

No 101. the LORDS found that the first compriser ought to count to the second comprise from the date of the act of Parliament, and this is always so decided.

*Newbyth, MS. p. 29.*

1670. July 5.

LINDSAY, and SWINTON her Spouse, *against* ENGLISH, Supplicant.

No 102.

What kind of citation, to warrant holding as confest?

————— pursued his debtor, and craved him to be holden as confest, who not compearing, the clerk was not clear to give out a decret, because the messenger's execution did not bear, that the defender was personally apprehended, but that the messenger came to his house and knew he was within and was forcibly kept out by his wife, and thereupon protested that the defender might be holden as personally apprehended. Upon the clerk's stop, the pursuer gives in a supplication, desiring that he might either have out his decret, holding the defender as confest upon this execution, or that he might have a warrant to cite the defender at the market-cross of the shire or burgh where he dwells, as being *difficilis conventionis*. Some were of opinion that he should be holden as confest; the messenger proving that he was within, or if the execution had borne that he and the witnesses also had given a particular evidence of their knowledge of his being within; others thought that he should be holden as confest, unless the defender could instruct he was *alibi* in regard of the contumacy; but the most resolved that holding as confest being a solemn and important certification peculiar to Scotland; that this assertion of the messenger's and his execution should not be sufficient, nor should put the defender to allege *alibi*, but that he should have a warrant to cite at the market-cross, with certification to be holden as confest.

*Fol. Dic. v. 2. p. 183. Stair, v. 1. p. 688.*

1672. November 21. GRAHAM *against* SMITH.

No 103.

Effect, as to heirs, where the party held as confest has died, *in cursu* of an attempt to be reponed.

JOHN STACHAN having obtained decret against umquhile Smith, upon this ground, That the pursuer's father having, in the time of the late troubles, a considerable sum of money by him, did (for fear of its being taken away by the soldiers out of his house) hide it there, and shortly thereafter died; and the said Smith having entered to the possession thereof as tenant, intromitted with the money which he had found hidden therein; whereupon Smith was holden as confest and decerned; but did not compear, neither was there a day taken to produce him; and so soon as he knew, he suspended; but before the suspension was discussed, he died; Strachan now pursues a transference of the said decret against the defunct's children; who *alleged*, That this

decreet being in absence, the defunct using all diligence to be reponed, and having, upon his death-bed, before ministers and gentlemen, solemnly cleared himself, by oath, of any such intromission, and thereupon reduction of the decreet being now raised, the same ought to be reduced. It was *answered*, That albeit the Lords, upon such a ground, might repone a party to his oath, yet this party being dead, and the mean of probation perished, he cannot be reponed; and, in fortification of the decreet, it was offered to be proved by one witness that saw the defunct find the money, and intromit therewith, though he knew not the quantity.

THE LORDS, considering the decreet was in absence, and suspended *de recenti*, and that the defunct had sworn he intromitted with no such money, they turned the decreet into a libel.

*Fol. Dic. v. 2. p. 185. Stair, v. 2., p. 121.*

1673. June 20. M'KEWAR against VERNOR.

IN a pursuit at M'Kewar's instance, as assignee to a bond made by Vernor, for payment of the sum therein contained, it being *alleged*, That the assignation was to the behoof of the cedent, which was offered to be proved by his oath, and that it was offered to be proved, by the cedent's oath, that he was debtor in as much; whereupon he was holden as confessed, because he was not personally apprehended the time of the citation; in which case, only decreets can be given holding a party *pro confesso*; it was *answered*, That, the time of the citation, the cedent was out of the country, and was cited upon sixty days; so that it was impossible to cite him personally apprehended. THE LORDS did sustain the answer, and ordained the decreet to be extracted; seeing, if it should be otherwise, it were an easy way for creditors to assign, albeit satisfied, and immediately to go out of the country, whereby no probation could be had by their oath for payment of the debt.

*Fol. Dic. v. 2. p. 183. Gosford, MS. No 595. p. 340.*

\* \* Stair's report of this case (Somerville against ———) is No 5. p. 8325. *voce* LITIGIOUS.

1675. February 6. IRVING against CARRUTHERS.

IRVING having obtained decreet against Carruthers for making forthcoming of his rent, arrested for his master's debt, and the same being suspended, and Carruthers being first examined, and having deponed upon what rent he paid, and what rent he was due, and having been ordained to be re-examined on his

No 103.

No 104.  
Parties out of the country may be held *pro confesso* upon a citation at the market cross of Edinburgh.

No 105.  
Holden as contest, sustained in a forthcoming, where the arrestee de-