

1670. June 15.

LORD JUSTICE CLERK and his Son, Sir ALEXANDER, *against* EARL of HOME.

No 138.

Parties who have not been called in a process of adjudication, may see it in the Clerk's hands, without delaying the cause by a new citation.

THERE being a contract betwixt the Earl of Home and John Stuart of Coldingham, and Francis Stuart, some time Earl of Bothwell, whereby the lordship of Coldingham was agreed to be possessed by the Earl of Home, until he were paid of L. 19,000; and also, that the Earl should uplift L. 200 Sterling of annualrent forth thereof to him, and the heirs-male of his body; and it was declared, that the possession for the L. 19,000 should only be for the annualrent thereof, *fructibus non computandis in sortem*. Sir Alexander Home, as having right to this contract by progress, did pursue a declarator against the late Earl of Home, that, in regard his predecessor, the Earl of Home contractor, died without heirs-male of his body, and he continued to possess, who had no right to the annuity of L. 200 Sterling; that his possession did satisfy the L. 19,000, and purged the right. The said umquhile Earl dying, there is now summons of transference at Sir Alexander's instance against this Earl of Home, as representing his father, and also therein a declarator against this Earl, as apparent heir, that the contract was satisfied and extinct by intromission, and the lands liberated. Compearance is made for an appriser, who produced his infestment, and who had apprised the lordship of Coldingham, and all right thereof, competent to the late Earl of Home, who alleged no process for the conclusion of declarator against this Earl of Home, because all parties having interest were not called, viz. himself, who had denuded the Earl of Home, and who is not cited.—The pursuer *answered*, That this being a personal contract with the Earl of Home, whereupon no infestment had followed, seeing the original right was in no register, he was not obliged to search the register for the infestments of apprisers, but it was sufficient for him to call the apparent heir of the contractor: But seeing this allegiance could not be proponed for the Earl of Home, being *jus tertii*; neither by the appriser, unless he had produced his right to verify the same instantly: Seeing he now compears for his interest, he may be admitted and heard to defend thereupon *in causa*, but not to delay, or exclude the process till a new citation; but, according to the Lords' ordinary custom, he may see the process in the Clerk's hands, and propone his defence, as the Lords have done in the same process against one Park, another appriser.

THE LORDS repelled the defence; but allowed this appriser, as they had done the other, to see in the Clerk's hands, and to be heard upon his right; and ordained all the Advocates compearing for the defenders to produce any other interest in their hands, and not to delay the process, by dropping them in severally.

Stair, v. 1. p. 681.