

DIVISION II.

Prorogation of Jurisdiction.

S E C T. I.

Decree pronounced by an Incompetent Court.—*Prorogatio de loco in locum*.—Decree pronounced in vacation time, how Prorogated?

1583. February.

ROBERTON *against* DUNDAS.

No 15.

A person being summoned to compare *coram non suo judice*, the Lords found, that if he did not compare and propone his declinator, the decree pronounced against him must stand good till it be reduced.

THERE was a woman called Dundas, who, being pursued by virtue of letters raised upon a decret by one Robertson, brother to the Laird of Ernock, obtained suspension, *alleging*, That the said decret was given against her *a non suo judice*, by the Commissary of Glasgow, she in the mean time being for the space of 40 days before the same having her remaining and dwelling in Edinburgh; and so the said decret, as she alleged, was null of itself, and merited not execution.—It was *answered*, and also reasoned among the LORDS, That the said decret, albeit it was given *a non suo judice*, behoved to stand and take effect; because the party was summoned to the giving thereof, *et de jure, prout in L. 5. D. De judiciis, si quis ex aliena jurisdictione ad Prætozem vocetur, debet venire, et privilegia sua allegare*, and so the said defender, Dundas, being once warned, ought to have compared and alleged that she was not under the Commissary's jurisdiction, and to have proponed *declinatoriam exceptionem*.—THE LORDS pronounced, That albeit the decret was given *a non suo judice*, it ought to stand until it be reduced.

Fol. Dic. v. 1. p. 493. Colvil, MS. p. 403.

1586. July.

M'DUFF *against* DOIG.

No 16.

The contrary of the above case was found, a decree of an incompetent court being

THERE was one M'Duff that pursued one Doig for ejecting him forth of a room held of the Earl of Gowrie, of the barony of Strabran.—It was *answered*, That he had committed no spulzie; because the said M'Duff's father, present occupier of the room, being convicted of a slaughter, and executed for the same, and his goods and gear being come into the King's Majesty's hands, and

his Treasurer; the defender was put in possession by the Earl of Gowrie, Treasurer for the time; and also thereafter, and after the decease of the Earl of Gowrie, the pursuer being summoned to compear before the Secret Council for the violent intruding of himself in the said room, was decerned by the Secret Council to have done wrong, and ordained in time coming to flit and remove, as he who had *vi majori et armata manu* intruded himself in possession of the said room.—To all this was *answered*, That in one part it was contrary; for the pursuer libelled, that he was in possession by the escheat obtained by him of his father, and put in possession by the Treasurer; and as to the decret obtained before the Secret Council against him, it was *decretum a non suo judice latum*, and in no manner of way ought to have effect.—THE LORDS repelled the exception, and found, That the decret given by the Secret Council could not take away the ejection nor purge the spulzie, because they were not judges competent.

Fol. Dic. v. 1. p. 493. Colvil, MS. p. 409.

1627. February 23. SERVICE *against* CHALMERS.

IN a suspension and reduction betwixt Service *contra* Chalmers, both being upon one reason, viz. That the decret desired to be reduced, was given by the Sheriff of Stirling, against the party reducer, who dwelt within the sheriffdom of Perth, and so not within his jurisdiction; therefore the decret was null, as *a non suo judice*; and that the said decret was given for non-compearance to explain the defender's oath, the summons being referred to his oath, and the party having compeared and deponed; after which deposition, the inferior judge had no power to summon over again the party, to compear to explain his oath; but when he first compeared, the judge might have interrogated him, as far as to make the deposition so clear as whereon to pronounce his sentence, and ought to judge conform thereto; and no inferior judge could summon any party to depone over again: These reasons were not found relevant, because the party reducer having compeared in the first instance, as the decret proported, he could not thereafter be heard to quarrel the decret, upon that reason, *a non suo judice*, which he ought to have proponed in the first instance, he then compearing.—And also the LORDS found, That no inferior judge might summon any party to compear to explain his oath, after it was given in the same process; and likewise found, That albeit in this reduction, the party offered to come, and to depone and explain his oath, yet for his contumacy, being holden *pro confesso*, in the first process, that they would not admit him now to depone.

Act. Nicolson.

Alt. —.

Clerk, Hay.

Fol. Dic. v. 1. p. 493. Durie, p. 280.

No 16.
declared *ipso jure* null; but here the incompetency was clear.

No 17.
A Sheriff's jurisdiction may be prorogated against a party living without it, by his compearing and pleading, without objecting to the jurisdiction, and he is thereby barred from challenging the decret as *a non suo judice*.