

1705. *June 27.*

JAMES STEUART Merchant in Dunkeld, *against* MARY BAILIE, LADY STROWAN,
and DUNCAN ROBERTSON, her SON.

JAMES STEUART charged Mary Bailie, and Duncan Robertson her son, for L. 280 pound, contained in a decret obtained before the Commissary of Dunkeld. They suspended, and afterwards raised reduction; and the suspension coming in before one Lord, and the reduction before another, the LORDS ordained the suspension to be discussed before the Ordinary in the reduction, because two Ordinaries might differ, and the one find the letters orderly proceeded, and the other reduce the ground of the charge, which inconsistent sentences would hinder the effect of each other. The reduction being insisted in, and the decret reduced upon nullities, it was alleged for James Steuart, That he might yet insist in it as a libel in the same process, and craved a day to prove the same as a libel.

Answered, Had the charger insisted to discuss the suspension, and the suspenders repeated their reduction at the discussing, and the decret been reduced or turned into a libel, the charger might crave *tanquam in libello*, a day to prove his libel; but the lady and her son having insisted in their reduction and prevailed, it were contrary to law and form to allow him, who was called as a defender in the reduction, to turn pursuer in the same process. But if he have a mind to pursue, he ought to raise a new summons, and insist therein in common form; especially considering, that he was not pursuer in the libel upon which the decret of reduction proceeded.

Replied, There is a great difference betwixt a simple reduction of a decret, wherein the obtainer of the decret is only defender, and a decret under suspension and reduction, which is James Steuart's case, where he, the obtainer of the decret being charger, has interest to discuss the suspension, wherein the reduction is but repeated by way of defence; and it is of no moment whether the suspension be remitted to the Ordinary of the reduction, or the reduction to the Ordinary in the suspension, since all is alike entire to the parties in both cases.

THE LORDS found the decret should be turned into a libel, and remitted the cause to an Ordinary.

Fol. Dic. v. 2. p. 180. Forbes, p. 17.

1705. *July 13.* DAVID OLIPHANT, *against* JAMES OLIPHANT of Gask.

IN the action of aliment at the instance of David Oliphant against James Oliphant of Gask.

THE LORDS refused to sustain process, because the summons required a term to prove, and contained but one diet. For summons of aliment not instantly

No 29.

The charger, on a decree reduced upon nullities, allowed to insist *tanquam in libello* for his claim in the same process.

No 30.

Summons of aliment should have two diets when it requires a term to prove.