

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 decret 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.

No 30.

verified, but requiring a course of probation, ought to have two diets; and the late act of Parliament allows only alimentary actions to be summarily discussed, without dispensing in the least with the days of citation, or the number of them.

Fol. Dic. v. 2. p. 178. Forbes, p. 25.

* * * Fountainhall reports this case :

DAVID OLIPHANT, as heir-male of the family of Gask, pursues for an aliment, against James Oliphant of Williamston, as the heir of line of Gask. *Alleged*, The heir-male has no title for pursuing for an aliment, unless it were libelled and instructed, that the estate was provided by the ancient investitures to the heirs-male, seeing the feudal law presumes all lands to hold ward. *Answered*, *Jura feudalia* are *localia*; and now the presumption runs as much in favour of the heirs of line; and many great estates in Scotland are feminine feus, and pass to and by heiresses. THE LORDS did not regard this defence. Then it was *alleged*; This summons of aliment was null, because it contained allenarly one diet, whereas all processes requiring a tract of probation must have two diets, in which number aliments are one; for there must be a previous trial and probation led of the rental of the estate, and quantity of the debt, to know the ex-cresce before any modification of the aliment can be made. *Answered*, That, by the 21st act 1696, summonses of aliment, as favourable, are privileged, and therefore need no more but one diet; but *esto* they required two, the messenger has, by his execution, cited them to two; so if they must have two diets, it is done, and if not, then two comprehend one, *et superflua non nocent*. *Replied*, There is no warrant in the summons but for one diet, and so the messenger has acted beyond and contrary to the will of the letters, in citing to two several diets; and so it is null, whatever way you take it; and though the act of Parliament declares these processes to come in summarily, yet that is only by dispensing with the roll, but not as to the diets of citation. THE LORDS sustained the dilator, and found no process, till he were legally of new cited to two sundry diets.

Fountainhall, v. 2. p. 284.

No 31.

A summons not called within year and day after elapsing of the last diet of compearance falls, and cannot be wakened.

1708. July 27.

JOHN DRUMMOND of Megginsh, *against* JOHN STUART of Innernytie.

IN a wakening of a special declarator of Blairhall's escheat, at the instance of Megginsh, against Innernytie and his tenants; the defender alleged no process, because the summons not having been called in judgment within a year after elapsing of the last day of compearance, expired, and could not be summarily wakened, as was decided November 1684, Belshes of Tofts, *contra* Earl of Lou-