

Part 4th.

When one Cited to give his oath appears and is bound to Depone, but is Relaxed by him who gave the Citation upon the account of being at the horn, he will not be held for as Contumacious 6 Feb. 1675 Reid contra Wilson 12 July 1676. Nor is contra Schaw, because he is hindered to Depone. And if he be held as Contumacious, because he would not in law Depone, he may, after he is Relaxed, be Restored Against the Decree, and allowed to give his oath. But if a person at the horn Cited to give his oath, is held as Contumacious for not Comparing, and his being at the horn not objected by the other party, he will never thereafter be Restored, except he purge himself of Contumacy (as it was once otherwise decided 8 June 1629 Strachan contra Jao. J.) for that if a person at the horn could not be held as Contumacious, albeit no hearing were obtained against him, but laws should be in a better case than free subjects, who being lawfully Cited to be held as Contumacious, and not Relaxed without Comparing a lawful Example, such as sickness, or the like for not Comparing in due time.

Where a term was assigned to one of the parties to prove his Allegation, he, if he hath recovered the writs he wanted, will probably call the day, after Elapsing of the term. But if he be not Master of those, the other party may call the day, and have the term to be Circumduced against him for not proving. In which case, the party on whom the proof lies, may upon his Reporting an Executed first Diligence in order to stop Circumduction, and get a second Diligence, which hath the Effect of a Caption Against those Cited in the first Diligence. At the Calling of which second Diligence, the adverse party is not allowed to take up the first Diligence to peruse. And Nothing an hind, or the granting a second when the first is produced, except, unless the Execution be after the term assigned for proof. Nor is any del. Extracted upon the Granting a second Diligence, but he to whom it is allowed, without waiving the Course of Reading in the Minutes Book, takes it out Against all those contained in the Execution of the first Diligence, and against none others; the first Diligence being General, and the second particular Conform to the Executions of the first. But without production of a first Executed Diligence, he will not get a second, nor a prorogation of the term or a New day for Executing of the first Diligence, except upon Weighty Reasons, and in force seen Reasons why the Execution of the Diligence was obstructed, sufficiently Verified. Nor will it be granted upon such Reasons without being

Modifying expenses for the other parties Damage that the delay to be first paid out of Judoth 1 Feb. 1715. And such a person must in order to get a second Diligence at any time there after, extract an ad. for himself. If he prorogeth or he granted the term is Circumduced against the party on whom the proof lies by, and Inured of Circumduction for not proving pronounced. Circumducing or absolving. A second Diligence may be executed at any time before or after the day assigned for Reporting thereof, and the persons attached thereby will be Examined at any time before Extracting a Decree of Circumductions or before preparing or trying of the cause. Those against whom second Diligence is issued for the may in time of session be apprehended and forcibly brought by a Mesnager before the Lord to Depone Concerning their having of the writs called for: But if the latter be executed in the Queen's township, and in up to be committed to prison, where they will stay till they have found and obtain a Charge to set at liberty, upon producing what writs they have and find any Contusion under the penalty of a Contumacious fine to Compare before the Ordinary upon Sabbath and well rested on a session day free fines, and to give their oaths.

When persons charged upon a first Diligence, or brought in upon a second, offer to give their oaths, the use of the Diligence pays the dues for calling, and the Marcs dues for each of those who are to Depone and Deliver the Act to the Clerk, who, upon these to Depone standing any time in the forenoon at the witness bar, causes a Major and both parties and their Advocates to the Bar before the Ordinary in the outer house, to whom he intimates the Design of calling the Acts, and the ordinary causes the person Cited to make faith, and bids them wait on in the afternoon before the ordinary to Oath and witness. Then the Clerk writes upon the Act the Date of their Making faith, and these words *subscripsit Confessum* which he Inserts in his Minute Book.

If the use of the Diligence delay to Dispatch both of Charge thereby, they are not making the Act in order to their Deponing, they are given him to do it, and protest that otherwise they may be free from the Effect of the Diligence, by taking Instruments in the hands of a Notary before witnesses.

A Compromit time being allowed for taking the Depositions of persons Cited by Diligence, the other party doth on the next day call his Act again, and if not well be then produced, gets a Decree of Circumduction for not proving.