

## No 116.

A man having absconded after he had been cited, on a summons executed at his dwelling-house, before calling the summons, a warrant was granted to cite him edictally at the market-crosses of the head burghs of the shires where he dwelt, or haunted, to hold him as confessed, if he failed to appear when the summons should be called.

1710. November 22. DUKE OF MONTROSE and OTHERS, Supplicants.

THE Duke of Montrose, and other Creditors of Robert Campbell, alias Rob Roy, after they had raised a summons for liquidating their debts and damages, and caused cite the said Rob Roy at his dwelling-place, did, before the cause came in to be called by course of the roll, apply to the Lords by bill, representing, that they intended to refer their libel to the defender's oath, in so far as it shall not be proved by writ; and that for several months he had fled and absconded, and kept himself in the Highlands without any fixed or certain abode, and craving *ut infra*. THE LORDS granted warrant for an edictal citation against the said Rob Roy, upon twenty-one and six days, at the market-crosses of the head burghs of the shires where he resided and haunted, in order to hold him confessed upon the libel, if he failed to appear; albeit some of the Lords thought, that since application had not been made for such a warrant, originally at the raising of the summons, it seemed preposterous or precipitant to give it now till the cause came in to be called before the Ordinary, till which time it cannot be known whether the defender will appear or not.

*Fol. Dic. v. 2. p. 184. Forbes, p. 635.*

1724. February 11. ARCHIBALD MACINLAY against JACK and Others.

## No 117.

A decree for a random sum, where the party had been holden as confessed, was considered to be presumptive evidence of the debt, till taken off by contrary evidence.

ELIZABETH BROWN, relict of Archibald Jack, merchant in Largs, obtained decret against Robert Jack her son, and representative of the said Archibald, before the Bailie-Depute of Cuningham, for L. 1000 Scots, as her legal share of her husband's moveables. This decret was assigned by her to Macinlay, and he insisted in a process, upon the passive titles, against the heir and relict of the said Robert, for payment of the sum contained in the decret.

The defenders *pleaded*, That the decret was not an instruction of the debt, because, *imo*, It was pronounced by an inferior Judge upon a random libel, bearing great sums and values of goods, as belonging to the defunct, of which he never was possesst, and concluding against his son as vitious intromitter with his father's effects, whereas he never intromitted with any of them; *2do*, A procurator compeared for Robert the defender, and denied the libel; but the decret did not bear that he had a mandate; *3tio*, The libel was referred to oath, but no day taken for the defender, and a day only assigned; and when the day came, the pursuer restricted her libel; and the defender was held as confest. Which being the whole progress of the affair, Jack contended, That no credit ought to be given to the decret, but that the pursuer should yet prove as *in libello*.

It was *answered* for the pursuer, That such objections against the decret were not now relevant, when the only mean of proof was lost, by Robert Jack's

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 DECREET 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.

Eol. 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.

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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*.