

1629. June 16. L. COILL against L. LOCHBOUIE.

A HIGHLANDMAN, dwelling in the Isles, being holden as confessed upon a summons referred to his oath, after a term assigned to produce him, and decret given against him, which being suspended, and the verity of the pursuit being deferred by the defender (whose own oath, being holden as confessed, was found could not be taken, in respect of the sentence) to the pursuer's oath, it was found that the pursuer could not be compelled to give his oath therein, neither by commission, nor yet *cum onere expensarum*, which were both offered by the suspender and refused.

Act. ———

Alt. Nicolson.

Clerk, Hay.

*Fol. Dic. v. 2. p. 184. Durie, p. 445.*

1630. March 2. WRIGHT against WRIGHT.

THOMAS WRIGHT in Leith having pursued James Wright for the price of a ship pertaining to him, and which the defender had sold for a price within the just avail, the ship being only disposed by the pursuer to him upon trust; this summons being referred to the defender's oath, and he summoned and holden as confest for not compearance, and decret given against him for the price of the ship libelled; whereupon the defender, who was not within the country when he was summoned to give his oath, raising summons at his home-coming, which was divers years after the sentence, and desiring to be reponed and his oath to be received, seeing that citation was only executed against him upon sixty days, he being then in Muscovy, whereby the citation could not come to his knowledge, and thereby could not be called *contumax*; it were great rigour that a decret should stand against him for so great a sum above his value, and exceeding the worth of the ship; specially seeing the ship came again in the hands of the same party's creditor, viz. Robert Monteith, who sold the same to another person, with express consent of the said Thomas Wright, and the price recovered therefor was converted to his own use, viz. for payment of his debts; and the party alleging, that this would invert the inviolable practice, if parties should be reponed against such decreets for being out of the country when they were cited; for such sentences are as lawful as if the party had been cited within the country, they being absent for their own private negotiation; and if either the party holden as confest so decerned should die, or that execution should follow thereupon, it were a dangerous preparative to make such sentences to fall, but specially in this case, where, after the party's citation to give his oath, his procurator compeared and obtained divers long diets assigned to exhibit him, which depended more than a year, in which time he might have con-

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Case where the party being out of the country must have been ignorant of the citation.

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veniently advertised, or craved commission to the Judges where he was to take his oath, if there had been reason for granting the same; notwithstanding whereof, the LORD found that he ought to be reponed, and restored him to the giving of his oath, specially seeing nothing had followed upon the decret, and seeing it was confessed by Thomas Wright that he had consented to the posterior alienation of the ship, and that the price was given to his creditors.

Act. *Nicolson.*Alt. *Mowat.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 184. Durie, p. 497.*

\* \* \* Auchinleck reports this case :

JAMES WRIGHT being pursued by Thomas Wright, and in the said James's absence out of the country, he is held as confest. After three or four years absence, he returned and meaned himself to the Lords, and craved to be reponed to give his oath, being, the time of his absence, in Muscovy, where he could receive no advertisement; and the matter whereupon he was to depone was so clearly untrue, that it were great injustice to discern him as confest for contumacy. THE LORDS, after trial of the whole matter, found he ought to be reponed, although it is contrary to the daily practics.

*Auchinleck, MS. p. 151.*

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1634. *Jrnuary 14.*CUNINGHAM *against* ROLLOCK.

IN an action of reduction pursued by John Cuningham against Robert Rollock, whereby the said John craves to be reponed to his oath and defences, because the decret was obtained against him for null defence and he not summoned, or at least not lawfully summoned, as the executions bear, which were vitiated in the days of compearance, and the principal summons both disconform in the days of compearance, and summoned to the second diet upon the            day of            ; which being so found by the executions, and            the first summons with the second, the LORDS reponed John Cuningham to his oath and whole defences.

*Auchinleck, MS. p. 175.*1637. *February 25.*DUNCAN *against* FRAZER.

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ONE Frazer having wadset his lands to one Duncan, redeemable upon 5000 merks, and *alleging*, that at the time of the wadset, Duncan promised that what the prices of the victual, according to the fiars of the year, extended to