decreet being in absence, the defunct using all diligence to be reponed, and having, upon his death-bed, before ministers and gentlemen, solemnly cleared himself, by oath, of any such intromission, and thereupon reduction of the decreet being now raised, the same ought to be reduced. It was *answered*, That albeit the Lords, upon such a ground, might repone a party to his oath, yet this party being dead, and the mean of probation perished, he cannot be reponed; and, in fortification of the decreet, it was offered to be proved by one witness that saw the defunct find the money, and intromit therewith, though he knew not the quantity.

No 103.

THE LORDS, considering the decreet was in absence, and suspended *de recenti*, and that the defunct had sworn he intromitted with no such money, they turned the decreet into a libel.

Fol. Dic. v. 2. p. 185. Stair, v. 2. p. 121.

1673. *June* 20. M'KEWAR *against* VERNOR.

No 104.
Parties out of the country may be held *pro confesso* upon a citation at the market cross of Edinburgh.

IN a pursuit at M'Kewar's instance, as assignee to a bond made by Vernor, for payment of the sum therein contained, it being *alleged*, That the assignation was to the behoof of the cedent, which was offered to be proved by his oath, and that it was offered to be proved, by the cedent's oath, that he was debtor in as much; whereupon he was holden as confessed, because he was not personally apprehended the time of the citation; in which case, only decreets can be given holding a party *pro confesso*; it was *answered*, That, the time of the citation, the cedent was out of the country, and was cited upon sixty days; so that it was impossible to cite him personally apprehended. THE LORDS did sustain the answer, and ordained the decreet to be extracted; seeing, if it should be otherwise, it were an easy way for creditors to assign, albeit satisfied, and immediately to go out of the country, whereby no probation could be had by their oath for payment of the debt.

Fol. Dic. v. 2. p. 183. Gosford, MS. No 595. p. 340.

*** Stair's report of this case (Somerville against ———) is No 5. p. 8325. *voce* LITIGIOUS.

1675. *February* 6. IRVING *against* CARRUTHERS.

No 105.
Holden as contest, sustained in a forthcoming, where the arrestee de-

IRVING having obtained decreet against Carruthers for making forthcoming of his rent, arrested for his master's debt, and the same being suspended, and Carruthers being first examined, and having deponed upon what rent he paid, and what rent he was due, and having been ordained to be re-examined on his

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 against a defender, 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.