

No 105.
poned, that
he did not
know how
much he was
owing to the
common
debtor.

rent in the year 1672, whether it was resting or paid, he deponed that he did not remember. Whereupon it was *alleged*, That he ought to be holden as confest, because he was obliged to depone *positive*, in so recent a fact of his own, whereof he could not be thought ignorant, and if this were allowed, it would afford a method for parties to shun their oath without hazard of perjury, for they could not be redargued upon their memory, as they could be in a palpable fact, and therefore, where in such cases parties remember not, the LORDS, if they see cause, give them time to inform themselves, and then put them to a positive answer.

THE LORDS held Carruthers as confest, conditionally, that if he came and deponed positive within a fortnight, either acknowledging or denying the particular, he should be received.

Fol. Dic. v. 2. p. 184. Stair, v. 2. p. 317.

* * * Dirleton reports this case :

THE summons being referred to the defender's oath, who having declared, that as to what was referred to his oath, he could not remember, nor be positive, it was debated amongst the Lords, whether the oath did prove or not, or if the defender should be holden as confest, in respect he was to declare *de facto proprio et recenti*, and in such a case the presence of *non memini* is neither excuseable nor relevant. And so it was found by the LORDS, though some were of opinion, that a person compearing and declaring upon oath, that to his knowledge he did not remember, could not be holden as confest, seeing he cannot be said to be contumacious, and to want memory is not a fault; and after a party has declared, it is only to be considered, whether the oath proves or not.

Clerk, *Mr John Hay.*

Dirleton, No 245. p. 117.

1675. February 6.

REID against WILSON.

No 106.
Holden as
confest was
refused a-
gainst a de-
fender, whom
the pursuer
debarred by
horning.

REID having pursued Wilson, and insisting against him to hold him as confest; the defender compeared and offered to make faith, but the pursuer debarred him with a horning; which being represented to the LORDS,

They found, That if the pursuer debarred the defender with a horning, that he could not crave him to be holden as being contumacious.

Stair, v. 2. p. 318.