

1735. *January 29.* CRAIK *against* CRAIK.

A DERECE absolvitor, pronounced in absence of the defender, found a *res judicata* in another process consequent upon the former, raised at the defender's instance against the pursuer's representatives; though it was pleaded as extremely unequal, that the absence of parties should give them all the benefit of the sentence when in their favour, without being tied down when it is against them; in respect it was *answered*, That a decret in absence must have this effect, or none at all; and with respect to the inequality, the pursuer against whom the decerniture goes, ought not to be in a better situation than if the defender had been present. See APPENDIX.

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Fol. Dic. v. 2. p. 206.

1758. *January 13.*

JOHN GOLDIE, Trustee of BROADHOLM'S CREDITORS, *against* KATHARINE MACDONALD.

KATHARINE MACDONALD brought an action against John Henderson, concluding, that he should be decerned in the sum of L. 400 Sterling, uplifted by him out of Andrew Garden's executry, in virtue of powers from George Keir her husband; or, at least, that it ought to be found and declared, That the said John Henderson either wilfully, or by supine negligence, neglected to expedite Andrew Garden's testament-dative; during which time her husband died, and his brother carried off the whole executry, by which she had suffered damage, and that therefore the defender ought to be decerned in L. 400 Sterling, as the value of her husband's share of Garden's executry.

No proof was produced with regard to the extent of the damages; but her procurator declared at the bar, that, in so far as the summons was not proved by writ, he referred it to the defender's oath. No appearance was made for Henderson, and decree was pronounced against him in absence.

Upon this decree an adjudication was afterwards obtained, but the sum was restricted in the adjudication to L. 212.

The Court having found that Henderson's neglect was such as to subject him in damages, No 64. p. 3527. *voce* DILIGENCE, this objection against the decree of constitution was afterwards stated in a petition for the Creditors of Henderson, that it had proceeded without any evidence; that decrees in absence, as well as decrees *in foro*, must either be supported by a proof in writing, or by the oaths of witnesses, or by holding the defender as confessed *in facto proprio*, otherwise the decree is intrinsically null; that, in the present case, no proper evidence in writing was produced, with regard to the extent of the executry, nor were any witnesses examined; but the whole rested upon a reference to the

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defender's oath ; and the decree proceeded upon holding him as confessed, in consequence of that reference ; but the fact upon which he was held as confessed, so far as it regarded the extent of the executry of Garden, was not the proper subject of a reference, upon which the defender could be held as confessed ; it was a fact with which he could not be acquainted, and therefore could not have made oath, had he appeared in the process. In this situation, the pursuer ought to have taken a term for proving the libel, and have brought evidence of the extent of her claim, before insisting for decree ; and therefore this decree in absence was intrinsically null for want of evidence.

In support of this, a decision was referred to, 28th December 1708, Philip, No 83. p. 12018. " where a baron having convened and decerned his tenant, in his own court, for bygone terms, and also for damages for riving out ground ; and no probation being led, but only the party present, and not contradicting nor objecting ; and, in supplement of this decret, the baron taking another decret against him before the Sheriff, where no probation was taken but the baron's decret, the LORDS reduced both the decreets as without probation, and reponed the tenant to his defences."

" THE LORDS refused the petition without answers."

Act. *Johnstonc.*

Alt. *Brucc.*

W. J.

Fac. Col. No 85. p. 149.

1789. July 23.

WILLIAM BLAIR *against* The COMMON AGENT in the Sale of the Estate of
KINLOCH.

No 345.

Effect of a decree in absence ; the defender, who had been personally cited, having died before any objection was offered.

AFTER several adjudications had been led against the estate of Kinloch for sums of money owing by the proprietor, the predecessor of William Blair brought an action in the Court of Session for constituting his claim, this being only vouched by a bill of exchange, more than six years due, and of course falling under the sexennial limitation introduced by the statute of 1772.

In this action the defender, who had been personally cited, did not appear, and a decret in absence was obtained, the extract of which bore, as usual, that " the Lord Ordinary found the points and articles in the summons relevant, and proven by the writs produced, and held the defender as confessed on the points not thereby proven." This decret of constitution was afterwards followed by a decret of adjudication, which also passed in absence.

In the ranking of the creditors, after the estate of Kinloch had been sold judicially, and after the death of the common debtor, it was maintained, that as the bill of exchange, on which the whole proceedings were held, had been cut off *quoad modum probandi*, nothing but an acknowledgement of the debt, on a judicial reference to oath, was sufficient for validating Mr Blair's claims. In bar of this objection Mr Blair