

1790. February 4.

The TRUSTEES of DONALD SUTHERLAND *against* The Honourable Mrs
CLEMENTINA LOCKHART, and Others.

No 347.

Effect of a
decree in ab-
sence obtain-
ed in an in-
ferior Court,
where the de-
fender has
not been per-
sonally cited.

THE deceased Donald Sutherland sued George Sinclair in the Sheriff-court of Caithness, for payment of money said to be due by an open account, which had lain over for more than three years.

In this action, Mr Sinclair, the defender, was not personally cited; and the decret which followed was pronounced without any appearance on his part. But in the course of certain proceedings in an action of multiplepounding, which were afterwards held in the Court of Session, where he had an opportunity of objecting to the claim founded on this decret, and where he offered several objections to other claims which were made against him, no notice was taken of the way in which this decret had been obtained.

After the death, however, of Mr Sinclair, an objection was stated by Mrs Clementina Lockhart and others, who had succeeded to him, and who contended, that a decret such as this, obtained in absence, without citing the defender personally, and upon a claim which, in consequence of the statute of 1579, could only be verified by the oath or writing of the party, could be of no avail.

The difference between this case and those mentioned above, was, that the decret had been pronounced in an inferior court, to which the enactments in 1672 and 1693 did not apply. The general argument being much the same in all of them, it must be unnecessary to repeat it. The rules established with regard to decreets in absence seemed to be these :

1mo, That a decret in absence proceeding on a personal citation, could not, after the death of the defender, be challenged for want of evidence.

2do, That where a decret in absence had been preceded by no personal citation, unless the pursuer had, by the authority of the judge, intimated to the defender his resolution of making a reference to oath, it was competent, not only to the creditors, but also to the representatives of the defender, to bring it under challenge at any time, and that it would be necessary for the pursuer to support the decret by the same evidence which would have been required, if appearance had been made for the defender.

3tio, That even where the defender had not been cited personally, and where there had been no intimated reference to oath, a decret in absence would be sustained after his death, if it appeared that, after having a proper opportunity of objecting to the proceedings as having been held without sufficient evidence, he had allowed them to pass without challenge.

In this case, where the defender had omitted to call in question the validity of the decret, when such circumstances occurred as must have led him to do so, if he had considered the claim to be an unjust one;

THE LORDS adhered to the judgment of the Lord Ordinary, which "over-ruled the objection to the decret." No 348.

Lord Ordinary, *Lord Rockville.* Act. *Macleod Bannatyne, Dalzell.* Alt. *Honyman.*
Clerk, *Menzies.*

C.

Fac. Col. No 109. p. 205.

SECT. XIX.

Reduction of Decrees.

1665. November 21. BAKERS in the CANONGATE.

THERE being a contract betwixt two bakers in the Canongate, to make use of an oven, still kept hot for both their uses, the one pursues the other, as desisting, and obtained decret before the Bailies of the Canongate for L. 36 of damage, which being suspended, it was *alleged ipso jure* null, as having compareance, mentioning defences, replies, &c., and yet expressing none; but refers the defender's action to the pursuer's probation by witnesses, who now offered to prove positively, that he continued in doing his part.

No 349.

THE LORDS would not sustain this visible nullity without reduction, though *in re minima inter pauperes*, for preserving of form.

Stair, v. 1. p. 310.

1696. July 30. GORDON against The DUKE of GORDON.

IN the pursuit by David Gordon, son to Mr Thomas, the criminal clerk, against the Duke of Gordon, it was debated, if the Duke ought to be reponed against a decret obtained against him when he was lately in France with King James; the nullity being, that he not only took forth the decret for the principal sums in the bonds, but also for the annualrents to which he had no title then in his person by confirmation or otherways. It was *argued* among the LORDS, That, conform to the article of the new regulations, it ought to be opened no farther than the nullity objected, and stand *pro reliquo*. But it was found that related only to decreets *in foro*, whereas this was in absence; so the LORDS reponed the Duke to his whole defences.

No 350.

Fol. Dic. v. 2. p. 206. Fountainhall, v. 2. p. 731.