On the 20th November 1771, the Lords "found that the fee was in the wife, and removed the sequestration upon an incidental petition."

Act. J. Scott. *Alt.* Cosmo Gordon.

1771. *July* 31. ALEXANDER SPENCE *against* THOMAS SMITH.

PROCESS.

A summons, it being sanctioned by the practice, may be called upon the last day of compearance.

[*Faculty Collection, V.* 367; *Dictionary,* 12,001.]

COALSTON. The objection is not relevant. To reduce the adjudication altogether would restrict it to security: here is an obvious irregularity. After the interlocutor was put up in the minute-book, it was not in the power of the Ordinary to touch it. An application ought to have been made to the Court for rectifying this error.

PITFOUR. Lord Milton ought to have signed a note setting forth the *res gesta.*

PRESIDENT. I do not like the putting hands to interlocutors; neither is the second one regular. The day of compearance ought to have elapsed before calling. See FOUNTAINHALL, vol. I., p. 72.

MONBODDO. The day must be past in judicial proceedings, as well as in pursuit for payment of a bond.

AUCHINLECK. The enrolment before Lord Milton was null, and there was no occasion for having it declared null. Interlocutors erroneously signed by one Ordinary, when pronounced by another, are scored daily.

PRESIDENT. That may be the practice; but surely not when the interlocutor is once put up in the minute-book.

On the 31st July 1771, the Lords "sustained the (first) objection, and annulled the adjudication *in totum;*" altering Lord Auchinleck's interlocutor.

Act. G. Wallace. *Alt.* D. Armstrong.

November 21.—PITFOUR. The adjudication is good. Lord Milton's interlocutor was pronounced *per incuriam.* I suppose that Lord Milton scored it upon hearing the mistake. It was pronounced *a non suo judice,* because the defender was not in Court, the days not being run. Although the interlocutor had not been scored, the proceedings would have been unexceptionable. Suppose a case were remitted to Lord Kennet, and yet brought to me to sign his interlocutor, whether I score this interlocutor erroneously signed by me, or leave it unscored by me, it matters not; for my interlocutor is just so much

waste paper. As to the other objection, it also is frivolous: the summons may be called on the last day of its compearance.

HAILES. Lord Pitfour has not gone to the bottom of the difficulty. He supposes that Lord Milton's interlocutor was *a non suo judice*. I do not see that: as the cause was in his roll, he might pronounce decreet. It was the fault of the pursuer, if he insisted in a cause without giving the legal *inducia* to the defender. But, independent of this, the interlocutor, as signed by Lord Milton, had gone to the minute-book; and I beg leave to deny Lord Milton's power to alter an interlocutor which had gone to the minute-book, or Lord Haining's, to pronounce an interlocutor, as if the former one had never existed. In such circumstances, the remedy does not lie with one Ordinary or another, but with the Court upon petition. As to the other case of an Ordinary signing an interlocutor pronounced by another judge, and then scoring it, *this* does happen sometimes; but there is no harm done, because his name will go for nothing when the cause is not before him. But, even in this case, it will be found that judges are cautious of scoring, without also marking—*signed by mistake*.

MONBODDO. I do not approve of putting hands to interlocutors. But, suppose that Lord Milton's interlocutor had not been scored, Lord Haining might pronounce a new one, for that the former was null. As to the other part, I am not satisfied: the last day of compearance must be free. The style of decreets bears—*after elapsing of the days of compearance*. For this there are produced authorities as well as principles. As to the practice, *communis error* indeed *facit jus*; but it is impossible that there can be a *communis error* here.

COALSTON. A laudable desire in the Court to put a stop to slovenly proceedings has carried it too far. When an exorbitant benefit is sought by an adjudication, as in the case of an expired legal, any objection will do. I would restrict this adjudication to a security for principal and interest accumulated at the date of the adjudication. I think that, in strictness, the party ought to appear on the last day of compearance: This is the practice in the Justiciary Court, and ought to be the practice in the Civil Court. It is said that the practice is not uniform; I therefore would not sustain it. The only consequence of not sustaining calling on the last day, would be to allow the defender to appear and object *de recenti*. The interlocutor pronounced by Lord Milton within the days, was void; therefore scoring made no difference. An interlocutor signed *a non suo judice*, is useless. My younger brethren speak from speculation rather than practice. I have often scored interlocutors, which I have signed by mistake when the case was not before me: I never knew any petition to the Court for rectifying such errors. Supposing the practice were wrong, it would be hard on that account to cut a man out of his just claim upon so great a dead sum of interest. As to going to the minute-book, *that* makes no difference: *that* will not validate a null interlocutor.

KAIMES. Both objections are good for nothing. Scoring is frequent whenever an error is observed. The Civil Court is with continuation of days; not so the Criminal. This shows why there is a difference between them.

AUCHINLECK. I have ever thought that forms were just the handmaids of justice. (But if justice goes abroad without her handmaids, she will run the risk of being insulted and trod under foot.) As to calling on the last day, that

calling is now by the clerk, without the presence of a judge. It is a piece of form, and there is no harm done. An Ordinary signing by mistake for another, is frequent. It matters not whether such interlocutor is scored or no, or by whom it is scored. Here the party went *brevi manu* to Lord Haining, without letting him know of the scoring: This of no consequence; for, if the fact had been set forth in a minute, Lord Haining would have proceeded just as he did. In an expired legal, I should have had more difficulty.

MONBODDO. If it is common to put up protestation on the *first* day after compearance, as I understand the practice to be, then the calling may be on the last day of compearance.

BARJARG. Without form we can have no justice. I cannot get over the difficulty of an interlocutor scored after it had gone to the minute-book.

On the 21st November 1771, the Lords "restricted the adjudication to a security for principal and interest accumulated at the date of the adjudication;" varying their own interlocutor of 31st July 1771, as well as Lord Auchinleck's interlocutor.

Act. G. Wallace. *Alt.* D. Armstrong.

1771. *November 22.* JOHN MACADAM of Craigengillan and OTHERS *against* WILLIAM MACILWRATH and OTHERS.

BANKRUPT—Act 1696, c. 5.

The apprehension of a Debtor, and his being in custody of the Messenger upon a caption, held to be imprisonment within the meaning of the Statute.—Effect of an Act of Warding.

[*Fac. Coll. V.* 331; *Dict. App. I.—Bankrupt, No.* 8.]

PITFOUR. It is not necessary to determine upon the effect of the Act of warding. Here Allison was in the *custody* of the messenger upon the caption: this is just the case of *Woodstoun*, determined in the House of Peers. Something, however, may be urged for the effect of an Act of warding. The Act 1696 meant to make notoriety the rule. It is true that the decision in the case of *Bent's Creditors*, goes the other way; but *there* a disposition to trustees, for the behoof of creditors, was in the field; and such dispositions, at that time, were considered exceedingly favourable, however they may have been considered since.

MONBODDO. If the cause rested upon the act of warding, I should have difficulty. I do not think that an act of warding produces such notoriety as a horning and caption; neither do I think that this act of warding was ever executed. Diligence by horning and caption, and apprehending by messengers, are sufficient to establish bankruptcy. So it was determined by the House of