

1711. *December 14.*

The REPRESENTATIVES of JAMES SMITH, late Bailie in Tranent, *against* ROBERT SEMPLE of Fulwood.

No 341.
An advocate's compearing for a party, and making no defence, but declaring that he had nothing to object against the debt therein claimed, does not make a decree *in foro*.

IN the suspension of a charge of horning, upon a decret of the Lords of Session, obtained by James Smith against Robert Semple, the LORDS found, that an advocate's compearing for Fulwood in that decret, and making no defence, but declaring that he had nothing to object against the debt therein claimed, did not make a decret *in foro*; and therefore reponed the suspender against that decret.

Fol. Dic. v. 2. p. 205. Forbes, p. 555.

1728. *February.* SIMON FRASER *against* HUGH FRASER.

No 342.
Decree in absence, what effect?

IT being doubted whether the peerage of the family of Lovat descended to heirs-male or heirs-female, the heir-female, while the heir-male was abroad, obtained declarator of her right to the peerage. This decret being simply in absence, and passing without proof, when the heir-male appeared for his interest, the question occurred, If it should be turned into a libel, or be allowed to stand, with liberty always to the heir-male to be heard upon his pretensions to the peerage *tanquam in libello*; it was yielded for the heir-female, that in processes for payment, where the decret is in absence, and without proof, there is both reason and custom for turning such into a libel; it remains still incumbent upon the claimant to bring evidence of his debt; and as he is *in prosequendo*, his decret can be of no use to him where it is objected to; but that decreets of declarator of a *jus incorporeum* stand upon a different footing; they give instant possession, and have their full effect, without necessity of further diligence; and as the heir-female, in virtue of her decree, stands in possession, there is no reason she should be deprived of her right of possession, till the heir-male's right be made out in a counter action of declarator. *Answered*, Possession commonly makes a presumptive title to the property, which must found a right to continue possession until the presumption be taken off by a contrary proof; that in the present case the possession, founded upon a decree in absence, without proof, can be no presumptive title, and therefore the heir-female ought to have no benefit by such a possession. THE LORDS turned the decree into a libel. See APPENDIX.

Fol. Dic. v. 2. p. 205.