

No 11.

1625. July 22.

LA. LEY against LA. BARR.

IN an action of removing of ward lands, the LORDS found this exception relevant, that the defunct, by whose decease the ward was craved, was denuded by a comprising, and a third party infest holden of the King; notwithstanding it was *replied*, that the defenders alleged no right from the comprising; next, that the comprising was to the behoof of the defunct and his heirs, and gave bond to use the same to his behoof; because, it was *duplied*, That it elided just actions, and the question being anent vacation of ward, it must be adjudged by the decease of him who was vassal, and not by the decease of him to whose behoof.

Fol. Dic. v. 1. p. 516. Kerse, MS. fol. 112.

1628. November 28. WILLIAM POTTER against WILLIAM BAILLIE.

No 12.
Found in
conformity
with Caddell
against
Vauss, No 10.
P. 7787.

WILLIAM POTTER having charged William Baillie, one of the Bailies of Inverness, to take and apprehend John Cuthbert, by virtue of letters of caption; thereafter he convened the said Bailie to make payment to him of the sums owing to the pursuer by the rebel, as being become debtor to the pursuer *ex delicto*, for not obeying of the charge. *Alleged*, No process, till the horning whereupon the caption proceeded, were produced; which if it were, he would allege the horning null, and so the caption following thereupon could be no sufficient warrant to take the rebel. THE LORDS repelled the allegiance. *2do, Alleged*, No process upon the summons while they were tabled and continued, by reason the same consisted *in facto*, and must abide probation. *Answered*, Ought to be repelled, because the summonses were privileged, and that they were accessory to the executions of the Lords' sentence, and depending upon the executions of the saids letters of caption, which are the chief part of the executions of the said sentence. THE LORDS repelled this allegiance also. 4th December 1628.—Afterwards the defender produced the horning himself, and *alleged* absolutor, because it was null, and so he had no necessity to obey the charge direct upon that horning. The nullity was this, that the rebel was charged by the said letters of horning in Inverness, where he had his residence, as the charge bore, and was denounced rebel at the market-cross of Aberdeen; whereas it should have been, conform to the act of Parliament, at Inverness. *Answered*, The horning could not be taken away *hac via*, but behoved to abide a reduction; and albeit the horning were null, yet that cannot excuse the defender, who was obliged to obey the charge of the King's letters, while the rebel had freed himself by order of law; or otherwise it would open a door to disobedience of the laws. "THE LORDS found the allegiance upon the nullity of the horning relevant, and therefore assoilzied the defender."

Fol. Dic. v. 1. p. 516. Spottiswood, (CAPTION.) p. 31.

* * * Durie reports this case :

No 12.

1628. *November 28.*—IN this action a Magistrate being pursued for the debt, for not taking the rebel, he being charged for that effect, and he *alleging*, that the horning should be produced, which was the ground of the charge of caption, and which he alleged was null; the LORDS found no necessity to produce the horning against the rebel, in this judgment and action against the Magistrate; but the defender might produce the horning himself; as also such actions needed not to abide continuation, where the summons has a privilege.

Act. *McGill.*

Alt. *Gibson.*

Clerk, *Scot.*

1628. *December 4.*—IN the cause, Potter against Baillie, mentioned 28th November, the LORDS found, that Magistrates, in such actions as these, when they are moved against them for payment of the debt, for disobeying of charges of caption, might propone nullity of the horning against the rebel, which was the ground of these charges of caption, and that they might deny to obey such charges upon their own hazard; for if the horning be null, the LORDS found, that the not satisfying of the command of the caption could not produce that action; and found that the defender himself might produce the horning, and oppone against the lawfulness thereof, albeit the pursuer should be urged to the production thereof, and this horning was found null, because the execution of the charge bore, 'that the party was charged at his dwelling-place in Inverness, and he was denounced at Aberdeen;' so that either the charge or denunciation was not good, and so the horning fell; neither was it respected, that the charge was intimated personally to the party apprehended after the charge, seeing the intimation was not a charge, for it bore not a copy to be delivered; and there was no probation received anent the parties' dwelling at the time of the charge or denunciation, but in respect the horning bore, as is above written, it was found null in itself.

Durie, p. 401. & 404.

1629. *June 24.*

Sir MUNGO MURRAY against ———.

No 13.

IN a general declarator of non-entry of the lands and Earldom of Athole, pursued by Sir Mungo Murray, it was *alleged, imò*, for my Lord St Colme's son, There could be no declarator of non-entry by the decease of Scott of Abbotshall, because there was none called to represent him. *Replied*, The excipient had no interest to propone that, unless he show and instruct some right and title in his person flowing from Abbotshall. *Duplied*, It was competent to any defender that was called, to propone any defence in general against the summons. " THE LORDS found this exception relevant, and competent to any

In a declarator of non-entry at the instance of the King's donatar against sub-vassals upon the vassal's lying out unentered, the Lords sustained this