

No 32.

cess could be sustained against him, in respect there is more than year and day betwixt the citation for the second diet, and the day of compearance.

Alleged for the pursuer, In executions, the day of compearance for the first diet must be within year and day of the citation, but it sufficeth that the day of compearance for the second diet be within year and day of the first diet of compearance.

Answered for the defender, Albeit when different citations were given for the first and second diets, it was sufficient to make the first day of compearance within year and day of the citation, and the second within a year of the first; yet now when citations to both diets are allowed to be given at once, the day of compearance should be cast within year and day of the date of the execution, otherwise wakenings would be unnecessary in any case.

THE LORDS repelled the dilatory defence.

Fol. Dic. v. 2. p. 179. Forbes, p. 347.

1709. December 31.

ALEXANDER WEDDERBURN *against* HENRY CRAWFORD.

No 33.

Process sustained on a summons of sale past without a bill, in respect of the former custom to do so, but in future such summonses are only to be expedie on bill.

ALEXANDER WEDDERBURN, Town Clerk of Dundee, being creditor to Henry Crawford, merchant there, raises a process of sale of his lands on the statute of bankrupt. Compearance is made for Nicolson and Low, likewise creditors, who object no process, because all summonses of sale ought to pass by bill, and bear *ex deliberatione Dominorum Concilii*, which this does not; and though the act 17th 1681, anent judging bankrupts' lands speaks not expressly of this, yet it has the equivalent; for it requires the intimations of the sale to pass by deliverance; and if adjudications, which have a legal reversion, require a bill, then sales which adjudge the property, ought much more to pass so. *Answered*, There is neither law nor act of Parliament to appoint summonses of sale to pass on bills, and *de facto* few of them do so, as appears by a declaration under the hands of sundry writers to the signet, and if the Lords should sustain this as a nullity, it may cast many of the processes whereon purchasers think themselves secure; and all the use of a bill is in case the summons should miscarry, they may have a new extract from the signet. THE LORDS considered the hazard and danger that might redound to many bygone purchasers at roups, if this were sustained, and therefore repelled the nullity; but wished there might be some order and regulation to correct this abuse in time coming.

Fol. Dic. v. 2. p. 177. Fountainball, v. 2. p. 550.

* * * Forbes reports this case:

1709. December 31.—IN the action of sale of the lands of Halcartoun, pertaining to Henry Crawford, carried on at the instance of Alexander Wedderburn

and others, compearance was made for Robert Nicolson and others, who *alleged*, That no process could be sustained, in respect the summons was past without a bill and deliverance of the Lords; whereas all summons of sale ought to pass by bill, specially narrating the act in virtue whereof the sale is raised; because, *imo*, Summonses of adjudication, that have neither so summary nor universal an effect as sales, require a bill; *2do*, By the act 17th Parliament 1681, intimations, which are but consequences of the process of sale, should pass *ex deliberatione Dominorum Concilii*; and much more is a bill requisite to found the summons itself.

Answered for the pursuer, No law appoints summonses of sale to pass upon bill; yea, these pass of course, because founded upon statute, the only design of a bill, when used, being in order to get an extract of the summons, in case it should be lost during a long dependence of the process. No parallel is to be drawn from a summons of adjudication to that of sale, because adjudications, by uniform and universal custom pass by bill, perhaps for clearing the secretary's dues, whereas summonses of sale go otherwise, being founded only upon the common debtor's circumstances, and the pursuer's title as a real creditor. Nor can any argument be fetched from letters of intimation, which need no bill, because the act and commission is their warrant, and they pass *per actum Dominorum*, and are not subscribed by writers to the signet, but by clerks of Session.

THE LORDS sustained process in the present case, in respect of the former custom, and the inconveniency that would otherwise arise to many who have *bona fide* purchased upon sales, wherein the formality of a bill was not observed; but the LORDS resolved to make an act of sederunt, that no summons of sale should hereafter pass without a bill.

Forbes, p. 383.

1711. July 3.

ANDREW BROWN of Braid and his CREDITORS against WILLIAM CARSTAIRS Writer in Edinburgh.

ANDREW BROWN of Braid having cited William Carstairs to count and reckon for his father's intrusions as factor with the said Andrew Brown's estate; the LORDS sustained no process, in respect the first day of compearance was beyond year and day of raising of the summons; albeit the same was executed within the year; because the common stile runs to compear at Edinburgh, the day of next to come, which argues that the first day of compearance at least should be cast within the year.

Fol. Dic. v. 2. p. 179. Forbes, p. 516.

66 K 2.

No 34.

Process not sustained on a summons wherein the first day of compearance was beyond year and day of the raising of the summons, although it was executed within the year.