

No 98.

veniently advertised, or craved commission to the Judges where he was to take his oath, if there had been reason for granting the same; notwithstanding whereof, the LORD found that he ought to be reponed, and restored him to the giving of his oath, specially seeing nothing had followed upon the decret, and seeing it was confessed by Thomas Wright that he had consented to the posterior alienation of the ship, and that the price was given to his creditors.

Act. *Nicolson.*Alt. *Mowat.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 184. Durie, p. 497.*

* * * Auchinleck reports this case :

JAMES WRIGHT being pursued by Thomas Wright, and in the said James's absence out of the country, he is held as confest. After three or four years absence, he returned and meaned himself to the Lords, and craved to be reponed to give his oath, being, the time of his absence, in Muscovy, where he could receive no advertisement; and the matter whereupon he was to depone was so clearly untrue, that it were great injustice to discern him as confest for contumacy. THE LORDS, after trial of the whole matter, found he ought to be reponed, although it is contrary to the daily practics.

Auchinleck, MS. p. 151.

No 99.

1634. *Jrnuary 14.*CUNINGHAM *against* ROLLOCK.

IN an action of reduction pursued by John Cuningham against Robert Rollock, whereby the said John craves to be reponed to his oath and defences, because the decret was obtained against him for null defence and he not summoned, or at least not lawfully summoned, as the executions bear, which were vitiated in the days of compearance, and the principal summons both disconform in the days of compearance, and summoned to the second diet upon the day of ; which being so found by the executions, and the first summons with the second, the LORDS reponed John Cuningham to his oath and whole defences.

*Auchinleck, MS. p. 175.*1637. *February 25.*DUNCAN *against* FRAZER.

No 100.

ONE Frazer having wadset his lands to one Duncan, redeemable upon 5000 merks, and *alleging*, that at the time of the wadset, Duncan promised that what the prices of the victual, according to the fiars of the year, extended to

further than would pay the ordinary profits of his sum, he should repay the same according whereto he alleged he had received payment two years together after the wadset, and that sinceyne there were eight years owing to him; pursues for the payment of the superplus, and refers the promise to the party's oath, who was holden as confest and decerned; which decret being suspended and the party offering to give his oath, excusing his contumacy by simplicity and ignorance, and that he came within a day or two after the sentence to have given his oath, but was not heard, because the sentence was extracted before, the Lords, albeit it was not verified that he came within so few days after the sentence, and without respect to this, reponed him to the giving of his oath, but ordained him to pay 100 merks for the party's expenses in purchasing his decret; and the Lords would not sustain the decret by the party's offering to prove the verity of the promise by witnesses, which the Lords found not probable by witnesses, tending in effect to take away his wadset by witnesses, and to pay his principal sum by this cautelous action.

No 100.

Act. Baird.

Alt. Mowat.

Clerk, Gibbon.

Fol. Dic. v. 2. p. 185. Durie, p. 831.

1665. June 27.

Mr WALTER CAUT against JAMES LOCH.

No 101.

MR WALTER CAUT having pursued James Loch and his mother as tutrix, for her interest, for the mails and duties of some appraised lands, and the quantities being referred to the tutrix's oath, she refused to depone, *alleging* that she had forgotten the quantities, whereupon the pursuer craved her to be holden as confest upon the rental given in by him as if she had acknowledged the same.

THE LORDS found she could not be holden as confest, being not the party but the tutrix; but they found that she might be forced to depone by horning and caption as other witnesses.

Fol. Dic. v. 2. p. 183. Stair, v. 1. p. 288.

* * * Newbyth reports this case ::

MR WALTER CAUT having comprised certain tenements of land from Mr Alexander Elies, and Mr Hary Charteris, pursues James Loch and his tutors, and likewise had comprised the same tenements, and before he had comprised to count and reckon for his intromissions; at least, that he having comprised within year and day of the first comprising, might come in *pari passu* with the defender, conform to the act of Debtor and Creditor; and it being questioned *quo tempore* the defender ought to count to the second compriser, whether from the date of the comprising, or from the date of the act of Parliament,