

No. 24. The Lords found the decree of ranking could not have the effect of a *res judicata* against Dean, and ordained him yet to be heard upon his interest; but found the decree standing as to the other creditors.

For Dean, *Sir Wal. Pringle.*

Alt. *Arch. Hamilton.*

Clerk, *Gibson.*

Bruce, v. 1. No. 98. p. 120.

1747. February 18.

LORD FORBES and Others *against* The EARL of KINTORE and Others.

No. 25.

One of many
defenders
who have a
common inter-
est dying, his
heir must be
called by a
summons, not
a diligence.

Certain of the inferior heritors on the river of Don, possessing cruives, by agreement, as they said, with the superior heritors, and carrying on their fishing by a joint management, a process was brought against them by the superiors, to have the cruives regulated; during the dependence whereof, Skene of Dyce, one of the defenders, died; and his heir being summoned upon an incident diligence, to which it was objected, That a principal party could not be called by this form of process, and all parties having interest not being called, the process could not go on against any; the Lord Ordinary, 27th January, "Repelled the objection proposed against the calling of Skene of Dyce's representatives by the diligence, in respect that there were many defenders in the process, and that the process was carried on jointly against them all."

Pleaded in a reclaiming bill: That no decree could be given against a man only summoned on an incident diligence; neither in this case could the process go on against the rest, neglecting Dyce, for they were partners in the cruives sought to be regulated, and had not distinct separate cruives.

Answered: Supposing Dyce to have an interest in this case, which did not appear, he was duly brought into the field; for when there were more than one defender, the death of one did not throw the cause out of Court; and there was no need to call his heir by an original summons, as there would be if there were but one, and so the cause entirely out, as was found in an action against the Managers of a public Tack for the Royal Burghs, 20th December, 1704, Anderson against Smollet, No. 13. p. 13258.

In actions of poinding the ground, the deceased heritor's heir was called by a diligence, as heirs also were in processes of ranking and sale.

The Lords sustained the objection to the process.

Act. *Ferguson.*

Alt. *H. Home.*

Clerk, *Kirkpatrick.*

D. Falconer, v. 1. No. 168. p. 222.

See ARRESTMENT—ASSIGNATION—CITATION—JURISDICTION—APPENDIX.