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

No 346.

Pleaded; The statutes of 1672 and 1693, introducing the modern form of summons in the Court of Session, have communicated to it the full effect of both the first and second summonses formerly in use; and as the last of these contained a special reference to oath, a decreet in absence obtained in that Court cannot, after the death of the defender, be set aside for want of evidence. It is true, that the decisions hitherto pronounced have related to cases where the defender had been personally cited. But this circumstance does not seem to be of any importance. A citation at the dwelling-house, or even an edictal one at the market-cross of Edinburgh, and pier and shore of Leith, has been, by special enactment, declared to be equally formal with one executed against the defender in person; and thus it must be held *præsumptione juris et de jure*, in all cases where the statutory solemnities have been observed, that the defender has been sufficiently put on his guard. Indeed, as it was not formerly necessary to execute the second summons against the defender in person, provided the citation was given by a messenger at arms; to require this now to be done, would be to introduce an additional formality, where the legislature meant an abridgement of those formerly practised, act 1537, c. 75.; 23d July 1789, Blair *contra* the Common Agent in the sale of Kinloch, No 345. p. 12194.

At the time when this reclaiming petition was under consideration, it appeared from the sale of the estate of Kinloch, that after paying the whole debts, including the one here claimed, there would be a reversion to the representatives of Mr Bruce.

The Court, however, were of opinion, that the judgment of the Lord Ordinary was well founded. A decreet of the Court of Session, pronounced in the absence of the defender, if preceded by a personal citation, it was observed, had been long considered as unchallengeable after his death, and adopting of a different rule might give occasion to much embarrassment and injustice. But where the defender had not been personally cited, and where it was at least a possible case that he was equally ignorant of the decreet as of the summons on which it was founded, it would be hard, and in many cases extremely unjust, to hold the proceedings as legal evidence of a claim otherwise unvouched.

The Lords refused the petition without answers.

Ordinary, *Lord Ankerville.* Act. *Smyth.* Clerk, *Menzies.*

C. *Fac. Col. No* 108. *p.* 203.