

expressly repudiated by his counsel. The respondent cannot force such a claim upon the Duke for the purpose of aiding his argument.

On these grounds I am for recalling this interlocutor, and finding that the respondents have failed to prove their alleged right, and therefore of granting interdict craved.

The Court pronounced this judgment:—

“The Lords having heard counsel for the parties on the reclaiming-note for the complainer against Lord Kinnear's interlocutor of 29th January 1889, Recal the said interlocutor, grant interdict in terms of the prayer of the note of suspension and interdict: Find the complainer entitled to expenses,” &c.

Counsel for the Appellant—Guthrie—Graham Murray. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Respondents—Lord Advocate Robertson—D. F. Balfour—C. S. Dickson. Agents—Davidson & Syme, W.S.

Friday, January 24.

OUTER HOUSE.

[Lord Trayner.

A v. B.

Process—Evidence—Divorce—Identification—Competency of Using Photograph where Party fails to Appear after Citation on Order by the Court for Identification.

Where a party to an action of divorce has been cited to appear at the trial and fails to appear, it is competent to show a photograph of such party to witnesses for the purpose of identification.

Observations on Grieve v. Grieve, May 22, 1885, 12 R. 964.

This was an action of divorce on the ground of adultery. The defender, who was in England, was cited to appear at the trial upon a warrant in the special form necessary for the citation of witnesses who are in England. She failed to appear. The pursuer proposed to show a photograph of the defender to witnesses for the purpose of identification. The defender objected.

Counsel for the pursuer was not called on.

The Lord Ordinary (TRAYNER) allowed the photograph to be used, reserving the objection till the conclusion of the evidence.

“*Opinion.*—I entertain no doubt upon this question. The rule I understand to be that when the Court has pronounced an order appointing a defender to appear for identification, and the defender being cited on that order fails to appear, then a photograph of the defender may be used for purposes of identification—*Forbes v. Forbes*, 24 D. 145. Such a defender cannot object that the use of a photograph in such cir-

cumstances is inadmissible, being only secondary evidence, because that defender has, himself or herself, rendered it necessary to resort to secondary evidence by refusing to obey the orders of Court. I confess to some surprise at hearing the opinion of Lord Fraser, which the counsel for the defender quoted (*Grieve v. Grieve*, May 22, 1885, 12 R. 964), because this matter of identification by a photograph was a subject of conversation between his Lordship and myself on more than one occasion, in the course of which he never suggested that before using a photograph it was necessary (where a defender ordered to appear had failed to do so) to resort to the apprehension of the defender or letters of second diligence, nor that a photograph could only be used when personal attendance could not thus be enforced. On the contrary, I understood Lord Fraser to hold the view I have stated as my understanding of the rule upon this subject.

“Without discussing this matter, I may perhaps say that the course which, upon the authority of Lord Fraser's decision, the defender's counsel maintains to be settled would at the least be a very inconvenient one. Letters of second diligence or warrant to apprehend cannot be obtained until, on the case being called for proof, it is ascertained that the defender has not appeared for identification in obedience to the order of Court. To apply for letters of second diligence at that stage would necessarily involve the postponement of the proof, which would again involve the discharge of all the witnesses in attendance, and entail on the pursuer an expense and inconvenience which should not be imposed upon him if it can be avoided.

“As regards the merits of this case, I think that the pursuer has established his averments, and I shall therefore pronounce decree of divorce.”

Decree of divorce was pronounced.

Counsel for the Pursuer—D. F. Balfour—Low. Agents—Tods, Murray, & Jamieson, W.S.

Counsel for the Defender—Sir C. Pearson—Sym. Agents—H. J. Rollo & Robertson, W.S.

Tuesday, February 18.

SECOND DIVISION.

[Sheriff of Fife and Kinross.

M'LEOD v. TANCRED, ARROL, & COMPANY.

Process—Jurisdiction—Proof.

In an action of reparation raised in a Sheriff Court, the defenders pleaded “no jurisdiction.” The Sheriff-Substitute allowed the parties a proof of their averments, “reserving the question of jurisdiction to be tried along with the merits.” Upon the pursuer appealing for jury trial, the Court held that the procedure adopted was wrong, unless