On the 23d November 1786, "The Lords, *in respect of the special circumstances of the case*, repelled the objections;" adhering, in substance, to the interlocutor of Lord Alva.

Act. W. Honeyman. *Alt.* R. Dalzell.

1786. *November* 29. WILLIAM ALLARDICE *against* JAMES MORISON and OTHERS.

LITIGIOUS.

Land rights not rendered litigious by the mere execution of a summons.

[*Fac. Coll. IX.* 507; *Dict.* 8336.]

MONBODDO. I am clearly of opinion for the interlocutor, both as to fact and law. As to the question of law, it is of great moment, being this, Whether an execution of a summons of declarator renders a subject litigious, so as to make null all voluntary rights or dispositions granted after its date? This cause cannot be determined on the principles of the old Roman law; for the *in jus vocatio* of that law was the laying hold of the party, and the bringing him into court without telling him wherefore. Our summonses are solemnly executed by a messenger invested with the royal authority. From the decision in Balfour, it appears that execution interrupted; and it is no answer to say that our records did not exist at that time. The Act 1696 proceeds on this supposition, because it appoints interruptions to be registered. The effect of altering this interlocutor would be to allow debtors to make fraudulent conveyances, and so turn their estate into money. The records, of which we have heard so much, have nothing to do in the matter. The law has properly said, that the *second* disponee, with the *first* infeftment, shall be preferred. This prevents the fraud of double rights. But when the subject is disponed from different authors, or from the same author in different circumstances, the records have nothing to do in the matter. A man is in possession for 39 years and 364 days, and then has a summons executed against him by the *verus dominus*: no creditor or disponee can, in such case, appeal to the records as securing them. I was against the appointment of a hearing, for I thought the cause perfectly clear, and that no cause can be made clearer by having it called in question.

ESKGROVE. I do not see that Allardice could have any accession to Bogie's fraud. It would strike very deep, should a man be held guilty of a fraud because his people of business have done wrong: neither can I think that Mr Duff has been any way participant in the fraud. The most that can be said is, that Mr Duff was less cautious on this occasion than he is wont to be. As to the point of law, it is said that the Roman law has nothing to do with this

cause. But it seems that 112 *Novel.* required more than an execution: it required that the cause should be brought into court. So far as the Roman law goes, it is against the interlocutor. At any rate, the Roman law has less authority in feudal cases than in others. An attempt was made to show that, in ancient times, the principle of the interlocutor prevailed. I do not say that the maxim, *pendente lite nihil innovandum,* is not applicable to real as well as personal rights; but then it must be properly interpreted. There must be diligences reaching real estates, to make the subject *litigious;* for the purpose of it is not to bring a cause into court but to create a *nexus* on the subject. The case in Dirleton is not in point. As to the case in Harcarse, there the deed was in favour of one creditor to the prejudice of another, contrary to the Act 1621. Inhibition is good, if the creditor be *in cursu diligentiæ,* and completes by registering. Effect is given to a summons of *apprising* upon the same footing as a step of legal diligence, not to be interrupted by any act of the debtor. By Act 1672, a debtor cannot affect the subject after an executed summons. This is the stronghold; but it is not to the point. An *adjudication,* come in the place of an *apprising,* has the like effect: in words it goes farther. The two cases in Falconer ascribe this effect to the positive enactment of the statute. Mr Erskine regrets that the rule had ever been established, as being a snare to creditors. I never could see this in so sad a light. He against whose estate a bill and a summons of adjudication are obtained, is one whose credit has been previously blasted; and, in general, an action constituting the debt, and a decree on such action, have been brought and obtained. There can be little harm in tying up the hands of a man who, in ninety-nine instances out of a hundred, ought to have his hands tied up; and it is not enough to say that such a man may, notwithstanding, have been of entire credit to the moment of the summons being executed, and even after that time, for statutes have *ordinary* and *probable* cases in view, not *uncommon* and *possible.* I must give effect to the law, so far as it goes, but I am startled at the notion of extending the rule to every summons whatever. It is objected that this action is a *rei vindicatio,* and why ought it not to have as strong an effect as a summons of adjudication? I answer, that as to adjudications the law is express, and I must obey it; but I am not bound to extend it *de casu in casum.* As to the Act 1696, the argument from it, so far as it goes, is against the interlocutor, for it presumes that mere citation is not enough against third parties. The case of *Michael Menzies* against *Creditors of Greenhill* is not conclusive. There the cause had been brought into court, and interlocutors had been pronounced. Afterwards the cause fell asleep; and, notwithstanding such temporary stop, matters were found to have been *litigious.* When such a case occurs again I shall give my opinion; but *this* is not a similar case, for in *that* of *Menzies* there was once a cause, or *lis pendens.* Here there was nothing else but a summons executed against the debtor, not called, and which indeed could not have been called, as the days had not run. To extend *litigiosity* to mere summonses would be dangerous. It is said that a debtor, on being summoned, might alienate the subject and defraud his creditors; but the remedy is obvious,—by *inhibition.* No doubt there are some cases in which the records do not give sufficient security; but shall we then say that a creditor should have still less security?

Braxfield. When a prior creditor means to obtain an additional security, he will take the best he can get; but *that* is not the case here. The clause in the heritable bond, of which so much has been said, appears to have been overlooked by the agent. He could have no interest to vest his client's money on dubious security, or to give Bogie an opportunity of cheating his partners. "What is it which constitutes a *lis pendens?*" is a question of moment. I think that the principles of the civil law go deep into this case. The mode of citation is different in different countries; but still the principle is the same, that, *pendente lite, nihil innovandum.* The bringing a person into court *obtorto collo,* without telling him *why,* could not render a particular subject litigious; and so, with us, a blank summons would not render a particular subject litigious; and such, for the like reason, would have been the case as to short citations, which were used in the Sheriff Court before the jurisdiction act. But the case is different as to a summons setting forth the whole fact, and proceeding on the authority of the sovereign: *that* makes a *lis pendens,* or *depending action;* and hence is the form of the deliverance on a bill for arrestment or inhibition, "because the Lords have seen the *dependence.*" I always thought that the principle was general as to every summons. If a simple summons of adjudication has so great an effect, why should a summons tending to a *rei vindicatio* have a less one? A denunciation of an apprising, mentioned in the Act 1672, is not more solemn than the execution of a summons.

As to the records,—these securities are merely statutory, and we must not extend them. The records do not give an absolute security: in many cases they give none. An infeftment is not enough: you must go back and look at the progress. The record shows incumbrances, but not a right of property. It might be very proper to have an Act of Parliament establishing a register of executions; but at present there is no such act.

Justice-Clerk. Here a *third* part of the subject was, in each of the partners, transmissable to heirs and assignees. Two or three persons, on the footing of a latent copartnery, bring an action against Bogie, *pro socio,* not as a *rei vindicatio;* and the purport of the summons is to make Bogie denude, as a debtor to the copartnery. As to the fact, there are no circumstances sufficient in law to make us hold that Allardice or his agent had any knowledge of the nature of the claim: so this case comes to the point of law.

Before the summons could have been called in court, the money was lent, and infeftment taken for securing it. Whenever a case is subjected to the cognizance of the magistrate, the subject becomes *litigious.* We must not suffer ourselves to be carried away by *words,* without attending to *principles.* Can it be said that a thing becomes *litigious,* when a person brings a real or a personal action by a summons in the King's name, and executed by a messenger? Such a summons need not to be called for a year: the pursuer during all that time may keep it in his pocket. Here will be a *litigiosity* for a year, and nothing done all the while. Should a messenger take upon him to antedate an execution,—and we know of what some messengers are capable,—what a door will be opened for the frauds of copartners and conjunct and confident persons? If the execution of a summons be enough, what use is there for inhibitions? No practitioner ever thought of trusting to an execution, without raising an inhibition. There must be a loss here, but by whose fault is it?

Certainly not by the fault of the creditor, who knew nothing of Bogie, but by that of the partners. Why did they suffer Bogie quietly to take infeftment? The creditors had no remedy, but the partners had, by means of inhibition.

The only thing that makes against my argument is the effect of the execution of a summons of adjudication. The law of Scotland is exceedingly favourable to creditors who are *in cursu diligentiæ*. This case is very different. Besides, if people are very cautious, they may learn from the bill of adjudication the condition of the party with whom they are about to transact business.

PRESIDENT. There is no doubt as to the fact. I admit the maxim, that, *lite pendente, nihil innovandum ;* but the question is, Was there a *lis pendens ?* It must startle every one that the execution of a summons should have so strong an effect against a creditor contracting on the faith of the records. I do not understand that, by the civil law, litigiosity was introduced without a cause being in court. A summons at large gives as little information to those who do not read it as a blank summons did: *res in judicium deducta* is necessary.

ROCKVILLE. Dallas says that the form is " because the Lords have *seen* the summons *executed*." This would have been unnecessary if the *execution* had the like effect.

HENDERLAND. The object of all nations who have adopted the maxim of *lis pendens* was to prevent fraudulent debtors from alienating and putting away their goods, to the prejudice of creditors. With respect to the civil law, see Gudelinus *De Jure Novissimo*. We must venerate and preserve our records; but there is no general enactment which says that the records shall be a security in all cases.

On the 29th November 1786, " The Lords repelled the reasons of reduction ;" altering their own interlocutor of ———, and adhering to that of Lord Hailes, Ordinary.

Act. Ch. Hay. *Alt.* G. Ferguson.

Hearing.

Diss. Braxfield, Henderland, Monboddo, Stonefield. *Non liquet,* Alva, Swinton.

N.B. If the hearing had not been appointed and the cause put off till the President came abroad, the judgment would probably have gone the other way. The party was too poor to appeal, and thus the point would have been fixed for ever.