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. No 37.

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.

No 38.
A pursuer may mend his libel, though the days of compearance are wrong filled up, if the *inducie* are elapsed before calling the cause.

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, 1*mo*, 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 *inducie*, but likewise commanding him to do an impossible thing, 2*do*, 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 *inducie* 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 38. ' of bankrupts are affected with adjudications, comprisings, and other real rights,' &c. Besides, by the act of sederunt 23d November 1711, it seems to be supposed that a naked adjudication is a sufficient title in a process of sale.

The Lords allowed the pursuer's procurator to amend the libel with respect to the filling up of the days of compearance therein, and repelled the allegeance against the pursuer's title, sustained the libel and active title libelled on, &c.

C. Home, No 83. p. 136.

1740. *January* 4. Wedderburn of That Ilk *against* Town of Dundee.

No 39.

In a declarator of astriction, the question occurred, how far the neglecting to call the heritor of the servient tenement, is supplied by his appearing, sisting himself as a party, and litiscontestating. The Lords found, That however a man's appearing for his interest may give ground for a decreet of preference against him, yet where he is not called, and no conclusion against him, his appearing in the process is no sufficient foundation of a personal decerniture against him.

Fol. Dic. v. 2. p. 179.

*** Kilkerran reports this case:

Where one not called in a process compears for his interest, though such compearance may be ground for a decree of preference, yet it was found, that his appearing for his interest could not be the foundation of a personal decerniture against him.

Kilkerran, (Process). *No 2. p. 434.*

1741. *June* 5.

Gray and Others, His Majesty's Feuers in Orkney, *against* Sir James Steuart of Burray, &c.

No 40.

Found that different parties could not accumulate their actions in one libel, unless they had connection with one another in the matters pursued for, or had been aggrieved by the same act; but that the procurators for the pursuers had their choice in whose name the process should proceed.

Should the parties differ among themselves, who should have the choice, it is thought it could of right pertain to no other than the first named in the summons.

Fol. Dic. v. 4. p. 147. Kilkerran, (Process.) *No 3. p. 434.*