

No 91.

1609. December 2. AIRTH against Lord ELPHINSTON.

THE Laird of Airth having summoned Lord Elphinston to exhibit, and deliver to him a tack of his teinds, set to him by the Earl of Lithgow, and a bond to set longer tacks to him and his heirs, my Lord denying, and witnesses being examined, they proved his having of the tack, but not his having of the bond. It was doubted if the holding of the defender *pro confesso*, not giving his oath *de calumnia*, was sufficient probation of his having of the bond; and because he had been summoned personally twice, to two sundry diets, the LORDS held him as confessed, and decerned.

Fol. Dic. v. 2. p. 183. Haddington, MS. No 1671.

No 92.

1610. June 26. L. MYRETOUNE against ELLIOT and KER.

A sentence for not-compearance, holding the party confessed, being past, it may be craved that the party be re-poned to his oath, if he prove that when he was ready to have taken journey to compear, he was hindered by infirmity of body and vexation of disease.

JOHN HALYBURTON of Myretoune pursues Gilbert Elliot of Horslyhill, and Gilbert Ker of Lochtour, Clerk of Register, and his deputes, for production and reduction of a decret recovered at their instance, as Executors to umquhile Gawin Elliot of Stobb, and against him for warranding of the by-runs of an annual rent of eight bolls victual yearly, furth of the lands of Myretoune, conform to John's alleged promise thereanent, which was referred to his oath, and he holden as confessed for not compearance. Reason of the reduction, the decret is allenarly given *in pœnam contumaciæ*, quhilk is ever purgeable by a lawful excuse *vis majoris tempestatis et ægritudinis*, quhilk may make the party have *justam causam essentiæ*; which being sufficiently alleged and proven in the second instance, and the party compearing and offering to purge to give his oath, is and must be sustained a sufficient cause to annul and retreat the sentence; and true it is, Myretoun, neither willingly, nor for contempt of justice and of the citation, failed to compear, but allenarly through his great disease, sickness and wounds, which has ever possest, seised on, and enfeebled his body, these ten months bygone, since the shooting and wounding of him committed be Haig of Bennersyde, nôtourisly known to the Lords, whereby has been so weakened in his person that he has been unable to travel frae his own house; lykeas it is of verity, that he, as of before the time of citation, quhilk was on _____ and the day whereunto he was summoned, quhilk was _____ and diverse days since syne, was diseased, so immediately before the day and time of compearance, when he was of deliberate purpose to have tane journey toward Edinburgh, to give his oath, and at the pronounciation of the said decret: quhilk was upon _____ was heavily vexed and diseased with great infirmities in his body, which at sundry times has recourse to him since his wounding: That he was altogether unable to have travelled without peril and danger of his person, at the least without farder encreasing and augmenting of his long

dwyning pain and heavy sickness, and might nor could not have compeared; and now being convalesced, and stoped of his heavy infirmity, and willing by his compearance to purge his contumacy, rendering verified the just cause of his absence, ought and should be restored against the decreet, and heard to depone in the cause, quhilk he is content to do, for satisfying both the Lords and party; according to quhilk, his oath and deposition, sentence ought allenarly to be given, and the sentence given retreated and reduced, and he reponed against the same. THE LORDS find the reasons relevant, and assign a term to prove, notwithstanding sundry allegeances proponed in the contrair and repelled.

No 92.

Fol. Dic. v. 2. p. 184. Nicolson, MS. No 247. p. 174.

* * * Haddington reports this case :

A MATTER being referred by the principal summons to the defender's oath and he lawfully summoned to give his oath, not compearing, and in respect thereof holden as confessed, and decreet given against him, if he thereafter intent reduction because he could not compear when he was summoned, being deadly wounded and unable to travel, and produce a testimonial thereof by the chirurgeon and minister, the same will be preferred to his probation, and he preferred therein to his party, offering to prove that when he was summoned to compear he was unable to travel, and then resorted to kirk and market, because they thought the testimonial of his sickness a more famous admynicle of probation than witnesses alone.

Haddington, MS. No 1922.

1616. *March 28.* LAIRD OF BALMANNO *against* THE PARISHIONERS OF FORDEN.

No 93.

In an action of spuilzie of teinds by the Laird of Balmanno, against the Parishioners of Forden, the LORDS would not hold the defenders as confessed, who were summoned to give their oath by the summons of continuation, while they were of new summoned.

Fol. Dic. v. 2. p. 183. Kerse, MS. fol. 256.

1616. *July.* GLENDINNING *against* TENANTS OF PARTON.

No 94.

In an action pursued by Glendinning of ——— against the Tenants of Parton, for spuilziation of teinds, the LORDS would not hold the defenders as confessed upon the summons of continuation.

2.

Fol. Dic. v. 2. p. 183. Kerse, MS. fol. 256.