No 344. defender's oath; and the decree proceeded upon holding him as confessed, in consequence of that reference; but the fact upon which he was held as confessed, so far as it regarded the extent of the executry of Garden, was not the proper subject of a reference, upon which the defender could be held as confessed; it was a fact with which he could not be acquainted, and therefore could not have made oath, had he appeared in the processs. In this situation, the pursuer ought to have taken a term for proving the libel, and have brought evidence of the extent of her claim, before insisting for decree; and therefore this decree in absence was intrinsically null for want of evidence.

In support of this, a decision was referred to, 28th December 1708, Philip, No 83. p. 12018. " where a baron having convened and decerned his tenant, in his own court, for bygone terms, and also for damages for riving out ground; and no probation being led, but only the party present, and not contradicting nor objecting; and, in supplement of this decreet, the baron taking another decreet against him before the Sheriff, where no probation was taken but the baron's decreet, the Lords reduced both the decreets as without probation, and reponed the tenant to his defences."

" The Lords refused the petition without answers."

Act. *Johnstone.* Alt. *Bruce.*

W. J. *Fac. Col. No* 85. *p.* 149.

1789. *July* 23.

William Blair *against* The Common Agent in the Sale of the Estate of Kinloch.

No 345.
Effect of a decree in absence; the defender, who had been personally cited, having died before any objection was offered.

After several adjudications had been led against the estate of Kinloch for sums of money owing by the proprietor, the predecessor of William Blair brought an action in the Court of Session for constituting his claim, this being only vouched by a bill of exchange, more than six years due, and of course falling under the sexennial limitation introduced by the statute of 1772.

In this action the defender, who had been personally cited, did not appear, and a decreet in absence was obtained, the extract of which bore, as usual, that " the Lord Ordinary found the points and articles in the summons relevant, and proven by the writs produced, and held the defender as confessed on the points not thereby proven." This decreet of constitution was afterwards followed by a decreet of adjudication, which also passed in absence.

In the ranking of the creditors, after the estate of Kinloch had been sold judicially, and after the death of the common debtor, it was maintained, that as the bill of exchange, on which the whole proceedings were held, had been cut off *quoad modum probandi*, nothing but an acknowledgement of the debt, on a judicial reference to oath, was sufficient for validating Mr Blair's claims. In bar of this objection Mr Blair

No 345.

Pleaded, Before the statute of 1672, every action in the Court of Session might be preceded by two summonses and two citations. One of each of these was sufficient, if the claim was to be proved by written documents; and the citation might be given by any one whose name was inserted in the summons as Sheriff in that part, the only sanction annexed to it being, that if the defender failed to appear, the LORDS would nevertheless proceed and pronounce decreet. But if the claim was to be verified by witnesses, or by the oath of the defender, a second citation was necessary, which was given by a messenger at arms, in consequence of what was called " an act and letters," that is, the act or warrant of the Court, and the letters, or second summons, proceeding on it. By this second citation the defender was required to appear, " and to hear and see all necessary probation led, and to give his oath of verity," under a certification, that if he did not he would be held as confessed, and that the Lords would give decreet accordingly. While this practice continued, it was no doubt necessary, in order to a holding as confessed, that the defender should be served with this last summons, in which only the pursuer declared his intention of making a reference to oath.

But when, by the statutes of 1672 and 1693, those two sets of summonses and citations were thrown into one, and it was declared, that a summons modelled after the new form, and executed by a messenger at arms, should be equally effectual, in all respects, as those formerly used, a very different rule was observed. Since that period, instead of those special certifications, which used to be severally annexed to the first and second summons, the certification is quite general, in these terms, " with certification as effeirs.' In consequence of this, where a defender has been personally cited, the Clerks in the Courts of Session have uniformly considered themselves as warranted to insert in the principal part of the decreet, or what is called the grand decerniture, a holding as confessed, in the same manner as if the defender had been cited in virtue of the second summons formerly used, and had failed to appear. And such a decreet, if not challenged during the lifetime of the defender, has been held to be altogether unexceptionable, To sustain the objection therefore which has been offered, would shake the security of many rights, the validity of which has never hitherto been questioned, Stair, B. 4. Tit. 2. § 2. Dallas's Style, p. 185, 188, 194.

Answered, The general rule undoubtedly is, that *actori incumbit probatio*; and hence a decreet obtained in absence of the defender, and without evidence, is only effectual while it remains unchallenged, Sir James Balfour *voce* Reduction of Sentence, Craig, lib. 3. dieg. 7. § 27.; Stair, B. 4. Tit. 38. § 28.

It is true, that where a pursuer is unprovided with any other mean of proof, he may in general resort to the oath of the defender, upon whose declining to swear, our law justly presumes, that he does really know the claim to be well founded; but for this purpose it is indispensably requisite, that the defender

No 345. should have had it in his power to swear that he owes nothing, otherwise the whole basis of this judicial compromise is wanting, Stair, B. 4. Tit. 38. § 27.; Bankt. B. 4. Tit. 33. § 7.; Erskine, B. 4. Tit. 2. §. 17.

Nor have the statutes of 1672 and 1693 made any alteration on this part of our law. Those statutes were made to abridge the forms of judicial procedure; but the rights of the parties still remain on the same footing. And, as prior to those enactments, it was not enough for holding a defender as confessed, that he had been cited in virtue of the second summons, unless a formal reference had been made, no reason can be given why the same rule should not still be observed. If it were to be established, that a decreet in absence, supported by no evidence, was to be held *pro re judicata*, in case of the defender's dying before any challenge was made, this would not only, in many instances, be attended with injustice, but might open a door to infinite frauds.

In support of this general argument it was contended, that the defender, at the time when the decreet was obtained, having been *vergens ad inopiam*, he would not have been allowed to offer any objection; so that the presumption arising from his silence was entirely done away.

The Lord Ordinary "sustained the objection."

But after advising a reclaiming petition, which was followed with answers, the Court, chiefly moved by the circumstances of the defender's having been personally cited, altered the judgment of the Lord Ordinary, and

"Repelled the objection to the claim entered by William Blair, and remitted to the Lord Ordinary to proceed accordingly."

Lord Ordinary, *Ankerville.* Act. *Mat. Ross.* Alt. *R. Craigie.*
Clerk, *Menzies.*

C. *Fac. Col. No 79. p. 142.*

1790. *February* 4.

Coll Macdonald *against* The Common Agent in the Sale of Kinloch.

No 346.
Effect of a decree in absence obtained in the Court of Session, not preceded by a personal citation of the defender.

In the year 1764, the predecessor of Coll Macdonald instituted an action in the Court of Session against the late Mr Bruce of Kinloch, for payment of money alleged to be due as the price of certain articles furnished to the defender much more than three years before.

The execution of the summons in this action bore, "That the messenger had left a copy of the citation in the key-hole of the door of the defender's dwelling-house, because he could not get access, the door being locked;" and a decreet in absence was regularly obtained and extracted.

Mr Bruce, the defender, died in 1784. By this time, his affairs had gone into disorder; a process of sale of his estate, and for ranking his creditors, had been brought, when the decreet already mentioned was produced; but the Lord Ordinary not considering it as a sufficient voucher of debt, refused to give it a place in the ranking. Coll Macdonald reclaimed, and