

No 57. call their summons as if these had not existed, therefore, "repelled the reasons of reduction of this decret founded upon these proceedings.

Act. Cullen.

Alt. Hay Campbell, Claud Boswell.

Fac. Col. No 23. p. 38.

1780. July 26.

CUNNINGHAME, DOUGAL, and Company, *against* WILLIAM MARSHALL.

No 58.
Edictal citations in a ranking and sale not being recorded before the last day to which the citations are given, the pursuer may, after calling his summons, let it fall out of the roll and call it anew.

CUNNINGHAME, DOUGAL, and Company, raised an action of ranking and sale against Marshall. After the legal *inducia* were elapsed, the summons was called by the clerk in the Outer-House, and a *partibus* marked upon it. It was then inrolled in the regulation-roll for the ensuing week, and called before the Lord Ordinary in the Outer-House; when appearance was made for the defender, who *objected*, That the edictal citations at two of the parish churches had not, in terms of the act of sederunt 1711, been recorded before the last day of compearance.

Upon this the pursuers having recorded the citations, and then filled up a day of compearance in the blank space of the summons, posterior to all the proceedings mentioned, *insisted*, That there was now no depending process before his Lordship, and declared that they would call their summons of new, and bring it before another Lord Ordinary, as every thing done before the day of compearance so filled up was void. On the other hand, the defender maintained, that the blank space left in the summons was virtually supplied by the calling of the clerk, and subsequent proceedings, and in practice is never, except very rarely, actually filled up; and that a depending process being thus constituted, it was not in the power of the pursuers to make void the proceedings held in it.

The Lord Ordinary pronounced this interlocutor: "Having considered the foregoing minute, and consulted with the under clerks as to the point of form, finds, That there is no dependence sufficient to bar the pursuers from calling again their summons."

A reclaiming petition against this judgment was refused without answers.

Lord Ordinary, *Hailer*.

Act. Mat. Ross.

S.

Fac. Col. No 119. p. 220.

No 59.

1793. June 12.

HERBERTSON *against* RATTRAY.

ROBERT RATTRAY was cautioner for James Rattray, in a suspension of a decree of the Sheriff pronounced in absence against him. The latter objected, That the decree was null, as being pronounced when he was in England, and

had neither domicile nor property in this country. The Lord Ordinary turned the decree into a libel; against which it was pleaded in a reclaiming petition, That a decree may be turned into a libel where it is defective in point of form, but not where it is fundamentally null. THE LORDS repelled the objection.

No 59.

Fol. Dic. v. 4. p. 148. Fac. Col.

* * * This case is No 82. p. 2157, *voce* CAUTIONER.

1794. November 26.

HORATIUS CANNAN, Common Agent in the Ranking of POLQUHAIRN, *against*
JOHN GREIG, Trustee for ALEXANDER CRAWFURD.

By a post-nuptial contract of marriage between the late Adam Crawford Newall and Marion Cunningham, co-heiress of the estate of Polquhairn, Mr Crawford settled certain provisions on the children of the marriage, payable at their marriage or majority.

Mrs Crawford, on the other hand, disposed her half of Polquhairn to her husband in liferent, and to their son Alexander Crawford in fee; whom failing, to her other children of that or any future marriage, in their order.

It was declared, however, that "notwithstanding the liferent of the said lands, in case of the subsistence of heirs of my body, is only given to the said Adam Crawford Newall, yet I do hereby grant full power to him, if he shall see cause, not only to sell, dispone, and alienate the said lands, &c. but also to contract debt, and burden the same therewith, at his pleasure, as amply, and in every respect, in the same manner as if he was the unrestrained fiar thereof; on condition always, that he shall, upon his so doing, provide and grant bond, or other sufficient security, to the said Alexander Crawford, my son, or, failing him, to the heir procreated of my body, for the time being, (if any such be) for the sum of L. 2000 Sterling, as a provision to him, payable at the first term of Whitsunday or Martinmas after the decease of my said husband."

Mr Crawford Newall stood previously infest in the whole lands, as trustee for his wife and sister-in-law; but he had, before the date of the contract, acquired the absolute property of the half which belonged to the latter, and his wife, by a subsequent clause in it, discharged the trust, in so far as respected her half.

Mr Crawford Newall afterwards contracted debt beyond the value of the estates; and not having granted a bond to his son for the L. 2000, in terms of the contract, the latter obtained a decree of declarator, finding, that notwithstanding the bond had not been granted, he was an onerous creditor of his father to that amount.

No 60.

The Court can dispense with the second diet in a summons of constitution on the passive titles, where the pursuer restricts his demand to a decree *cognitionis causis*.