

No 81.

1682. *March.* PRESTONGRANGE *against* Sir JOHN SINCLAIR of Longformacus.

FOUND, That a pursuer ought to prove his libel, though not expressly denied by the defender; and a decret was turned into a libel, because the libel on which it proceeded was not proved, albeit the defender did not positively deny it in his defence, seeing his procurators did not expressly acknowledge it; and the *ratio rationis* was because the defence denying the libel is a thing of course, which clerks often forget to mark, or the defender's procurator forgets to make.

Fol. Dic. v. 2. p. 182. Harcarse, (DECREETS.) No 400. p. 106.

No 82.

1683. *February.*CREDITORS of BAILIE MARJORIBANKS *against* ALEXANDER CHAPLAND.

FOUND, That a charger could not, immediately after the letters were found orderly proceeded by discussing of the charge upon a bill of suspension, denounce; but that the decret ought first to be put up in the minute-book and extracted as if the suspension had passed the signet; and here the suspender died some few hours after the denunciation, which was upon the same day that the decret was pronounced.

Harcarse, (HORNING.) No 61. p. 142.

* * * Sir P. Home reports this case :

UPON a complaint at the instance of ——— Brown and the Creditors of the deceased ——— Marjoribanks, late Bailie of Edinburgh, against Alexander Chapland, writer, the LORDS found, that Bailie Marjoribanks having suspended the charge of horning upon a bond, albeit the letters were found orderly proceeded, yet the denunciation upon the former charge was found unwarrantable, being before the deed of suspension was read in the minute-book, and extracted.

Sir P. Home, MS. No 332.

No 83.

The pursuer must prove his libel, and it is not sufficient that the defender neglect to deny the libel.

1708. *December 28.* PHILP *against* MENZIES of Pitfoddels.

DAVID PHILP being tenant to Gilbert Menzies of Pitfoddels, in a half-net coble-fishing on the water of Dee, and also some acres of land, he pursues him before his own baron-court, and takes a decret against him for two barrels and one half of salmon, at L. 50 Scots the barrel, and for his damage in riving out and impoverishing his land, cognosced by the verdict of the Birlawmen;

and, for supplement and confirmatory of the rollment of the baron-court, he takes likewise a decret against him before the Sheriff of Aberdeen. Which two decreets Philp suspends, on these reasons, that Pitfoddels being displeas'd with his renouncing his tack under form of instrument, he conven'd him in his own court, where, without all manner of probation, he took a decret for extravagant quantities and prices at random, and the Sheriff proceeded on no other probation than the baron's decret; and therefore craved to be repon'd to his defences, especially seeing Pitfoddels being a notour Papist, could neither sit judge himself, nor depute another in his stead, being incapacitated by the act 1700, made against Papists. *Answered*, The tenant can never reclaim, for he was present in the baron-court, and acquiesc'd; neither can he deny the debt, or show any discharge for it; and as to his holding a court, the act cited does not disable them from judging their own tenants; and by the 45th act 1572, the exception of Popery only takes place, in such as are given up in a list by the clergy after due admonition and contemptuous refusal, which cannot be subsum'd against Pitfoddels. THE LORDS found the decreets without probation, and therefore repon'd the tenant to his defences.

No 83.

Fol. Dic. v. 2. p. 182. Fountainhall, v. 2. p. 475.

1709. November 3.

MARION and JANET JOHNSTONS against GAVIN JOHNSTON of Elshieshiels.

THE deceased Elshieshiels, in his first contract of marriage, provides, in case there be no heirs male of that bed, and two daughters, they shall have 8000 merks payable at their age of sixteen, and till then, to be educated and alim'nted according to their quality and degree. It happen'd there were only two daughters of that marriage, but in a second, he had a son; and he being deceased, his daughters pursue their brother for an alim'nt, till they shall arrive at the foresaid age of sixteen, at which time their portions commence to bear annualrent; and the LORDS having allowed the pursuers a probation of the yearly rent and value of the estate, and the defender to prove the debts and incumbrances affecting the same, upon advising the cause this day, found the estate proved to be worth 4000 merks by year, and the term circumduced as to proving the debts; whereon the LORDS proceeded to modify the alim'nt, and found the least they could give them was the annualrent of their portion, deducting always the retention; but when they considered at what time this should begin, they found the time of the father's decease was not proved; and though the pursuers *contended*, That they need'd not, for they had libell'd that he died in March 1702; and that, some months thereafter, their stepmother had thrust them out of the house, and in all the debate this was never denied, but taken as granted; yet the LORDS thought this position a vulgar error,

No 84.

Found in conformity with the above.