1771. *Nov.* 22. & 1772. *Feb.* 25.

ALEXANDER SPENCE, Pursuer, *against* THOMAS SMITH, Defender.

No 56.
A summons, in consequence of the practice, may be called upon the last day of compearance.

THOMAS SMITH, the defender's father, in the 1750, had led an adjudication upon a bond against Patrick Cuninghame, as apparent heir to Alexander Cuninghame, over certain subjects in Linlithgow. Alexander Spence, a creditor, having also adjudged, brought an action of reduction of Smith's adjudication, upon the following grounds.

The decrees of constitution and adjudication by Smith, being taken against Patrick, the apparent heir, then abroad, required two diets of compearance, the one of sixty, the other of fifteen days; and from the warrants, it appeared that the summons of adjudication had been executed upon the 15th January 1750, tabled and called upon the 9th of June, before the *inducia* were run, enrolled that same day, called before Lord Milton, Ordinary, upon the 12th June, when decree in absence was pronounced in terms of the libel.

The error of calling the summons before the *inducia* were expired, having, it is supposed, been discovered, Lord Milton's interlocutor was cancelled and scored. The summons was again called on the 16th June, was inrolled in the next week's roll for the Outer-House, before Lord Haining, who, on the 19th June, pronounced another decree in terms of the libel.

Upon these facts, the pursuer, in support of his reduction of the defender's adjudication, *pleaded*,

1*mo*, The first calling of the adjudication, before Lord Milton, the *inducia* not being elapsed, was irregular. The second calling, upon the 16th of June, was also premature. Not only must both diets of compearance, the second as well as the first, be free, but even upon the supposition that the 16th of June was the last diet, yet as that was a Saturday, and as no summons could be regularly called before the last diet was elapsed, the present could not regularly have been called before the 19th of June. Skene's Form of Process, cap. 5. Hope's Minor. Pract. tit. 1. § 1. Stair, B. 4. tit. 38. § 2. 2d Jan. 1680, Arbuthnot, (See Note p. 12000.) Erskine, B. 4. tit. 1. § 36. Agreeable to these principles, the uniform style of every decree bore, that the summons was called after elapsing of the days of compearance; which was better evidence of the practice than a few rare instances of irregularity which might have occasionally been committed.

2*do*, As the process had been originally fixed before Lord Milton, as Ordinary, no other Ordinary had power to judge in the cause; so that the interlocutor by Lord Haining was *ultra vires*, pronounced *a non judice* and consequently good for nothing. The summons having once been tabled and called in Court, could not, its effect being executed, be called a second time. The very calling by the clerks made the action a depending process. A judgment pronounced and signed carried it still farther, and rendered it altogether in-

No 56. competent to return to the clerk, or to transfer the cause elsewhere. The cancellation of the interlocutor, pronounced by Lord Milton, rendered matters worse. The Ordinary himself had not power to destroy an interlocutor pronounced, signed, and issued; it was not here pretended that it had been done by his authority; and it would be of the most dangerous consequences, if the records of Court, which should be preserved pure and entire, should, in this manner, be altered or destroyed.

The defender *answered*,

1*mo*, The pursuer's doctrine, as to the necessity of the day of compearance being elapsed before the summons could be called, was founded upon the rule of practice, prior to the Stat. 1672, cap. 6. and 1693, cap. 12. relative to second summonses, or a summons of continuation. When these acts were examined, it would be found, that a summons at present had the same effect as a summons of continuation by the ancient practice. The summons of continuation was accordingly of a peremptory nature, and might be called on the very day of compearance. The authorities quoted did not sufficiently distinguish betwixt simple summonses and summonses of continuation: The decision from Fountainhall most probably related to some case of a simple summons prior to the act 1672; and Lord Stair stated rather what was the practice in his own time, than what was required by law. The practice at present was to call a summons on the last day of compearance, and if that was to be held a nullity, many decrees would be overturned.

2*do*, The procedure before Lord Milton, as the *inducia* had not expired, was erroneous, and *funditus* null and void. It was in fact extrajudicial. The clerk had no authority to call, the keeper of the rolls no authority to enrol, and the Lord Ordinary no authority to decern. In the present case, accordingly, as there was regularly no process, there was no proper record which could be altered or vitiated,; and as it was evident there could be no criminal intention, the scoring of the proceedings as they were equally unavailing whether scored or not, was of no consequence.

Different interlocutors were pronounced in this case. Upon the 31st July 1771, the Court sustained the objections to Smith's adjudication as sufficient to annul it *in toto*; but, upon advising a reclaiming petition for Smith, with answers, the following judgment was pronounced:

November 22. 1771. "Sustain the adjudication in question as a security for principal sum, annualrents, and necessary expenses, to be accumulated at the date of the decree of adjudication, and for the annualrents of the sum so accumulated after the date of the said decree till payment."

Upon advising a reclaiming petition for Spence, with answers, on the 24th of February 1772, the Lords "were pleased to remit to the clerks of Court to enquire, whether summonses are in use to be called the day of compearance, or not till the day after. When, in answer to this remit, which the clerks understood to relate merely to the practice, they report, That the clerks are in

use to call summonses on the day of compearance. They also take the liberty to observe, That, according to their information, the question was agitated some years ago in a summons of sale of the estate of Forbes. The Lord Ordinary was difficulted, but, upon advising with the Court, the objecion was repelled." No 56.

Thereafter, upon the 25th of February 1772, the following judgment was given: "Having advised this petition, with the answers, and report of the clerks of Court upon the practice, and considering also that the calling before the Lord Milton as Ordinary, and signature thereon, was void and null, as being before the *inducia* were run, they adhere to their former interlocutor of the 22d November 1771, and in so far refuse the desire of the petition; but with this explanation, that the necessary expenses cannot exceed the penalty in the bond."

Lord Ordinary, *Auchinleck*. For Spence, *Lockhart, G. Wallace*. For Smith, *D. Armstrong, Crosbie*. Clerk, *Campbell*.

R. H. *Fac. Col. No* 124. *p.* 367.

1778. *June* 25. JOHN and JAMES WILSONS *against* HENRY LOCHHEAD.

No 57.
Proceedings in absence before expiry of the *inducia*.

JOHN and James Wilsons having brought an action for payment against Lochhead, called their summons, by mistake, before the last diet of compearance, and got a decreet in absence. Having discovered the error, they called it anew after the *inducia* were run, and obtained decreet in absence.

Lochhead, in a reduction of this decreet, among other grounds, *insisted*, That it was void, on account of the former irregular proceeding. By calling the summons, and obtaining the decreet before the *inducia* were run, the authority of the summons was exhaused, and the pursuers could not thereafter remedy the defect at their own hand, as the proceedings were the act of the Court. They ought either to have raised a new summons, or applied to the Court to rectify the error.

Answered for the defenders: The proceedings previous to the running of the *inducia* must be held *pro non scriptis*, being intrinsically void; and the authority of the summons to call for the defender's appearance, after the *inducia* were run, remained the same as ever. It was sufficient that the pursuers passed from these proceedings, and there was no necessity to make any application to the Court to enable them to do so. There was no cause in the Court, at that time, on which to found such application. Spence *contra* Smith, 2th February 1772, *supra*.

The Court were of opinion, That the pursuers were entitled to consider the proceedings previous to the running of the *inducia* as intrinsically null, and to