No 21.

But, in the *second* place, whatever is the privilege of baron-decreets, it cannot be extended to this case; seeing, by the decreet, he was expressly ordained to make payment within the term of law; whereby he had reason to believe, that provided he paid within fifteen days, he was safe from all execution; notwithstanding of which his effects were carried off within that period; and the construction put upon the decreet by the defender, is inconsistent with common language, as the term of law is always supposed to imply a certain number of free days.

Triplied; That, before the statute 1669, poindings, in all cases, proceeded summarily without the necessity of a charge, and even where a horning was raised and executed before the days thereof expired, as is observed both by Balfour, in his Practiques, and Sir George Mackenzie, in his observations on this statute. Besides, the act 1469, ch. 34. which prorogates the poindings for rents due at Whitsunday and Martinmas, to the third day after those terms, in respect the poinding at the term day occasioned a profanation thereof (both which were then holidays), is a demonstration that poinding was then competent immediately after decreet; nay, it has been found, that in matters which do not concern poindings, the law stands upon the same footing it did before the act 1669. Thus, a decreet of removing before an inferior court may be put to execution by ejection immediately after it is pronounced; and, if the law stood so before the act, the defender has done nothing wrong, seeing, at the same time that the statute discharges poinding for personal debts until the days of the charge be expired, it expressly excepts decreets recovered at the instance of heritors against their tenants in their own courts. As to the passage quoted from Lord Stair, it is at best very ambiguous and inaccurately expressed. In the *second* place, the defender cannot admit the gloss that is put on the decreet, namely, that it imports the same thing as if the pursuer should pay within fifteen days, seeing the term of law, in its proper, as well as its legal sense, signifies the term within which execution may be awarded, and therefore cannot be understood to give any other *inducie* than were allowed by law in this particular case.

The Lords repelled the objection to the poinding, and assoilzied.

Fol. Dic. v. 1. *p.* 466. *C. Home, No* 5. *p.* 15.

1761. *July* 17.

Robert Hamilton of Boutreehill, *against* Alexander Blackwood, Merchant in Edinburgh.

No 22.
Second diet of compearance in a second process of adjudica-

Alexander Blackwood was creditor to Cathcart and Blackwood, merchants in London, who became bankrupt in 1745, and obtained a certificate of bankruptcy. It was afterwards discovered that there was an heritable subject in

Scotland belonging to Cathcart, which had not been surrendered to the commission under the bankruptcy. Alexander Blackwood obtained decreet of adjudication of this subject on the 26th of June 1760.

No 22. tion dispensed with, in order to bring it within year and day of the first adjudication.

Robert Hamilton of Boutreehill, another creditor, executed a summons of adjudication upon the 4th of April 1761, and as Cathcart's residence was at London, the diets of compearance could be no sooner than the 12th and 28th of June thereafter, the last of which diets fell without year and day of Blackwood's adjudication.

Hamilton applied by petition to the Court, after the elapse of the first diet of compearance, praying that the second diet might be dispensed with, and that warrant might be granted for inrolling, calling, and decerning in the adjudication. THE LORDS, upon the 19th June 1761, granted warrant in terms of the prayer of the petition, 'authorising the clerks to call, and the keeper of the 'rolls to inroll the above adjudication in the next week's regulation-roll for the 'outer-house, notwithstanding the second diet of compearance was not come; 'and authorising the Lord Ordinary to pronounce decreet of adjudication there-'in.' And the Lord Ordinary, upon the 24th of that month, pronounced the common interlocutor of adjudication, *reserving all objections* contra executionem.

Pleaded in a reclaiming bill for Blackwood; By the laws of all civilized nations, sentence is not suffered to pass against any man's person or estate till an opportunity is given him of being heard in his defence. In Scotland, our ancestors were particularly careful that full time and repeated notice should be given to the defender to bring him into court before any judicial proceeding could go on against him. By act 30. par. 1449. no less than three summonses, each of them upon fifteen days, were appointed to be given to parties, even within the kingdom.

After the institution of the College of Justice, first and second summonses were for a long time in use; these different summonses taken out and executed one after another, were found troublesome, and new regulations were from time to time made, but still two distinct diets of compearance were preserved; and, as some abuses had crept in as to shortening these diets, it was provided by act of sederunt, 29th June 1672, That all summonses should be given upon 21 days warning for the first diet, and six days warning for the second, excepting alimentary causes and certain others therein mentioned, which are specially privileged to pass upon shorter *inducie*; but among these, summonses of adjudication are not mentioned, nor have they ever been considered in practice as privileged, either as to the number of diets or days of compearance; and therefore they have always been expeded with two diets, and upon the common *inducie*.

With regard to persons out of the kingdom, the immemorial practice has been to cite them at the market cross of Edinburgh, and pier and shore of Leith, upon 60 days for the first, and 15 for the second diet of compearance; nor has any exception been made with regard to adjudications. An adjudication is a process

No 22. that deserves attention as much as any process whatever; it is an extraordinary remedy by which the estate of the defender is conveyed in satisfaction of the pursuer's debt; the law, therefore, has given an alternative to the defender, that if he thinks fit, he may produce a progress, and prevent more of the estate from being affected than answers the extent of the debt; and it would be very hard to deprive him of an opportunity of taking the benefit of this alternative, by assigning him fewer diets, or giving him shorter *inducie* than usual for his compearance.

Summonses are issued from the King's signet, authorising messengers at arms to cite defenders to compear at the diets therein mentioned. It is submitted, if a summons, once issued and executed agreeable to law and practice, can be altered in an essential point in favour of the pursuer, and in prejudice of the defender. Here the days of compearance are filled up in the summons, 'the 12th 'and 28th of June,' and the execution bears, that the defender was cited to the days 'therein mentioned.' This implies a sort of contract between the parties, that the defender shall appear at the days to which he is cited, and that the certification in the summons shall not take place till he be heard, or these days elapsed. Besides, till the days to which a defender is cited are past, there is no action or process depending in court, upon which any order can be given, or decreet pronounced. The case is quite different where the days are run, for the defender is then held to be in court; and there is a depending action which the court may justly forward in its issue, by dispensing with mere forms, such as the outgiving of a summons, which has sometimes been done in the case of second adjudications, after the elapse of the days of compearance, to bring in creditors *pari passu* on the act 1661; but no argument can from thence be drawn to the present case.

Answered for Robert Hamilton; Before the statute 1672, first and second summonses were necessary; and after the first was executed, and the diet of compearance therein elapsed, an act of continuation was granted, upon which a second summons was raised and executed before the pursuer could proceed in his cause; but as these acts of continuation and second summonses were expensive, and occasioned delays, it was provided by act 1672, that there should be only one summons, containing two several warrants for citing the defender at different times; and thereafter, for the greater ease of the lieges, a further remedy was provided by act 12th, Parl. 1683, whereby one citation was declared sufficient for both first and second diets of compearance. But though, by our ancient practice, two citations were necessary, yet the defender was understood to be in court upon the first citation, and the second was not in all cases necessary; this is clearly laid down by Lord Stair, b. 4. tit. 38. § 30. and Sir Thomas Hope, in his Minor Practics, tit. 1. § 4. who both make this distinction, that where the libel required to be proved by witnesses or oath, an act of continuation was necessary; but where the pursuer could instantly instruct his libel by writ, the first citation was sufficient. It does not appear that the statutes 1672

and 1693 made any alteration in this respect, but only provided, that, in the cases where two summonses were formerly necessary, two citations should now be given, or the defender should be cited to two diets; and therefore it is thought, that where the summons can be instantly instructed by writ, it is not at this day necessary that it should contain two different diets. A process of adjudication is properly of this last kind; the grounds of it must be clear and liquid; the debt must be previously constituted and instructed by writ; and therefore two diets in a summons of adjudication would in no case be necessary, were it not on account of the alternative introduced by the act 1672 in favour of the debtor, by which he can avoid a total adjudication of his lands by giving off a part effeiring to the debt, which can only be done by a proof of the value of the lands. This circumstance seems to render two diets necessary in a summons of adjudication; but then it will be observed, that this can only hold with respect to the first adjudication, where the defender is entitled to take a day to produce a progress, purge incumbrances, and to give off lands effeiring to the debt, which requires a proof of the value. It cannot apply to the case of a *second* adjudication; for, after one decreet of adjudication is obtained against the debtor, he has it not in his power to lay hold of the alternative given by the statute; he cannot pretend to give off lands effeiring to the debt; he must allow decreet of adjudication to go against his whole lands; nay, he cannot propone any defence whatever against the second action; he cannot even object to the debt for which the adjudication is led. And thus, in practice, when a second summons of adjudication is called by the clerks in the outer-house, the defender is not allowed the common privilege of having a lawyer marked for him; it must pass in absence; the pursuer is entitled to have his decreet, that he may come in *pari passu* with the first adjudger; and all objections are reserved *contra executionem*. No 22.

A second summons of adjudication is therefore precisely in the case of those actions where the pursuer instantly instructs his libel by writ, and where no act of litiscontestation is necessary; and consequently there appears no necessity for a second diet of compearance. It is indeed necessary that the defender be brought into Court, because no action can proceed without a defender; but, as in former times, he was truly in court after the diet of compearance upon the first summons, and for the same reason is now in court after the elapse of the first diet of compearance; so it must appear idle to use either a second citation or a second diet against a defender, who, though in court, can make no defence. The relief, therefore, which the court has given in this case is, in reality, no more than dispensing with a step of procedure which was altogether unnecessary; and there is the clearest ground in equity for giving this relief, as the intention of it is to bring in creditors *pari passu*, who have an equal title to attach their debtor's estate. Accordingly it has always been the practice of the court in such cases to dispense with the second diet upon the application of the pursuer. One instance of which occurred very lately, in the case of Newal

No 22. of Barskeoch against Alexander M'Clamroch, decided 2d August 1758.* THE LORDS adhered.

For Hamilton, *Macqueen.* For Blackwood, *Rae.*

J. C. *Fol. Dic. v. 3. p. 316. Fac. Col. No 48. p. 101.*

SECT. III.

Annus Deliberandi.

1609. *November* 17. FAUSYDE *against* ADAMSON.

No 23. An apparent hier may be charged to enter any time after his predecessor's death; but no summons can be executed against him till the year and day expire.

GEORGE FAUSYDE charged Adamson to enter heir to umquhile James Adamson of Cowthripill his father; thereafter pursued him for translation or implement of a contract. It was *alleged*, That the pursuer should have no process; because, by act of Parliament, it was provided, that no process nor charges should be used against an apparent heir while year and day were past after his father's decease, and the charge was used, being before the expiring of year and day. It was *answered*, That the act of Parliament was only militant in the pursuit of actions before the expiring of year and day; and that, albeit this pursuer's charge was raised and executed within year and day, he had not intented his action while after year and day.——THE LORDS remembering that they had so decided the Laird of Cluny against Errol, found the charge lawful within year and day, albeit they would not authorise any pursuit moved within year and day; and declared they would observe this as a practice in time coming.

Fol. Dic. v. 1. p. 467. Haddington, MS. No 1642.

1611. *February* 19. FAIRLIE *against* BLAIR'S HEIRS.

No 24.

A CHARGE to enter heir being raised and executed within year and day, it is sufficient if the last day of the forty was after the year and day.

Fol. Dic. v. 1. p. 467. Haddington.

*** This case is No 83. p. 2746.

* Not Reported.