

1670. *July 21.*————— *against* —————

A DECRET being ALLEGED to be intrinsically null, because it was given the time of vacance without a dispensation; it was ANSWERED, the decret was good notwithstanding of that defect, because it was a decret *in foro* given, the defender compearing therein, and proponing other objections, and noways objecting that; by which compearance he *tacite* past from these dilators.

This answer was FOUND RELEVANT; albeit it was replied, that a dispensation was *pars judicis*, and a thing the parties had no interest to take notice to.

*Act. Falconer.**Alt. Dinmuire.**Advocates' MS. No. 87, folio 83.*1670. *July 21.*

ANENT REFERENCES to OATH.

IT WAS QUESTIONED if, as where any thing is referred to a person's oath, and a term is assigned for producing of him, and he dies before the day assigned to him for his compearance to depone, the thing referred to his oath will not be holden as proven, but he must prove it otherways? If likewise he die after the day of compearance but before the term is circumduced, *quid juris?* It may be thought that *dies interpellat pro homine*, and he not compearing at the day assigned to him for that effect, he is *in mora*, and so the points to be proven must be holden as confest by him; yet it seems more consonant to law that they nowise be esteemed proven till an act be extracted and the term circumduced, seeing all acts assigning terms bear with continuation of days, &c.

*Advocates' MS. No. 88, folio 83.*1670. *July 22.*FRANCIS ARNEILL *against* WILLIAM BROWN, Agent.

THIS was a declarator of a gift of *ultimus hæres*, together with an improbation of sundry evidents *super hoc titulo* as donatar to the *ultimus hæres* of

ALLEGED against the declarator, no process, because not tabled. This was found relevant.

ALLEGED against the improbation; that he can never be heard to insist therein till such time as his gift be declared; seeing a naked gift, without a declarator, can never be a title nor interest whereon an improbation can be pursued. The pursuers ALLEGED in the contrary.

The Lords were contented to give them the Lords' answer thereon.

*Act.**Alt. Eleis.**Advocates' MS. No. 89, folio 83.*