

use to call summonses on the day of compearance. They also take the liberty to observe, That, according to their information, the question was agitated some years ago in a summons of sale of the estate of Forbes. The Lord Ordinary was diffculted, but, upon advising with the Court, the objection was repelled."

No 56.

Thereafter, upon the 25th of February 1772, the following judgment was given: "Having advised this petition, with the answers, and report of the clerks of Court upon the practice, and considering also that the calling before the Lord Milton as Ordinary, and signature thereon, was void and null, as being before the *induciæ* were run, they adhere to their former interlocutor of the 22d November 1771, and in so far refuse the desire of the petition; but with this explanation, that the necessary expenses cannot exceed the penalty in the bond."

Lord Ordinary, *Auchinleck*. For Spence, *Lockbart*, *G. Wallace*. For Smith, *D. Armstrong*, *Crosbie*. Clerk, *Campbell*.

R. H.

Fac. Col. No 124. p. 367.

1778. June 25. JOHN and JAMES WILSONS against HENRY LOCHHEAD.

JOHN and James Wilsons having brought an action for payment against Lochhead, called their summons, by mistake, before the last diet of compearance, and got a decret in absence. Having discovered the error, they called it anew after the *induciæ* were run, and obtained decret in absence.

No 57.
Proceedings
in absence be-
fore expiry of
the *induciæ*.

Lochhead, in a reduction of this decret, among other grounds, insisted, That it was void, on account of the former irregular proceeding. By calling the summons, and obtaining the decret before the *induciæ* were run, the authority of the summons was exhausted, and the pursuers could not thereafter remedy the defect at their own hand, as the proceedings were the act of the Court. They ought either to have raised a new summons, or applied to the Court to rectify the error.

Answered for the defenders: The proceedings previous to the running of the *induciæ* must be held *pro non scriptis*, being intrinsically void; and the authority of the summons to call for the defender's appearance, after the *induciæ* were run, remained the same as ever. It was sufficient that the pursuers passed from these proceedings, and there was no necessity to make any application to the Court to enable them to do so. There was no cause in the Court, at that time, on which to found such application. Spence *contra* Smith, 2th February 1772, *supra*.

The Court were of opinion, That the pursuers were entitled to consider the proceedings previous to the running of the *induciæ* as intrinsically null, and to

No 57. call their summons as if these had not existed, therefore, "repelled the reasons of reduction of this decret founded upon these proceedings.

Act. Cullen.

Alt. Hay Campbell, Claud Boswell.

Fac. Col. No 23. p. 38.

1780. July 26.

CUNNINGHAME, DOUGAL, and Company, *against* WILLIAM MARSHALL.

No 58.
Edictal citations in a ranking and sale not being recorded before the last day to which the citations are given, the pursuer may, after calling his summons, let it fall out of the roll and call it anew.

CUNNINGHAME, DOUGAL, and Company, raised an action of ranking and sale against Marshall. After the legal *inducia* were elapsed, the summons was called by the clerk in the Outer-House, and a *partibus* marked upon it. It was then inrolled in the regulation-roll for the ensuing week, and called before the Lord Ordinary in the Outer-House; when appearance was made for the defender, who *objected*, That the edictal citations at two of the parish churches had not, in terms of the act of sederunt 1711, been recorded before the last day of compearance.

Upon this the pursuers having recorded the citations, and then filled up a day of compearance in the blank space of the summons, posterior to all the proceedings mentioned, *insisted*, That there was now no depending process before his Lordship, and declared that they would call their summons of new, and bring it before another Lord Ordinary, as every thing done before the day of compearance so filled up was void. On the other hand, the defender maintained, that the blank space left in the summons was virtually supplied by the calling of the clerk, and subsequent proceedings, and in practice is never, except very rarely, actually filled up; and that a depending process being thus constituted, it was not in the power of the pursuers to make void the proceedings held in it.

The Lord Ordinary pronounced this interlocutor: "Having considered the foregoing minute, and consulted with the under clerks as to the point of form, finds, That there is no dependence sufficient to bar the pursuers from calling again their summons."

A reclaiming petition against this judgment was refused without answers.

Lord Ordinary, *Hailer*.

Act. *Mat. Ross*.

S.

Fac. Col. No 119. p. 220.

No 59.

1793. June 12.

HERBERTSON *against* RATTRAY.

ROBERT RATTRAY was cautioner for James Rattray, in a suspension of a decree of the Sheriff pronounced in absence against him. The latter objected, That the decree was null, as being pronounced when he was in England, and