

THE LORDS repelled the defence of *res judicata*, in respect of the answer. Thereafter this affair ended in a submission.

No 376.

*Fol. Dic. v. 2. p. 207. Harcarse, (DECREETS.) No 411. p. 110.*

1692. December 27. KINLOCHS against CHARLES OLIPHANT, the Clerk.

No 377.

THE LORDS found Charles's decret-absolvitor of the nature of those exceptions that are called *impeditivæ litis ingressus*, and that the said decret should be first reduced, ere they can quarrel the disposition; but found, if there was any new ground of law insisted on against the disposition, that was not *deductum in judicium* in that decret-absolvitor, that they might be yet heard on it; seeing competent and omitted did not hold in reductions, nor could be obruded against pursuers, but only against defenders; for a man may first quarrel a right *ex capite exhibitionis*, and if he succumb, he may raise a reduction of it on the act of Parl. 1621; and he may pursue first as donatar, and then as adjudger; and competent and omitted will not exclude him in either cases, whether the reasons be *in facto* or *in jure*: So they allowed the reporter to hear Kinlochs, the pursuers, on any new grounds not alleged in the former absolvitor.

*Fol. Dic. v. 2. p. 207. Fountainhall, v. 1. p. 539.*

1700. January 2. PETER ARCHIBALD against JAMES WILSON.

No 378.

ANSTRUTHER reported Peter Archibald against James Wilson, merchant in Edinburgh. Patrick charges the said James for L. 200 contained in his bond. He suspends on this reason, that he must have compensation for the aliment of the said Patrick's daughter, who staid three years in his house. *Answered*, The case was *res judicata*, seeing he had an absolvitor from the aliment before the Sheriff. *Replied*, I have raised reduction of that decret, which proceeded on a wrong ground; whereby his wife, in his absence, offered to prove there was express paction for an aliment, in the probation whereof she succumbed, whereas there was no need of putting it upon that foot; for whether paction or not, you are liable, for *debitor non præsumitur donare*, and I liquidate it instantly by referring the alimenter and time of it to your oath, and the modification of it to the Lords. *Duplied*, If the process was mismanaged by burdening themselves to prove an unnecessary allegiance of paction; and, upon their succumbing, I being assoilzied, *sibi imputent*, but the decret must stand.

Found in conformity to Strachan against Drysdale, No 369. p. 12225.

THE LORDS thought competent and omitted did not militate against a pursuer, but he might still insist *super alio medio* than that which was formerly deduced *in judicium*; and being a decret of an inferior court, they reponed