

1686. *February.* MR EDWARD WRIGHT *against* LORD RUTHERFORD.

No 111.

THE Lord Rutherford being holden as confest, and reponed, by way of suspension, on this reason, That he was out of the kingdom *animo remanendi*, and some other reasons, a new term was assigned, and a commission granted to take his oath; but before the day in the commission came, he died; upon which the charger craved holding the defunct as confest, seeing he had not deponed negative; and the presumptive acknowledgment must hold.

*Answered* for the now Lord Rutherford, That the reponing his brother to oath put him in the same condition he was in before the decret holding him as confest; and therefore the charger must prove his oath.

THE LORDS, before answer, ordained the interlocutor to be seen, whether he was reponed *ex gratia* to purge his contumacy; in which case it appeared just, that the party not having deponed conform to the faculty given him, the presumptive confession should hold as probation against his heirs and executors; or if the decret was turned into a libel, upon some nullity or informality, in which case the contrary appeared just. And it appearing that the reason of reponing my Lord was an objection against the executions, the LORDS found the presumptive confession did not militate against the defenders.

*Fol. Dic. v. 2. p. 185. Harcarse, (OATHS.) No. 741. p. 210.*

1688. *February.* CRAICK of Stewarton *against* WILSON.

No 112.

THE defender, in a forthcoming, having suspended a decret, holding him as confest, and the charger not having insisted, the suspender died some years after, without craving to be reponed; and the defender's heirs being pursued, they craved to be reponed against the said decret; which the LORDS refused, seeing now the charger had lost the benefit of the defunct's oath, as to what he was debtor in the time of the arrestment; and there was no nullity in the decret.

*Fol. Dic. v. 2. p. 185. Harcarse, (OATHS.) No 745. p. 210.*

No 113.

Where the party has purged the *mora*, although he die in the *interim*, before deponing, decret will not be allowed to go out without a new circumduction.

1701. *June 21.* KINCAID *against* SOMERVELL.

THOMAS KINCAID being creditor to Somervell of Gladstanes, he arrests, in Hugh Blair Dean of Guild of Edinburgh's hands, as debtor to the said Somervell, and pursuing a forthcoming, and a day being taken to produce him to depone, the term is circumduced against him, which the said Hugh being advertised of, he comes in, and makes faith, and offers to depone; but the act not

being there, it is delayed till another time, and witnesses *avisandum* is put up in the minute-book. This being in the end of a Session, before the next, the said Hugh dies. At the sitting down of the next Session, Thomas Kincaid and Thomson, his assignee, crave out the extract of their decret of circumduction. *Alleged*, There can be no decret, because it was passed from by his subsequent compearing, and making faith. *Answered*, This is not sufficient, unless he had actually deponed; and if the coming in to make faith stopped decreets, then they would always offer themselves, as if they were ready, and so delay causes long enough; and now by his death the mean of probation of their debt is lost, *et non debet lucrari ex sua culpa*.—*Replied*, That it is a certain principle in form, that after a party compears and makes faith, the former decret of circumduction cannot be extracted, till the act be of new called again, and the circumduction craved *de novo*; likeas, these arrestments being libelled at random, that you owe their debtor to 10 or L. 20,000 Scots, it were an intolerable stretch that, on such a circumduction, afterwards loosed by the party's offering to depone, a party's heir shall pay the vast sum, where truly he owed nothing; and though there may be an inconvenience to assoilzie, where it may be he was truly debtor, yet that may be remedied by your calling and circumducing of new, or by proving the debt by his count-book, or otherwise, though the mean of probation by his oath is indeed perished. THE LORDS considered, where a defender is truly contumacious in a process where a libel is referred to his oath, and a decret is thereupon extracted against him in his own life-time, and no endeavours used by him to be reponed against the same before extracting, it is just that such a decret should stand as a fixed evident against his representatives after his decease; because not only is the mean of probation now lost by his death, but law strongly presumes, that if the defender had compeared, he would have acknowledged the libel, and therefore he absented himself; but here the Dean of Guild had shewed himself willing to depone, and had actually made faith, and so purged the former *mora*; and so they not having of new circumduced the term against him, the LORDS refused to give out the decret, but prejudice to them to instruct him debtor by his count-book, or any other manner of way. If the Lords had observed any collusion, or tergiversation in his deponing, they would not have so clearly liberated him, but there appeared none.

*Fol. Dic. v. 2. p. 186. Fountainball, v. 2. p. 115.*