

## NO. 2.

In a process of adjudication, the defender is entitled to take a day to produce a progress, whatever may be the consequence to the pursuer, of the delay. See No. 154. p. 12067.

1776. Dec. 13.

PEADIE, Petitioner.

PEADIE being creditor to the deceased Hamilton of Overtown, with the view of obtaining a preference to the creditors of the heir, upon the act 1681, c. 17. raised an adjudication against the late Mr Hamilton's estate, upon one diet, the induciæ whereof did not elapse until Saturday the 11th of January; and the three years from the death of Mr Hamilton expired upon Monday the 13th of the same month. As the 11th of January fell to be within the Christmas recess, Peadie petitioned the Court that they would authorise any one of their number to decern in the adjudication, reserving all defences *contra executionem*, without allowing the defenders to take a day to produce a progress; the unavoidable consequence of which must have been, to prevent the decree being obtained within the three years from the defunct's death, and thereby preventing the petitioner's legal diligence from affecting the estate of Overtown.

The Court considered that there were no grounds whatever which could induce them to grant this petition; for if they were even sitting upon the 11th of January, yet that could not avail the petitioner, for the Court could not dispense with the alternative of the act of Parliament allowing the defenders to take a day to produce a progress; and although the Court have sometimes *ex gratia*, allowed second adjudications to pass on one diet, for the sake of establishing a *pari passu* preference, yet they never would allow so new and extraordinary a measure as a first adjudication to pass upon one diet, when that diligence was intended to establish the preference of the single creditor.

The Court refused the petition.

For the Petitioner, *J. Boswell*.

D. C.

1800. Dec. 11.

DUNCAN MACKAY *against* The COMMON AGENT in the Ranking of MARGARET WATT'S CREDITORS.

## NO. 3.

An adjudication set aside, where the debtor

DUNCAN MACKAY, on the 7th June 1796, obtained a decree of constitution for L. 177 : 6 : 6 against Margaret Watt and John Grieve, her second husband, for his interest, as representing her first husband Daniel Morgan.

From the marking of the collector of the clerks' dues at the bottom of the extract of the decree, it appeared to have been extracted on the 27th July 1796.

On the 8th June, Mackay, in virtue of the decree of constitution which he had obtained the day before, raised a summons of adjudication against Margaret Watt and John Grieve. The latter being out of the kingdom, it was, on the 9th June, executed against him at the market-cross of Edinburgh, pier and shore of Leith, upon two diets of sixty and fifteen days.

On the 1st July Mackay presented a petition to the Lords, praying, in order that he might come in *pari passu* with other adjudications, that the Court would allow the summons of adjudication to be enrolled in the regulation-roll, notwithstanding the second diet had not elapsed. The petition was granted.

On the 3d July, Mackay obtained a decree of adjudication.

A judicial sale of Margaret Watt's heritable property having afterwards been brought, Mackay produced the decree of adjudication, to which the common agent

Objected, *1st*, The decree of constitution was not extracted at the time the summons of adjudication was raised, 4th February 1784, Apparent Heir of Porteous; No. 43. p. 132., 20th January 1801, Buchanan against Gray, APPENDIX, PART I. *voce* ADJUDICATION, No. 12. p. 26.

*2dly*, Although the Court dispensed with the second diet of the summons of adjudication, they neither did nor could legally dispense with any part of the first, 26th November 1794, Cannan, No. 60. p. 12005. As the citation, however, was given on *inducia* of sixty days, the first diet of appearance could not arrive till the first day of the winter session 1796, yet the pursuer prematurely obtained decree on the 3d July preceding.

Answered: *1st*, A decree always bears the date of the interlocutor which is the foundation of it; and this must be regarded as its legal date, at whatever time it may be extracted. During the sitting of the Court, when the extractors have a load of business, it would be attended with much injustice if the diligence of creditors were retarded, till the extracting of the decree was finished.

*2dly*, Adjudications do not stand in the same predicament with ordinary summonses. They came in place of apprisings, and as apprisings always proceeded on an *inducia* of fifteen days, it is sufficient if that period intervene between the date of citation, and that of the decree of adjudication; Stair, B. 4. Tit. 3. § 33. At all events, in second adjudications, it does not seem necessary that either diet of appearance should be elapsed, when the summons is enrolled; Bankt. B. 4. Tit. 2. § 4. and 37.

NO. 3.  
was cited on the summons before the previous decree of constitution was extracted, and where the decree of adjudication itself was obtained before the first diet of appearance had elapsed.

- NO. 3. The Lord Ordinary sustained the objections.  
On advising a reclaiming petition for Mackay, with answers, the Court adhered.

Lord Ordinary, *Balmuto.*  
Alt. *Hagart.*

For the Common Agent, *Williamson.*  
Clerk, *Menzies.*

R. D.

*Fac. Coll. No. 207. p. 475.*

NO. 4.

1800. Dec. 20.

JOHN PATERSON against JAMES REID.

An action is competent in the Court of Session, for a sum above 200 merks, though below L. 12 Sterling.

JOHN PATERSON brought an action in the Court of Session against James Reid, for payment of the balance of an account, amounting to L. 11 : 8 : 3.

The defender contended, That the action was incompetent in the Court of Session, because the sum concluded for was below L. 12 Sterling.

The Lord Ordinary sustained the action; and a petition was refused without answers, on the ground that the act 20th Geo. II. c. 43. § 38. prohibiting advocations for sums below L. 12 Sterling, refers to the act 1663, c. 9. against advocations for sums below 200 merks, but makes no alteration upon the act 1672, c. 16. § 16. prohibiting summonses in the first instance for sums below that amount.

Lord Ordinary, *Balmuto.*

For the Petitioner, *Turnball.*

Clerk, *Menzies.*

D. D.

*Fac. Coll. No. 209. p. 479.*

1802. Jan. 21.

SMITH and another, Petitioners.

NO. 5.

The deposition of a witness was allowed to be taken, to lie *in retentis*, although the summons was but just executed, and the parties not yet in Court.

A PETITION was presented to the Court in the name of Alexander Smith and Robert Auchterlony, trustees under the settlement of Dr James Young, praying, that a witness, of whose deposition there was danger of their being deprived before the proof could be regularly taken, might be immediately examined, his deposition to lie *in retentis* till opened by authority of the Court. The summons in the action in which this evidence would be necessary, had been raised and executed, but the *induciæ* were not yet expired; and in the mean time, the witness, as he was in a very declining state of health, (to which effect a certificate by his physician was produced), was