

1686. *February.* MR EDWARD WRIGHT *against* LORD RUTHERFORD.

No 111.

THE Lord Rutherford being holden as confest, and reponed, by way of suspension, on this reason, That he was out of the kingdom *animo remanendi*, and some other reasons, a new term was assigned, and a commission granted to take his oath; but before the day in the commission came, he died; upon which the charger craved holding the defunct as confest, seeing he had not deponed negative; and the presumptive acknowledgment must hold.

*Answered* for the now Lord Rutherford, That the reponing his brother to oath put him in the same condition he was in before the decret holding him as confest; and therefore the charger must prove his oath.

THE LORDS, before answer, ordained the interlocutor to be seen, whether he was reponed *ex gratia* to purge his contumacy; in which case it appeared just, that the party not having deponed conform to the faculty given him, the presumptive confession should hold as probation against his heirs and executors; or if the decret was turned into a libel, upon some nullity or informality, in which case the contrary appeared just. And it appearing that the reason of reponing my Lord was an objection against the executions, the LORDS found the presumptive confession did not militate against the defenders.

*Fol. Dic. v. 2. p. 185. Harcarse, (OATHS.) No. 741. p. 210.*

1688. *February.* CRAICK of Stewarton *against* WILSON.

No 112.

THE defender, in a forthcoming, having suspended a decret, holding him as confest, and the charger not having insisted, the suspender died some years after, without craving to be reponed; and the defender's heirs being pursued, they craved to be reponed against the said decret; which the LORDS refused, seeing now the charger had lost the benefit of the defunct's oath, as to what he was debtor in the time of the arrestment; and there was no nullity in the decret.

*Fol. Dic. v. 2. p. 185. Harcarse, (OATHS.) No 745. p. 210.*

No 113.

Where the party has purged the *mora*, although he die in the *interim*, before deponing, decret will not be allowed to go out without a new circumduction.

1701. *June 21.* KINCAID *against* SOMERVELL.

THOMAS KINCAID being creditor to Somervell of Gladstanes, he arrests, in Hugh Blair Dean of Guild of Edinburgh's hands, as debtor to the said Somervell, and pursuing a forthcoming, and a day being taken to produce him to depone, the term is circumduced against him, which the said Hugh being advertised of, he comes in, and makes faith, and offers to depone; but the act not