

No 108. 1676. July 4.

BUCHANAN *against* LOGIE.

THE LORDS found, That a person out of the country, being cited at the market-cross of Edinburgh, and pier and shore of Leith, upon 60 days' warning, to be holden as confest, though he was not cited personally, and that the decret could not be questioned upon that ground as null; but if he were living, and desired to be reponed to his oath, there might be ground to repone him.

Reporter, *Newbyth.*

Clerk, *Mr John Hay.*

*Fol. Dic. v. 2. p. 184. Dirleton, No. 367. p. 181.*

\*\*\* Stair reports this case :

THOMAS LOGIE having pursued George Buchanan for several articles of accounts referred to his oath. The defender *alleged* absolutor *ab instantia*, That he could not be holden as confest, because he was not personally apprehended by a messenger. It was *replied*, That he was out of the kingdom, and cited upon 60 days, with certification to be holden as confest, according to the common consuetude, whereby all Scotsmen are liable to the jurisdiction of the Lords; and if they have any interest in Scotland, they ought to have procurators in Edinburgh, which is *communis patria*, to answer for them, as to all certifications, whether it be in improbations, or being fugitive for not appearing to underly the law, or to give their oaths, or to be holden as confest, and so the law holds them contumacious if they have no procurator to compear, and shew the just cause of their absence, and so purge their contumacy, in which case they will get commissions to depone abroad. It was *duplied*, That the certification *pro confesso* is only sustainable upon being personally apprehended, and not upon citation at the dwelling-house, which is more than the market-cross, especially in this case, where the articles are alleged to be several years before the defender went out of the country, and no citation till immediately after he was gone.

THE LORDS held the defender as confest, upon the citation at the market-cross of Edinburgh, &c. but allowed him commission to depone abroad, if his procurator did desire it.

*Stair, v. 2. p. 437.*

\*\*\* Gosford also reports this case :

IN an action betwixt one Buchanan and Logie, this general point was considered, if a party absent, out of the country, and the libel referred to his oath may be holden as confessed. The citation being upon 60 days, the reason of the doubt was, that it was looked upon as a principle, that no party can be holden as confessed but such as are cited personally apprehended. The LORDS did find

otherwise by their interlocutor, upon the reason that it might be a general prejudice to all trust and commerce, seeing defenders, who were sure there could be no other probation against them by writ or witness, might so dispose upon their affairs as to retire out of the country, of purpose to defraud their true and lawful creditors.

Gosford, MS. No 870. p. 550.

No 108.

1680. December 17.

CLERK against SHARP.

JAMES CLERK pursues reduction of an apprising of the lands of Conachie, upon these reasons; *1mo*, That it proceeded upon decreets of the regality of St Andrews in absence, holding Conachie as confest, for exorbitant prices, far above the fiars; *2do*, The archbishop had received the pursuer as his vassal upon an apprising, before these decreets, and so ought to have called him in any process against the possessors; *3tio*, He produces a discharge of a part of the feu-duties apprized for, and yet insists not for annulling the apprising simply, but for restricting it to the principal sum and annualrent, and the true prices by the fiars. The defender *answered*, That if the discharge had been by the bishop himself, it might have annulled the apprising, but being by his factor, he might have been ignorant of it the time of the apprising, unless it were proven that before then the factor had accounted therefor, and therefore the discharge can only be allowed in the apprising, but restricted no further; neither is there any man obliged to accept the fiars, if he can prove a greater price, which he did, by holding the heritor as confest, who cannot be reponed after so long a time and diligence.

THE LORDS restricted the apprising to the fiars, and to the annualrent and necessary expenses.

Fol. Dic. v. 2. p. 184. Stair, v. 2. p. 819.

No 109.

A decree in absence, holding the defender as confessed, for exorbitant prices, far above the fiars, with an approving following thereon, was restricted to the fiars.

1682. February.

———— against LITTLEGILL.

A PROMISE of payment being referred to the defender's oath, and he having deponed *non memini*, the LORDS held him as confessed, unless he would be positive before extracting, it being *factum proprium* within two years.

Fol. Dic. v. 2. p. 184. Harcarse, (OATHS.) No 738. p. 209.

No 110.