

1624. June 8.

STRACHAN *against* SCOT.

In an action pursued by Mr James Strachan against Sir John Scot, as executor or intromitter with the goods and gear of umquhile James Courty, for payment of some monies addebted to the pursuer by the said umquhile James Courty, and which sums was referred to the defender's oath of verity, who being at the horn when he was desired by the pursuer to be holden as confest for not compearing to give his oath, being lawfully summoned to that effect; the LORDS found that his being at the horn being a cause why he could not compear, ought to stay to be holden as confest, albeit the pursuer obruded no horning against him, and albeit it was in his own cause wherein he was summoned, and that it was his own default, through not relaxing of himself, that he compeared not; and the LORDS granted a commission to any Judge the pursuer pleased, to pass privily to some private part where the defender might safely depone, and to take his oath upon the summons.

Act. Russel.

Alt. Scot.

Clerk, Gibron.

But this decision is of an evil preparative and not to be observed; for hereby the rebels are in better case than the King's free and obedient subjects, who will be holden as confessed, being lawfully cited, and who will not obtain commission except upon lawful excuses of sickness verified, or such like. Thereafter the pursuer resiled from referring of the summons to the party's oath, and offered to prove the defender's intromission by witnesses, which was permitted, and granted by the Lords.

1624. June 15.—IN this above-written cause of Mr James Strachan, of which the 8th instant, the defender compeared and proponed an exception, that he could not be convened as intromitter with James Courty's goods, &c. because the same were disponed by the said James in his own lifetime to Daniel Melvil, who, after the said disposition, disponed the same to the defender. To which it was *answered* by the pursuer, That that disposition behoved to be reputed simulate, seeing James Courty disponer remained in possession of the goods to the time of his decease, notwithstanding of the disposition, after whose decease the defender intromitted. This reply was found relevant to elide the exception; and the LORDS found it not necessary to the pursuer to reply any further, that the said disposition made to Daniel Melvil was to the defender's behoof; but found it sufficient to reply that the disponer retained the possession to the time of his decease, and that thereafter the defender intromitted.

Fol. Dic. v. 2. p. 192. Durie, p. 127. & 128.

No 192.

Where the party to depone was under diligence, commission was granted to take the evidence in a private place.

No 192.

* * Haddington reports this case :

ANE man at the horn for ane civil cause being pursued be another party for ane fact or debt, and the same being referred to his aith of verity, the LORDS considering the defender's difficulties, either to be holden as confest gif he compear not, or to be imprisoned gif he compear, will sometimes incline, out of pity, either to give to the pursuer his choice of any Judge or clerk to receive the party's aith, or to give ane protection to the defender to compear and depone in the cause.

Haddington, MS. v. 2. folio 238.

1710. June 17.

GEORGE MOUAT, Petitioner.

No 193.

In case of necessity, reading in the minute book may be dispensed with.

GEORGE MOUAT of Hammer in Zetland, gives in a bill to the Lords, representing that William Mouat of Balquholly his cousin, having lately deceased, he has served himself heir-male and of tailzie to him *cum beneficio inventarii*, and that by the 24th act 1695, he must within year and day of his predecessor's death make up inventories of the lands and estate whereto he succeeds, and depone thereupon before the Sheriff of the shire where the lands lie; and that Balquholly lies in the shire of Aberdeen, and he has dwelt these fifty years in Zetland, and, by testificates produced is wholly unable to travel from his own house to Aberdeen; besides that their coast is full of pirates, that there is little safety in sailing, so that necessary it is that he have a commission to depone at home, which the Sheriff of Aberdeen refuses to grant him, alleging he must, by the act of Parliament, compear and depone before him: Therefore craves the Lords would either authorise the Sheriff to direct his commission, or grant it themselves, for his deponing at home, to be reported back to the Sheriff within the year of deliberation, and recorded in his books. THE LORDS saw the case was new and unprecedented, being the first of this kind demanded since the act was made; yet thought where the heir lived at such a distance, and was valetudinary, there behoved to be a remedy; and therefore yielded to a commission, but demurred if they or the Sheriff by their authority should grant it, and thought it easier to direct it straight to the Stewart-depute of Zetland themselves, to be reported to the Sheriff of Aberdeen. But it being further represented, that the occasions going thither were very rare, especially now in the time of war, and that there was a fleet ready to sail from Leith to the Orkney isles, with which the commission might be sent, and if that were lost, it may be another occasion would not offer this summer, so he should not get it reported within the year, and so lose the benefit of the act of Parliament; and therefore craved the commission might be allowed to be extracted, and given him before it came to be read in the minute-book, otherwise