

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

A DECEE 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.

No 343.

*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

No 344.  
Effect of a decree in absence, proceeding upon a reference to oath, and holding as confessed.