1764. *November* 15. PATERSON *against* ANDERSON of Kestock.

No 54.
In a sale of a bankrupt estate, it is usual to leave a blank in the summons for the names of the creditors, to be filled up afterwards, from the messenger's execution.

IN a summons of sale, containing a warrant in general to cite all the real creditors, a blank was left for the names of these creditors, which, by authority of the Lord Ordinary, was afterwards filled up from the executions against these creditors produced in process. It was *objected*, That the summons was informal, because it ought to have contained the names of the defenders; which objection was repelled, it appearing to be customary to libel a summons of sale in that manner, for a good reason, that it cannot always be certainly known before hand who are the real creditors; and therefore, it is convenient to leave this to the sagacity of the messenger.

Sel. Dec. No 224. *p.* 289.

*** This case, as reported in the Faculty Collection, is No 17. p. 3691, *voce* EXECUTION.

1769. *August* 7.

HENRY BUTTER, Factor appointed by the Barons of Exchequer upon the forfeited estate of Cluny, *against* RONALD and ALEXANDER M'DONALDS.

No 55.
A party may sist himself without any summons.

THE question was a removing from certain lands, part of the annexed estate of Cluny.

Pleaded for the defenders; The lands possessed by them are under the direction not of the Barons of Exchequer, but of the trustees for annexed estates.

By 25th Geo. II. c. 41, his Majesty is empowered to vest in Trustees certain forfeited estates, and, among the rest, the estate of Cluny, for the purposes mentioned in the act. In consequence of this statute, certain trustees have been appointed by two several commissions in 1756 and 1761. These trustees have the sole management of the estates enumerated in the act, to the exclusion of the Barons of Exchequer.

Answered for the pursuer; There is no doubt, that, by the vesting act 20th Geo. II c. 41, the Barons of Exchequer have the power of removing tenants, as well as of granting leases and levying the rents. It is *jus tertii* to the defenders to argue upon the different powers of the Barons of Exchequer and the trustees for annexed estates; and it must be presumed, that those officers know the limits of their respective duties and powers.

The Lords differed both as to the validity of the objection, and as to its competency. Some were of opinion, that here, as in every case, it was competent to a tenant to plead defect of title in a removing; and the defenders illustrated the matter, by the comparison of a second factory, which supersedes the first.

No 55. But the majority, though inclined to sustain the objection, had there been a competition between the Barons of Exchequer and the trustees for annexed estates, did not think themselves entitled to enter into it *in hoc statu*, as being *jus tertii* to the defenders. And therefore the COURT "repelled the defence, and decerned in the removing."

Several other defences were pleaded in this process.

After the summons had been called, a blunder having been discovered in the execution, it was sent to the country in order to be executed of new. The defenders, in the mean time, put up protestation for not insisting; but the summons being returned with the new execution, and presented before the lapse of the days of compearance to which it had been made, the protestation was immediately scored. Upon this *species facti* the defenders pleaded, 1*mo*, That the second execution of the same summons was irregular. But this was repelled; because, at the time of the second execution, the summons had not been brought into Court.

2*do*, That it was improper to call the summons before the days of compearance in the second execution were elapsed, and consequently, that the protestation ought not to have been scored, but allowed to be extracted, whereby the instance must have perished, and a new summons become necessary.

This objection was likewise over-ruled; because a party may sist himself without any summons at all; and the present defenders must be considered as having renounced this dilatory defence, which ought to have been pleaded *in initio litis*; and that, though it was argued from the bar, that a litigant is not bound, by the compearance of his counsel, before the lapse of ten days; that the act of sederunt concerning dilators relates only to the case where the parties have actually come into Court; and, that the objection now pleaded was formerly sustained, where a summons had been called upon the very day of compearance; 2d January 1680, Arbuthnot, observed by Lord Fountainhall. *

Act. *King's Counsel.* Alt. *Lockhart, Elphinston.* Reporter, *Lord Kames.*
G. F. *Fol. Dic. v. 4. p. 146.* *Fac. Col. No 102. p. 189.*

*** This case was appealed:

THE HOUSE of LORDS, 4th April 1770, "Ordered and Adjudged, That the appeal be dismissed, and that the interlocutors therein complained of be affirmed."

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* The following are Lord Fountainhall's words:——1680. Jan. 2. Alexander Arbuthnot of Knox pursuing a reduction against Nicolson of Carnock and William Keith in Inneragie; the summons was cast, because it was called on the day of compearance; which Hope, in his Min. Pract., tells us may not be done except allenarly in witnesses. And lately, in December 1679, the same point being taken to interlocutor in another cause, the LORDS found no process till it were of new marked as called by the clerk, at least of a day's date posterior to the day of compearance.——V. 1. p. 72.