Rutherglen, he suspended upon this reason, that the charger had passed from his bargain, in so far as, the suspender having afterwards acquainted him by a letter, that he could get his whole interest in Kilbride sold to the Dutchess of Hamilton, if these in the minute were included: the charger returned answer, that he would be sorry if his bargain should obstruct the suspender's selling the rest; but if the Dutches were ambitious of his little bargain, she should be welcome to it for some consideration. Upon the faith of which letter the suspender had entered into a contract with the Dutchess for the lands in the minute.

The Lords found, the letter was not an overgiving of the bargain, and did not put Sir Alexander *in tuto* to enter into a new one with the Dutchess; but that he behoved to fulfil and perfect the first minute.

Vide February 13, Dutchess of Hamilton contra Campbell.

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1706. *February* 1. Mr. DAVID RAMSAY, W. S. as Factor for the Executors of the deceased JOHN KIRKWOOD, servant to the Duke of Lauderdale, *against* ALEXANDER GIBSON of Durie.

IN the action at the instance of Mr. David Ramsay, as factor foresaid, against Alexander Gibson of Durie, as representing the deceased John Gibson of Durie, for payment of a bond granted by him to the said John Kirkwood, the pursuer's constituent: no process was sustained; because the summons contained only a warrant to cite the defender on twenty days for the first diet, and not upon twenty-one days. Albeit it was alleged, for the pursuer, that there are more [than] twenty-one days from the date of the execution to the first diet of compearance as marked in the summons; so that the defender can pretend no prejudice. And a literal mistake of the writer of the summons may be helped, as the wrong filling up of the days of compearance is allowed to be helped at the bar, when the pursuer offers to abide by.

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1706. *February* 7. The Lord BELHAVEN *against* Lord DAVID HAY of Beltoun.

THE Lord Belhaven having pursued Lord David Hay upon the Act 17, Parl. 1669, for adjudging a part of the defender's neighbouring lands of Beltoun to himself, to make an inclosure regular: it was alleged for the defender, that there was action formerly raised before the Justices of Peace upon the same account, which is not yet discussed; and therefore no new process can be sustained before the Lords, till the ish of that *lis alibi pendens*; there being no way to bring a depending process from an inferior judge to a more sovereign court, but by advocation. 2. No process at the pursuer's instance, in respect he has produced no title in his person to the lands he is inclosing: and the act of Parliament ordains,

that in lieu of the lands adjudged to the heritor making the inclosure, an equivalent piece of his land be adjudged to the other party. So that this being a petitory action, it ought not to be sustained without production of the pursuer's title *in initio litis*, more than actions of molestation, or for dividing of commonties or runrig, are sustained without an active title produced with the summons.

ANSWERED for the pursuer,—There is *no lis alibi pendens* here, seeing the process before the justices was deserted before litisconstestation. Besides, there are no Justices of Peace in effect now in being in Scotland, since the old set were exauctorated by King William's death, and the expiring of the last Parliament; and no new ones have been appointed since her Majesty's accession to the throne. 2. Possession without any more is a sufficient title for commencing such a process, and carrying it on the length of a visitation: though when the Lords come to adjudge, the defender will have interest to see the pursuer's right to the equivalent land to be adjudged. And yet even then there is no hazard: for an heritor afterwards emerging, could not be heard to claim, upon a better right, the lands adjudged from the defender, without quitting his ground inclosed. And it may fall out that of the two alternatives provided by the act of Parliament as a recompense for the ground taken off to make the pursuer's dike run in a straight line, viz. The equivalent in ground, or the value in money, that the defender choose to have money: in which case there will be no need for producing the pursuer's right to his lands. But yet he is content to produce his charter and seasin *cum processu*.

The Lords repelled the first dilatory defence *simpliciter*, and repelled the second; the defender producing his infeftment *cum processu*. And appointed the Earl of Lauderdale, Justice-Clerk, Fountainhall, and Prestonhall, or any two of them to visit and perambulate the ground, and to take trial of the value of what is sought to be inclosed, and how it might be done with the least inconveniency to Lord David Hay, and what compensation should be given to him in land or money. *Page* 92.

1706. *February* 8. GRISSEL EWART *against* ANDREW EWART, Minister at Kells, her father.

MR. ANDREW EWART having granted bond in the 1695, narrating that the sum of 6000 merks, provided in his contract of marriage with Mary Canon, the pursuer's mother, for the daughters of the marriage, failing male children, was not sufficient, and therefore obliging himself and his heirs, secluding executors, to make payment of the sum of 10000 merks to the daughter or daughters of that marriage in case there should be no male children to enjoy his estate; and the marriage having dissolved by the death of the said Mary Canon without any male children; Grissel Ewart, the only daughter, pursued her father for payment of the 10000 merks with annual-rent thereof since her mother's death.

ALLEGED for the defender,—That his obligement contains no definite term of payment, nor any clause for annual-rent; but was only to take effect in case he, wanting heirs-male of the marriage, should give away his estate to other heirs-