

1707. *March 18.* The Dutchess of GORDON *against* the Duke her Husband.

BY decret arbitral pronounced by the Earl of Marchmont, the Duke of Gordon being decerned to pay L.800 Sterling of yearly aliment to the Dutchess, with the burden of Lady Jean Gordon their daughter's aliment, education, and apparel; and it being declared, that if Lady Jean did not live with her mother through any other cause than that of the Dutchess's refusing to entertain her, the Dutchess should be free from all charge of her education, without any defalcation of her Grace's aliment on that account. After Lady Jean was married to my Lord Drummond, the Duke suspended the aliment upon this ground, that the Dutchess being now free of Lady Jean's education by her marriage, the L.800 of aliment must suffer a defalcation.

The Lords refused to modify the aliment, and found the letters orderly proceeded.

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1707. *March 18.* Sir JAMES HALL of Dunglass *against* Dame JANET MURRAY, Lady Pitfirren.

IN the process at the instance of Sir James Hall *against* Dame Janet Murray, as representing her father Sir Patrick Murray, this dilator being proponed for the defender: That the process being founded upon a charge at Sir James's instance against the deceased Charles Murray of Hadden, as principal, and the said Sir Patrick Murray as cautioner, which was suspended upon compensation; and after it had been let sleep, wakened only against the said Dame Janet Murray as representing her father; whereas it ought also to have been wakened against Charles Murray's representatives: it being a rule that in all wakenings the principal cause must be wakened in the same state it was, and all relating to the process given out.

ANSWERED for Sir James,—That it was entire to him to insist against both or either of the representatives of Sir Patrick or Charles Murrays as he thought fit, their predecessors being bound conjunctly and severally to him: and whom one is not obliged to call in the beginning of a process, he is not obliged to continue the process in all its steps against.

REPLIED for Dame Janet Murray,—Albeit it was in the option of Sir James Hall in the beginning to have charged Sir Patrick, who was bound conjunctly and severally with Charles; yet seeing they were both charged, and the suspension passed in both their names, it ought to be wakened against both. For though Sir Patrick being a cautioner bound conjunctly and severally, had not *beneficium ordinis*, yet payment by the principal did exoner him: and consequently, the grounds of compensation proponed for the principal ought to be first discussed; and the process wakened against his representatives, for that end.

DUPLIED for Sir James Hall,—That any real defences that were competent to Charles Murray, are competent to the Lady Pitfirren, as representing his cautioner: and for proving thereof, she may have a diligence to recover papers out of the hands of the representatives of the principal debtor.

The Lords repelled the dilator.

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