

to propone all his other defences when he should be pursued, as representing his father granter of the bond, the tenor whereof is craved to be proved.

No 14.

*Fol. Dic. v. 2. p. 346. Newbyth, MS. p. 24.*

1675. January 9.

TOWN of EDINBURGH against The EARL of LOTHIAN.

THE Lady Yester having mortified L. 5000 for the use of the poor in some parishes about Jedburgh, the same was put in the hands of the Town of Edinburgh, who gave bond therefor; which being lost, there was process at the instance of the minister and poor of these parishes, and at the instance of the Earl of Lothian, as now become patron of these parishes, at whose advice the sum was to be employed, against the Town, proving the tenor of the contract of mortification; wherein the Town proponed a defence, that they had made payment of the sum to the Earl of Lothian; and it being alleged, that the Earl alone had not power to uplift the sum;

No 15.

A defender had been held as confessed. In a subsequent action, about the same matter, this was received as evidence.

THE LORDS, before answer to the relevancy, ordained the Earl of Lothian to depone, whether he received the money or not, with certification if he deponed not, to be held as confessed; whereupon, the Earl was held as confessed, and gave in a bill desiring to be reponed, and was thereupon reponed, and a new term assigned, and then was again held as confessed. The poor obtained decreet; and now the Town pursues the Earl of Lothian for relief, to pay the sum, to be employed according to the first destination; and for proving his receipt of the sum, make use of the decreet of tenor, in which he is held as confessed. It was *alleged* for the Earl, *imo*, That his being held as confessed could operate nothing, except in the process wherein he was held as confessed; neither was it equivalent as if he had deponed and confessed, which might have proved against him at the instance of any other party. *2do*, Though it could operate, yet he craves to be reponed. It was *answered*, That being held as confessed, proves as effectually as the acknowledgement itself, as to the effect for which the oath was to be adhibited; and seeing the Earl was a pursuer in the process, and a debate did arise upon the relevancy what his oath would import; the LORDS did not determine the relevancy, but that the matter of fact might first appear, ordained him to depone, whether he received the money, declaring, that if he deponed not, he should be held and presumed as if he had deponed and confessed. Whatever could be relevantly founded upon his real confession, may also be presumed upon his presumptive confession; and therefore the Town might either crave to be free upon his receipt of the money, or at least the Earl, upon his confession, should be decerned to relieve them; and though they have raised a new summons, it is but a continuation for the same cause; neither can the Earl be reponed, having been twice held as confessed.

No 15.

and nothing alleged to purge his contumacy ; but on the contrary, Cockpen, his trusty and intimate friend, his chamberlain, and several ministers being examined for adminiculating the verity of the contract, depone, that the Earl received the money, and paid the annualrent to the poor several years, and the Town-Treasurer's accounts bear the same.

THE LORDS found, That the Earl's being held as confessed, as said is, was a sufficient probation in this process among the same parties depending on the former process ; and notwithstanding of the evidences adduced, they had such deference of the Earl's integrity, that if, under his hand, he would desire to be reponed, as not having the money, they would take it in consideration ; but that not being done, the decret was ordained to be extracted.

*Fol. Dic. v. 2. p. 348. Stair, v. 2. p. 304.*

\* \* \* Dirleton reports this case :

THE Lady Yester having mortified a certain sum of money for the poor in certain parishes in the south ; and having employed to the end foresaid the foresaid sum upon bond or contract, granted by the Town of Edinburgh ; The ministers of the said parishes did pursue the Town of Edinburgh to hear and see the tenor of the said writ to be proved ; and that being done, that they should be decerned to pay ; And did sufficiently prove the tenor of the same.

In the process against the Town, there was a defence proponed, viz. That my Lord Lothian, who had interest in the said mortification, had got payment of the said sum from the Town of Edinburgh, which they offered to prove by his oath.

THE LORDS having ordained his oath to be taken before answer ; and he being summoned to that effect, he was held as confessed ; and having thereafter, upon a bill, desired to be reponed to give his oath, and being reponed, he was held as confessed the second time ; and, in respect that the said defence was not proved by his oath, the LORDS proceeded and decerned against the Town.

The Town of Edinburgh having intented process against the Earl of Lothian, for refunding the said sum ; upon that medium, that the same was formerly paid to him ; and that he had confessed, at least was held as confessed, which is equivalent as to the payment of the said sum ;

It was *alleged*, That his being held as confessed in the process foresaid, did operate only that the defence referred to his oath was not proved, but could not be a ground of pursuit against himself, unless it were proved by his oath, that the said sum was paid to him ; and he desired to be reponed to his oath. It was *answered*, That he being twice held as confessed, there was no reason to repone him ; and his being held as confessed, doth operate in law as much as if he had confessed the said sum ; seeing through his contumacy the pursuers are prejudged ; and he cannot pretend, that he was not a party in that process, seeing he was held as confessed, and in the same process craved to be reponed, and was reponed, as said is ; and though he had not been called *ab ini-*

*tio* in that process, yet being called *incidenter* for proving of an allegiance, by the certification foresaid, he became party therein; and as when an incident diligence is raised against a haver of writs, for proving of an allegiance, and the having thereof is referred to the oath of the defender in the incident; if he be held as confessed, though the allegiance be not proved, the pursuer of the incident will have execution against him as haver, and for the damage and interest sustained through his contumacy; so it ought to be in this case.

THE LORDS, though the Earl of Lothian's presumptive confession (being held as confessed, as said is) be a convincing evidence, that the said money was paid to him; yet they had that respect to him both as to his quality and integrity, that they would have reponed him, if he had compeared himself, or had written to the Lords, that he desired to be reponed, and did intimate as much to his procurators; and to that effect did give some time, but no return being made, they proceeded, and sustained the pursuit at the instance of the Town of Edinburgh, upon the medium foresaid.

Clerk, *Monro.*

*Dirleton, No 217. p. 101.*

No 15.

1675. January 13. GLENDINNING against The EARL OF NITHSDALE.

THIS cause having been debated upon the 6th day of January current, No 371. p. 12226, *voce* PROCESS, it was then represented as containing a transference of a former process at the pursuer's instance, against the late Earl of Nithsdale, where-in probation was led, and the cause concluded, and in respect of the state of that process, the LORDS refused to admit a defence upon a writ suspected, being registered 70 years after its date, and never produced before, and many presumptions of falsehood alleged against it. But now having considered the process for advising the probation, there was found no transference in it, but a process at the pursuer's instance against this Earl of Nithsdale, as heir to Robert Earl of Nithsdale, father to the last Earl, who was obliged to pay the half of the worth of the lands of Dolphington, and till then to pay the half of the rents; where-upon this question arose to the LORDS, whether the depositions of the witnesses taken in the process against the late Earl of Nithsdale were receivable against this Earl of Nithsdale; and they found, that seeing the process was not transferred against this Earl, that there was no instruction that he was heir to the late Earl, and therefore the probation against the late Earl was as *inter alios acta*, and was not receivable against this Earl; for albeit probation against a party at the instance of one pursuer is sometimes receivable against that same party at the instance of another pursuer, as often occurs in the probation of passive titles; yet the defender against whom the probation is used is always the same person, or representing the person against whom the former probation

No 16.

Probation of witnesses ad-  
duced against  
a defunct not  
probative a-  
gainst a per-  
son who re-  
presented the  
defunct's fa-  
ther.