

Rutherglen, he suspended upon this reason, that the charger had passed from his bargain, in so far as, the suspender having afterwards acquainted him by a letter, that he could get his whole interest in Kilbride sold to the Dutchess of Hamilton; if these in the minute were included: the charger returned answer, that he would be sorry if his bargain should obstruct the suspender's selling the rest; but if the Dutches were ambitious of his little bargain, she should be welcome to it for some consideration. Upon the faith of which letter the suspender had entered into a contract with the Dutchess for the lands in the minute.

The Lords found, the letter was not an overgiving of the bargain, and did not put Sir Alexander *in tuto* to enter into a new one with the Dutchess; but that he behoved to fulfil and perfect the first minute.

*Vide* February 13, Dutchess of Hamilton contra Campbell.

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1706. *February 1.* Mr. DAVID RAMSAY, W. S. as Factor for the Executors of the deceased JOHN KIRKWOOD, servant to the Duke of Lauderdale, *against* ALEXANDER GIBSON of Durie.

IN the action at the instance of Mr. David Ramsay, as factor foresaid, against Alexander Gibson of Durie, as representing the deceased John Gibson of Durie, for payment of a bond granted by him to the said John Kirkwood, the pursuer's constituent: no process was sustained; because the summons contained only a warrant to cite the defender on twenty days for the first diet, and not upon twenty-one days. Albeit it was alleged, for the pursuer, that there are more [than] twenty-one days from the date of the execution to the first diet of compearance as marked in the summons; so that the defender can pretend no prejudice. And a literal mistake of the writer of the summons may be helped, as the wrong filling up of the days of compearance is allowed to be helped at the bar, when the pursuer offers to abide by.

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1706. *February 7.* The Lord BELHAVEN *against* Lord DAVID HAY of Beltoun.

THE Lord Belhaven having pursued Lord David Hay upon the Act 17, Parl. 1669, for adjudging a part of the defender's neighbouring lands of Beltoun to himself, to make an inclosure regular: it was alleged for the defender, that there was action formerly raised before the Justices of Peace upon the same account, which is not yet discussed; and therefore no new process can be sustained before the Lords, till the ish of that *lis alibi pendens*; there being no way to bring a depending process from an inferior judge to a more sovereign court, but by advocacy. 2. No process at the pursuer's instance, in respect he has produced no title in his person to the lands he is inclosing; and the act of Parliament ordains,