevantly conceived, and cast them *ratione qualitatis*, because he bounded not, nor yet specified clearly, the fifteen husband lands contained in his summons. Also, in the said cause, the LORDS decerned process to the said William against the said Earl absent forth of the realm, notwithstanding his respite and Lords' decret interponed thereto, and letters past thereupon, and the said decret not being reduced, because the King, under his letters of seal, charged the Lords to proceed, notwithstanding the respite which they delivered, should not have procurators in the cause intended against the said Earl, or obeying of the same, and before his departing forth of Scotland.

Fol. Dic. v. 2. p. 197. Sinclair, MS. p. 21.