1787. *March* 8.

JAMES MORISON and COMPANY *against* WILLIAM ALLARDES.

No 11.
Land rights not rendered litigious by the mere execution of a summons.

JAMES MORISON, Andrew Murison, and William Boggie, entered into a Copartnery for carrying on a manufactory; and, with that view, purchased a house and a small piece of land. The disposition from the seller was conceived in favour of all the three *nominatim*, 'equally amongst them, their heirs 'and assignees, heritably and irredeemably.'

Soon afterwards Boggie, one of the partners, borrowed a sum of money from Allardes, to whom he granted an heritable security over the above mentioned subjects. But some days before this, a summons, in the name of the other partners, was executed against him, concluding for having it found, that the subjects, having been purchased for the Company, could not be alienated, or charged with debt by any of the partners, till the Company debts were paid.

An action was afterwards instituted by the partners, for setting aside the infeftment granted to Allardes, on this ground chiefly, that, by the execution of the summons against Boggie, the subjects had become litigious; and, of course, incapable of alienation.—The defender

Pleaded, The rule, that, *pendente lite nihil innovandum*, though of considerable importance to the efficacy of judicial proceedings, must always be so limited in practice, as not to encroach on the security of *bona fide* purchasers and creditors. Hence, by the Roman law, from which the maxim has been introduced into Scotland, the *vocatio in jus*, which was of the nature of our summons, was not held to create litigiosity, this being only inferred from the litiscontestation, whereby the parties joined issue on the matters in controversy, and the dispute became so public, as to put third parties on their guard. In the same way with us, so strong an effect has never been given to the mere execution of a summons; but the cause must have been called in Court, or some litigation must have ensued, from whence the dispute may be supposed to be generally known; Voet, *ad l.* 44. *tit.* 6. *ff. l.* 1. *D. De Litigiosis*; Bankton, *b.* 4. *tit.* 23. § 14.; 9th January 1760, Menzies *contra* the Creditors of Gillespie, *voce* SALE.

Indeed, it may admit of doubt, whether, since the establishment of the public registers, the doctrine of litigiosity ought, with regard to land-rights, to be of any force. It is easy to see how little benefit would be derived from that institution, if, on account of judicial proceedings which do not enter any proper record for publication, and still more, if, by the mere execution of a summons, the work perhaps of a mean and needy messenger, transactions of the greatest importance were liable to be set aside. When to this it is added, that in questions of this nature every litigant, by using inhibition, may immediately notify his claim to the public in general, as well as to the person against whom his action is directed, it must appear most just, that any loss ari-

No 11. sing from his neglecting to use this precaution should be made to fall on himself. And it is of no importance, that, in the case of an inhibition, the intimation to the debtor, if duly followed with registration, and in adjudications the execution of the summons, are sufficient to bar a posterior alienation. Neither of these can be viewed as an action, but as a form of legal diligence, to which, by enactments in 1621 and 1672, when the utility of the records was not fully understood, extraordinary privileges were annexed. And, even although they could, with propriety, be mentioned as exceptions from the general rule, this surely ought not to pave the way for any farther deviation.

Answered, If the prohibition arising from litigiosity is to be of any use, it must have its commencement from the time at which the claim is first notified to him against whom the action is brought. To allow of any interval, would only hasten those fraudulent alienations which it was intended entirely to repress.

In the usage of ancient Rome, litigiosity was not established by the *vocatio in jus*; because, from the manner in which this was at first performed, it conveyed no intimation of any particular claim. But when a more decent method of summoning was introduced by Justinian, the defender being furnished with a schedule, containing the grounds of the action, this was immediately altered. The practice of Scotland, confessedly derived from this source, has continued to run in the same channel; and hence a summons, once marked by the Clerk, or called in Court, though such proceedings are of no greater notoriety than the execution of the summons, has been found to prevent alienation; Hieneccius, *ad tit. D. De in jus vocando, Authentic. litigiosa*; Gudelinus, *de jure novissimo*; 9th January 1760, Menzies *contra* the Creditors of Greenhill, *voce* Sale.

Neither has the establishment of the records produced any alteration in this part of our law. In no case do the statutes provide a remedy for a defect in the right of the person from whom a conveyance is obtained; the sole purpose of the Legislature being to enact, that, in a competition of rights of the same nature, and acquired from the same person, such deeds as have been registered should, without regard to priority of date, be preferred to those unregistered. And, with respect to judicial proceedings, the only provisions that have been made in 1669, c. 10. and 1696, c. 19. relative to the interruption of prescription in real rights, being grounded on the idea, that all summonses were at common law effectual, even against third parties, from the date of their execution, tend, in the strongest manner, to enforce the present argument. The effect, too, which is still given to an inhibition, after it is personally intimated to the debtor, and to the execution of the summons in processes of adjudication, cannot be accounted for in the way suggested on the other side. The statute of 1621, it is true, set aside alienations in favour of a creditor, after the commencement of legal diligence at the suit of another creditor; but the same thing is observed with regard to a purchaser, a case neither within the words,

nor in the purview of that enactment. And, besides the adjudications introduced by the statute 1672, instead of apprisings, there were others formerly known, which have been always attended with the same consequences. As to the supposed neglect of the pursuers, in not using an inhibition, the observation seems entirely groundless: For, not to mention that this form of diligence is not properly applicable to declaratory actions, such as the one giving rise to the present dispute, it is evident, that, in this way, the doctrine of litigiosity might, with regard to land rights, be altogether laid aside. No 11.

"THE LORD ORDINARY sustained the defences."

After advising a reclaiming petition, with answers, the Court altered the judgment of the Lord Ordinary.

A petition was afterwards preferred for the defender, which was followed with answers.

THE LORDS ordered a hearing on the general point; after which they altered their interlocutor; thus returning to the judgment pronounced by the Lord Ordinary.

A reclaiming petition was preferred for the pursuers, which was refused.

Lord Ordinary, *Hailes*. Act. *Lord Advocate, C. Hay, Maconochie.*
Alt. *Blair, Geo. Fergusson, W. M. Bannatyne.* Clerk, *Robertson.*

C. *Fol. Dic. v. 3. p. 392. Fac. Col. No 331. p. 507.*

SECT. II.

Can Executions be Amended after being produced in Process?—Executions of Legal Diligence after Registration.

1667. *January 25.* EARL of ARGYLE *against* GEORGE CAMPBELL.

No 12.
Execution allowed to be amended at the bar, the pursuer abiding by it.

THE Earl of Argyle insisting in the removing against George Campbell, it was *alleged* no removing, because the warning was null, not bearing to have been read at the kirk door, either at the time divine service uses to be, or at least before noon.—It was *answered*, That the warning bore that the same was affixed on the kirk door, and lawfully intimated there, which does import the lawful time of the day. 2*dly*, The pursuer offered to mend the execution at the bar, and abide by it as so done.—It was *answered*, That the defender accepted the executions, as produced, after which they could not be amended, and that lawfully could not supply that speciality; otherwise, if the warning had only borne that the officer had warned the party lawfully, it would have been enough.