No 290. bonds, upon the head of falsehood; after the suspender's consigning L. 40, the charger's giving in articles of improbation, and abiding by the verity of the bonds quarrelled *sub periculo falsi*, but before any act was extracted, the Lords allowed the suspender to pass from his improbation, and found, upon payment instantly verified, by discharges produced, he always deponing *de calumnia*, that these discharges came to his hand after proponing falsehood; the meaning of the brocard, *exceptio falsi est omnium ultima*, being, that one who hath proponed the exception of falsehood cannot, after he is concluded by an act extracted upon it, recur to other defences, and payment instantly verified being the most favourable defence. But the Lords ordained the L. 40, consigned by the suspender, to be given up to the charger.

Fol. Dic. v. 2. p. 198. Forbes, p. 703.

1716. *July* 28.

The Laird of Meldrum *against* The Feuars of Meldrum.

No 291.
In a reduction and improbation, the Lords allowed the pursuer to eik to his libel the very points on which he insisted, not only after the outgiving, but even after two acts of production were extracted in the process.

There being a commonty at some distance from the town of Old Meldrum and arable ground belonging to the Laird interjected, there is contained, in the dispositive part of the Feuars' charters, (besides other things that are usual,) this clause: 'Cum libertate focalia sive glebas et cespites effodiendi, et lucrandi 'lapides molliores et duriores, *lie hard and free stone*, in et a quavis parte com-'munitatis dicti burgi baroniæ, ad emendanda ædificia super dictum tenemen-'tum ædificanda vel instauranda.'—By virtue of this clause, the feuars conceiving themselves entitled to common pasturage, casting feal and divot, &c. did for some years bygone use these servitudes, but were frequently interrupted by minority, *via facti*, lawburrows, &c.; and at length the superior raises reduction, improbation, and declarator, against them; in which process, the question coming to be, Whether the feuars, by the said clause in their charters, had right to feal and divot and pasturage on the commonty?

It was *alleged* for the defenders, 1*mo*, That, though their charters do not specifically contain the faculty of feal and divot, yet that is undoubtedly comprehended under the power to cast peats, dig stones, &c.; especially considering the common clause, (*cum pendiculis, privilegiis, et pertinentibus*,) which general words may well be interpreted to comprehend the privilege of casting feal and divot; especially considering, 2*do*, That, without that privilege, the feus could not subsist many years, they consisting mainly of houses, and but little ground annexed, and even that arable, which cannot afford materials necessary for upholding tenements; so that it would have been elusory to grant them stones to build their walls, unless it were understood that they were to be supplied with feal and divot for covering of the walls out of the burgh's commonty; and, therefore, though the words in the charter be not specific, yet it

must be considered as the meaning of all parties; 3*tio*, That the greater privilege of digging stone, winning peats, &c. must be presumed to imply a further liberty of doing those things, which, however less in themselves, and less prejudicial to the commonty, yet are equally necessary with what is expressed in the charter. No 291.

Answered for the pursuer, 1*mo*, That the allegeance was a plain acknowledgment, that there is no such right, as the defenders pretend, conveyed to them by the said clause in their charters; 2*do*, No use or custom could be founded on in their favour, unless they could say 40 years possession without interruption; 3*tio*, That they could not found their possession upon part and pertinent, for the same reason; 4*to*, Neither law nor reason will allow them, from the privilege of winning stones, to infer that they have right to cast feal and divot, and to pasture; because, 1*mo*, The parties' bargain and design is plainly expressed in the clause, and the special granting the privilege of winning stone excludes all others not expressed; 2*do*, Feal, divot, and pasturage, are different rights from stones, and they can never be constituted without writ, or 40 years possession; 3*tio*, The defenders might as well hence conclude, that the pursuer is bound to furnish them timber for supporting the divots, and straw for thatching, &c.; and though it is true, that stones, without these other particulars, would be of little use, yet all the charters being restricted to stones, *pactum dat legem contractui*; 4*to*, This privilege is so far from being the greater right, that the houses being now built so as none of them probably will have occasion once in a year to break ground for stones, whereas, by their daily using the commonty for feal, divot, and pasturage, &c. they must necessarily in a short time ruin their pasturage, which belongs to the tenants who labour the arable ground, whereby the pursuer must hazard the casting the same waste.

"THE LORDS found it relevant to give the defenders the privilege of casting feal and divot, and pasturing on the commonty; that the feuars, and tenants of the burgh and barony were in use to cast feal and divot, and pasture on the said commonty, before and after the feus.'—*See* SERVITUDE.

IN the above action, this dilatory defence was proponed, viz. That the conclusions insisted on by the pursuer were eiked to the libel, not only after the outgiving, but even after two acts of production were extracted in the process; and, therefore, could not be insisted on.

Answered for the pursuer; That, by the nature of a process of improbation, where a superior is calling for his vassals' rights, it is impossible, before production of the charters, that a superior can found any conclusion of declarator, nullity, or falsehood; and, therefore, it is still allowed to a superior to insist upon such grounds, or frame such conclusions as he thinks proper, after the charters are produced, upon the defender's being allowed to see the libel again;

No 291. as the LORDS lately found in the case of the Lord Lindores against his pretended Vassals.

Replied for the defenders; That, though emendations of a libel be allowed, yet these only can be made *in initio processus*, before any act be extracted; nor can these eiked conclusions of the pursuer be accounted emendations, being truly total mutations of the libel; and it is the opinion of Lawyers, that the amendments be allowable *usque ad litiscontestationem*, yet alterations, which invert the nature of the libel, ought not to be put in; far less, then, in this case, where acts are extracted which limit the plea, and set boundaries thereto. Thus the Lords, 13th December 1709, Earl of Lauderdale against the Lord Yester, No 288. p. 12151. found no process upon the passive titles, as charged to enter, though libelled, seeing no such charge was produced; nor would they allow the pursuer to mend his libel; and as this is consonant to our law, so it is to the common law; L. 18. D. Commun. Divid. et L. 23. D. De Judic. in judicium non tenetur venisse, quod post acceptum judicium accidit; ideoque, alia interpellatione opus est.

Duplied for the pursuer; That the decision was not to the purpose; for, 1*mo*, The Lords found there no process against the defender, in regard there was no passive title libelled against him, as representing his mother, but as charged to enter heir, and that was not produced; therefore, the pursuer was not allowed to mend his libel, and the defender had only proponed objections against his title; and, 2*do*, Improbations and declarators jointly seem plainly to be favoured in practice, with the privilege of framing and insisting upon new grounds, which were not libelled upon before production.

"THE LORDS repelled the dilator."

Act. *Leith.* Alt. *Hay.* Clerk, *Roberton.*

Fol. Dic. v. 2. *p.* 198. *Bruce, v.* 2. *No.* 30. *p.* 38.

1736. *December* 17.

The EARL of SUTHERLAND *against* REBECCA, &c. DUNBARS.

No 292.
Substituting a new sheet upon a summons, in place of an old one, without authority, makes the instance perish.

IN the process of wakening and transference of an action of declarator of recognition at the Earl's instance, against Dunbar of Thundertown and others, it was *objected*, That the principal summons could not be the foundation of any judicial proceeding; because, instead of the first sheet, which contained a description and enumeration of the lands said to have recognosced, and on which the calling, and *a partibus*, ought to have been marked, there was battered on in place thereof, without any authority, a new sheet, containing a new enumeration of the lands which were, or at least might have been, different from the former, and bearing no calling marked upon it.