No 291. as the LORDS lately found in the case of the Lord Lindores against his pretended Vassals.

Replied for the defenders; That, though emendations of a libel be allowed, yet these only can be made *in initio processus*, before any act be extracted; nor can these eiked conclusions of the pursuer be accounted emendations, being truly total mutations of the libel; and it is the opinion of Lawyers, that the amendments be allowable *usque ad litiscontestationem*, yet alterations, which invert the nature of the libel, ought not to be put in; far less, then, in this case, where acts are extracted which limit the plea, and set boundaries thereto. Thus the Lords, 13th December 1709, Earl of Lauderdale against the Lord Yester, No 288. p. 12151. found no process upon the passive titles, as charged to enter, though libelled, seeing no such charge was produced; nor would they allow the pursuer to mend his libel; and as this is consonant to our law, so it is to the common law; L. 18. D. Commun. Divid. et L. 23. D. De Judic. in judicium non tenetur venisse, quod post acceptum judicium accidit; ideoque, alia interpellatione opus est.

Duplied for the pursuer; That the decision was not to the purpose; for, 1*mo*, The Lords found there no process against the defender, in regard there was no passive title libelled against him, as representing his mother, but as charged to enter heir, and that was not produced; therefore, the pursuer was not allowed to mend his libel, and the defender had only proponed objections against his title; and, 2*do*, Improbations and declarators jointly seem plainly to be favoured in practice, with the privilege of framing and insisting upon new grounds, which were not libelled upon before production.

"THE LORDS repelled the dilator."

Act. *Leith.* Alt. *Hay.* Clerk, *Roberton.*

Fol. Dic. v. 2. *p.* 198. *Bruce, v.* 2. *No.* 30. *p.* 38.

1736. *December* 17.

The EARL of SUTHERLAND *against* REBECCA, &c. DUNBARS.

No 292.
Substituting a new sheet upon a summons, in place of an old one, without authority, makes the instance perish.

IN the process of wakening and transference of an action of declarator of recognition at the Earl's instance, against Dunbar of Thundertown and others, it was *objected*, That the principal summons could not be the foundation of any judicial proceeding; because, instead of the first sheet, which contained a description and enumeration of the lands said to have recognosced, and on which the calling, and *a partibus*, ought to have been marked, there was battered on in place thereof, without any authority, a new sheet, containing a new enumeration of the lands which were, or at least might have been, different from the former, and bearing no calling marked upon it.

No 292.

Answered for the Earl; The process of recognition having depended for several years, the first sheet of the summons by use was so torn, that it became necessary to substitute a new one in the place thereof, a practice no ways illegal, seeing, by the 31st act of sederunt, allowance is given to the pursuer to amend his libel under the limitations therein mentioned; * therefore, inserting a sheet, or amending what may be amisss, can be no fault, unless some damage, arising from such alteration, could be condescended on; for, even supposing other lands, different from the former, were enumerated in the adjected sheet, still that is what the pursuer apprehends he had a power to do before extracting the act; *2dly*, It is of no importance that the *partibus* is cancelled, seeing it is a minute of the feeblest kind, a mere form of no advantage to either party, all summonses being thereafter given out, seen, and returned; so that, granting the same had never been called in the Outer-house, it is impossible to maintain such an omission would have been a bar to extracting, especially after several interlocutors had been pronounced in the cause, without moving the objection. Besides, where there are several defenders, the *partibus* is not marked on the margin of the summons, but on the roll of defenders, as appears from one extant in this process.

Replied for the defenders; The summons is not now the same that was originally given out to them, and which they were obliged to answer to. It is true, if any accident deface a libel, upon application to the Court, it may be mended; but, if a pursuer shall wilfully, at his own hand, destroy any material part thereof, the instance must fall, just as much as if he had thrown it in the fire: To confirm this, the decision, 5th December 1609, Irvine, was quoted.—(*See* APPENDIX.)—With respect to the act of sederunt, it was *answered*, That the manufacture in question does not come under the description of the amendments allowed by it, and even these must be done conform to the manner prescribed by the act, so that an alteration in any other form is not valid. *Answered* to the *second*, That it was indispensably necessary to call the cause in the Outer-house, in order to the out-giving, if any procurator for the defender appeared; consequently, it was necessary to make a minute of that step, to the end the extractor may, with legal certainty, affirm, that such proceedings were truly had; therefore, if no such minute appears, the defect must be fatal to the process. Nor does it mend the matter, that the procurators for the pursuer and defenders appear marked on the roll of the defender's names, since perpetual custom has made it necessary to enter that minute on the margin of the summons, and the delivering over a roll of the defenders' names to the procurator who takes out the process, is for no other end than that he may know what lawyers are entitled to see it in his hands.

THE LORDS sustained the objection, and found no process, and that the instance has fallen or perished.

C. Home, No 45. p. 81.

* See Act of Sederunt, 1st January 1726.