

death; *2do*, It appeared by the decret that the defender Robert was personally apprehended, and consequently it must stand with much better reason than a decret against a person out of the kingdom legally cited, which decrets are every day sustained; *3tio*, Though the decret did not bear the procurator's producing a mandate, yet it did not from thence follow, that no mandate was produced; and this defect, though true, was supplied by the defender's being personally apprehended; *4to*, It was no presumption against the decret, that a great sum was libelled, and thereafter restricted, that being the daily practice.

THE LORDS found, That the decret was a presumptive evidence of the debt, which they sustained, except the defenders did take it off by a more clear probation.

N. B. In this cause there was a letter from the clerk of the Bailie-court of Cuningham produced to the Lords, which bore, that neither a mandate, when one was personally apprehended, nor second citation, was usual in that Court.

Act. Pat. Boyle.

Alt. And. Macdowal.

Clerk, Justice.

Edgar, p. 26.

1732. December 21.

ROBERTSON against M'KENZIE.

A DECRET of an inferior court was turned into a libel long after the defender's death, he being held as confessed, and yet no citation *pro confesso*.—See APPENDIX.

Fol. Dic. v. 2. p. 183.

1738. February 24.

MARY DICK against HELEN AITON and JAMES CASSIE, her Husband.

DICK having obtained a decret against Cassie and his wife for 1000 merks, they afterwards *craved*, That certain articles of mourning, bed, board, &c. furnished by them to her, might be allowed to be imputed in extinction of the sums pursued for, conform to an account given in; and *insisted*, That, before they condescended, she should confess or deny, in terms of the act of sederunt, 1st February 1715.

Mary Dick *answered*, The account produced is prescribed, and only probable by her oath (which she is willing to give;) in which case, the act of sederunt does not take place, it being only calculated for this purpose, that people might confess or deny a fact that was offered to be proved by witnesses, that in case

No 117.

No 118.

No 119.

A party is not bound to confess or deny, in terms of the act of sederunt, 1st February 1715, where the subject claimed is an account prescribed *quoad modum probandi*.

No 119. it appeared, from the proof, it consisted with their knowledge, they might be liable in expenses.

THE LORDS found the account not probable otherwise than by the pursuer's oath.

C. Home, No 91. p. 143.

1750. December 1. MAXWELL against the TRUSTEES of CHALMERS.

No 120.
A party, against whom decree has been obtained as holden confessed, may be reponed on paying expenses.

AGNES and Ann Maxwells being pursued by the Trustees of Chalmers of Fingland, upon the passive titles, as representing certain of their predecessors, to make payment of certain debts due to Chalmers of Fingland, to which the pursuers had right by disposition from him; the passive title insisted on was, as charged to enter heir; and a day being taken for them to renounce, and that day again prorogated; and, last of all, a petition to the Lords refused, craving that the extract of the circumduction pronounced on the 21st February might be superseded till the 5th June last; and they having after all failed to renounce; the circumduction was extracted, and became a decree *in foro*.

Of this decree a bill of suspension was now presented, wherein it was *alleged*, That the complainers had never employed either the agent or procurator who had appeared for them, which was offered to be proved by their oaths; an allegiance which could not have been listened to, however such procurator and agent upon their acknowledgements might have been subjected to the complainer's damages. But another ground occurred to the Lords, namely, that in all decrees, however *in foro*, proceeding upon being held as confest, parties are reponed upon payment of the expense; and as there was no doubt of the complainer's now giving in a renunciation, it was remitted to the Lord Ordinary to pass the bill, upon caution.

Kilkerran, (PROCESS.) No 12. p. 438.

1797. June 20.

THOMAS GILMOUR against The REPRESENTATIVES of Captain MATHEW STEWART.

No 121.
A defender in an inferior court, to whose oath the libel had been referred, having been held as confessed for not appearing to depone, and

THOMAS GILMOUR, in June 1793, brought an action before the Sheriff of Ayr, against Captain Mathew Stewart, for payment of L. 1 : 13 : 3, being the amount of an account for tea and sugar, alleged to have been furnished to Jane Stewart, the defender's sister, in the years 1781 and 1782, at which period she kept his house.

Gilmour produced orders in Miss Stewart's hand-writing, but without dates, for the quantities of tea and sugar stated in the account. Miss Stewart had