1686. *March.* JOHN JOLLY *against* The LAIRD of LAMINGTOUN.

FOUND that a summons of reduction on minority, not executed within year and day after raising, is null.

Page 260, No. 921.

1686. *March.* BELSHES of TOFTS *against* The TENANTS of LOUDOUN.

IN a process of mails and duties,—it being alleged, That the executions of the summons were null, for not bearing the particular diets when the defenders were severally cited, whereby the mean of improving the same was cut off; 2. The principal apprising is not produced as the title of the process, but only a transumpt thereof;—Answered for the pursuer, When many defenders are cited, especially tenants, 'tis usual for the execution to bear upon the 1st, 2d, 3d, 4th days, &c. without distinguishing which of the defenders were cited upon the 1st day, &c. and this always sustained, unless improbation be proponed *peremptoriè* against the execution; and then the pursuer may condescend upon the particular day; 2. Transumpt is a [formal] sentence before the Lords of Session, and therefore a sufficient title to pursue. The Lords sustained process, and repelled both defences.

Page 260, No. 922.

1686. *March.* LORD CALLENDER *against* The DUKE of HAMILTON.

IT being objected against the executions of a summons, that the day of citation was a Sabbath-day, and so unlawful;—Answered, That was but an error in the naming of the day of the month. The Lords sustained the execution, and allowed the day of citation to be helped.

Page 260, No. 923.

1686. *March 25.* MILTOUN *against* SIR DANIEL CARMICHAEL.

IN the improbation at the instance of young Miltoun, against Sir Daniel Carmichael, of a seisin to Sir John Whitfoord, the pursuer's father, the articles of improbation were, That three of the witnesses insert deponed, that they did not remember that ever they were witnesses to such a deed, but could not be positive, it being thirty years ago; and the alleged bailie to the seisin deponed, that he could not say positively that ever he gave such a seisin; 2. The seisin was not booked in the register, but only marked by the depute. And, albeit the dead witnesses might prove presumptively *per se*, they cannot make faith against a contrary positive probation by four concurring living witnesses; for, if living witnesses were not sustained to convel the presumption arising from such as are

dead, it were easy to secure all forgeries, by putting in dead witnesses. The articles of approbation were,—1. Some of the witnesses in the seisin being dead, these are probative of the instrument; 2. Sir John was generally looked upon as a person infeft, and borrowed money, near to the value of his lands, from Sir Daniel Carmichael, a neighbour heritor, to whom he, Sir John, delivered his seisin now quarrelled; 3. When Sir John borrowed money from my Lord, his seisin was got up from Sir Daniel, to be shown to his Lordship, who got a wadset from Sir John, designed therein *heritable proprietary;* 4. Sir John, as a baron, stood and voted for commissioners to the Parliament, was a commissioner of assessment, and frequented all the meetings of the heritors; 5. In a petition to the Exchequer, signed by him, narrating there were precepts out of the Chancery upon his retour to infeft, and that the sheriff was chargeable with the non-entry by the responde, he craved, that, in respect of his services to and sufferings for the king, he might have the ease of his non-entry, and the sheriff discharged thereof; which desire was granted, after the term subsequent to the precepts, when they were null by the clause *præsentibus post proximum terminum non valituris.* Now, this petition imports, that he was liable and the sheriff liable, and consequently that he, Sir John, was infeft; 6. His special retour to these lands is produced; 7. The seisin is marked by the register-depute, who acknowledges the marking; and Archibald Hasty, sheriff-clerk, who is dead, was notary thereto, a man of entire reputation. The Lords having considered the articles of improbation and approbation, they sustained the verity of the seisin, and assoilyied from the improbation. *Vide* No. 603, [Sir Daniel Carmichael against John Whitfoord of Miltoun, December, 1685.]

Page 157, No. 567.

1686. *December.* The CREDITORS of LAUDERDALE *against* LORD YESTER.

THE Creditors of the Duke of Lauderdale, having craved a decreet, *cognitionis causa,* upon the heir of tailyie's renunciation, my Lord Yester compeared, and alleged, That he had interest to show that the pursuer's debts were satisfied, both as being apparent heir of line, against whom the creditors might recur, and as the first adjudger; and therefore he craved to see the process. Answered for the pursuers, That the year and day of my Lord Yester's adjudication was so far run, that a week's delay would totally exclude them from coming *in pari passu* with him; and they were content to reserve all defences competent to the heir of line *contra executionem.* The Lords ordained a decreet *cognitionis causa* to be put up in the minute-book, not to be extracted, that the summons of adjudication might be raised and executed; and allowed my Lord Yester to insist in proving the debts satisfied, any time betwixt and the pronouncing of the decreet of adjudication; and the decreet *cognitionis causa* to be restricted and regulated according as the debts should appear to have been satisfied.

Nota. Here the summons was raised at the instance of many creditors, every one for their own debts; which was a novelty, the ordinary custom being to assign all the debts to one upon back-bonds.

Page 3, No. 10.