

further than would pay the ordinary profits of his sum, he should repay the same according whereto he alleged he had received payment two years together after the wadset, and that sinceyne there were eight years owing to him; pursues for the payment of the superplus, and refers the promise to the party's oath, who was holden as confest and decerned; which decret being suspended and the party offering to give his oath, excusing his contumacy by simplicity and ignorance, and that he came within a day or two after the sentence to have given his oath, but was not heard, because the sentence was extracted before, the Lords, albeit it was not verified that he came within so few days after the sentence, and without respect to this, reponed him to the giving of his oath, but ordained him to pay 100 merks for the party's expenses in purchasing his decret; and the Lords would not sustain the decret by the party's offering to prove the verity of the promise by witnesses, which the Lords found not probable by witnesses, tending in effect to take away his wadset by witnesses, and to pay his principal sum by this cautelous action.

No 100.

Act. Baird.

Alt. Mowat.

Clerk, Gibbon.

*Fol. Dic. v. 2. p. 185. Durie, p. 831.*

1665. June 27.

Mr WALTER CAUT against JAMES LOCH.

No 101.

MR WALTER CAUT having pursued James Loch and his mother as tutrix, for her interest, for the mails and duties of some appraised lands, and the quantities being referred to the tutrix's oath, she refused to depone, *alleging* that she had forgotten the quantities, whereupon the pursuer craved her to be holden as confest upon the rental given in by him as if she had acknowledged the same.

THE LORDS found she could not be holden as confest, being not the party but the tutrix; but they found that she might be forced to depone by horning and caption as other witnesses.

*Fol. Dic. v. 2. p. 183. Stair, v. 1. p. 288.*

\* \* \* Newbyth reports this case ::

MR WALTER CAUT having comprised certain tenements of land from Mr Alexander Elies, and Mr Hary Charteris, pursues James Loch and his tutors, and likewise had comprised the same tenements, and before he had comprised to count and reckon for his intromissions; at least, that he having comprised within year and day of the first comprising, might come in *pari passu* with the defender, conform to the act of Debtor and Creditor; and it being questioned *quo tempore* the defender ought to count to the second compriser, whether from the date of the comprising, or from the date of the act of Parliament,

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