

action being possessory, for payment of by-gone stipends, and in time coming, conform to use and wont; it is not competent to the defenders, in this instance, to object against his title of admission; but they may insist in a reduction as accords. Nay, suppose the defenders were in a reduction, the objection against the pursuer's title is not relevant. Because the *jus devolutum* to the presbytery (which is confirmed by the Act of Parliament,) had taken place; and they had called the pursuer in virtue thereof to be minister at Avoch before the Act restoring patronages was made. Now, seeing the Act doth annul only calls by heritors and elders, and there was no place for such a call in this case, the patron, who succeeded in place of these heritors and elders, hath no pretension to that right which they had lost *jure devoluto*. 2. The defenders have no interest to object against the pursuer's not being qualified, by taking the oath of abjuration, till he be convicted by a sentence of a competent court, where the pursuer may have opportunity of a full exculpation. 3. There is no process here for a modification, but only for payment of by-gone stipends, and in time coming, conform to use and wont; which is most competent *in possessorio*, and hinders not a modification and valuation in their due course.

The Lords found, 1. The defence against the pursuer's admission and possession, not competent in this process. 2. Found the defence founded on his not taking the oaths not competent, he not being legally convicted thereof. 3. They repelled the defence of incompetency of court; and sustained process for the stipend the pursuer's predecessors in office had been in possession of, for by-gones, and in time coming, until there be a constant modified stipend allocated to the pursuer by the commission for valuation of teinds.

*MS. page 28.*

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1714. *June 11.* ALEXANDER DUNCAN of Straithmartine, *against* JOHN CUMMING, Merchant in Edinburgh.

ALEXANDER DUNCAN of Straithmartine, having raised a process of adherence against Agnes Cumming his lady, before the Commissaries of Edinburgh, about the year 1708; and the Commissaries having sustained the libel, he allowed the process to lie over several years, and then commenced an action *injuriarum* against John Cumming, her father, for L100 Sterling yearly of damages on account of his instigating and enticing and encouraging his daughter to desert and abandon the pursuer, her husband, and harbouring her in his house after she had deserted him.

ANSWERED for the defender,—Damages being libelled against him for entertaining the pursuer's wife, who has unlawfully diverted, it must be first proven that she has maliciously diverted; which only can be cleared before the Commissaries in the process of adherence, which is prejudicial to this imaginary process of damages.

REPLIED for the pursuer,—He hath prosecuted an action of adherence as far as is necessary to show that his wife's abandoning her family was irregular and unlawful ; having obtained an interlocutor before the Commissaries, sustaining process, and repelling the defence proponed against it. And any decret would be of no effect ; since he could expect little from the care and affection of a wife forced home *obtorto collo*, or by caption, or such legal diligence. But if those who encourage her in her impiety were deterred from it, by feeling the weight of the law, perhaps she might be brought to a better temper of mind. It is not controverted, but that in case the wife could give good and sufficient reasons for her non-adherence, and such as could warrant her desertion, this process against her father would be elided ; but then, these grounds, or reasons for her desertion ought here to be repeated, by way of defence, to exculpate him. Especially considering that there is no manner of connexion, or necessary dependence betwixt this process and that of adherence. They have quite different conclusions ; proceeded upon different grounds, and against different parties. Whatever is done in the process of adherence will not be *res judicata* against this defender. And suppose the pursuer were insisting upon the grounds of adherence, and his wife should offer to adhere, then there is an end of that process : but still the conclusion against her father would be good now, after he hath had an injurious accession to her desertion for the space of several years.

DUPLIED for the defender,—Since the whole imaginary relevancy against the defender lies upon his daughter being a wilful deserter, she must first be convicted of her being so before the proper judicature, by an extracted decret, and her refusing to return notwithstanding. And to oblige the defender to repeat here the grounds why she deserted, were directly to bring the libel for new adherence before the Lords in the first instance, without having the proper contradictor in the field. For, by proponing defences upon the wife's grounds of living separately, the whole question, whether she ought to live separately or not, comes to be determined ; and the Lords might give sentence against a person for entertaining a deserting wife, who yet, in the process of adherence, might be found thereafter to have had just ground to desert.

The Lords stopped procedure in the process against the defender for the pretended damages till the process of adherence before the Commissaries should be determined.

*MS. page 59.*

1714. *June 17.* The EARL OF WINTOUN, *against* Mr. WILLIAM HAY of Drumelzier, and JAMES FINLAY, his Groom.

GEORGE, Earl of Wintoun, raised an action of deforcement *ad civilem effectum*, for damages against Mr. William Hay of Drumelzier, and James Finlay, his servant ; libelling upon the acts of Parliament touching that crime ; and subsuming that the defenders were guilty thereof, in so far as the said James Finlay being legally apprehended by James Calder, messenger at Whittingham, upon letters of second diligence or caption, for his not compearing to depone as a witness in a process at the Earl's instance against the said Drumelzier and others, and