

No 38.

was competent, yet was not found so necessary as if the foresaid charges could not be direct; for, if the contract betwixt the parties which bears thirlage were registrate, charges of horning would pass thereon, so here in the declarator upon the contract, charges may be suspended by obedience and caution to obey.

Act. *Nicolson et M^cGill.*Alt. *Stuart et Lermonth.*Clerk, *Scot.**Fol. Dic. v. 1. p. 538. Durie, p. 736.*

No 39.

Executions of a summons, whereby several parties were cited to several terms by the first citation, were not sustained till one term was inserted for all.

1680. *January 15.* GORDON *against* The Laird of LEE and Others.

GORDON of Nethermoor having adjudged the lands of Tarbrax from Dame Anna Lockhart, did thereupon pursue a reduction of a tailzie granted by William Lockhart of Tarbrax her brother, providing his estate 'to him and the heirs of his own body; which failing, to Lee and his heirs,' as being done *in lecto*. The defender *alleged* no process, because parties necessary to be called, were cited at several diets by the first citation, which if it should be mended, and a day inserted for them all, there will not remain free days for the second citation, conform to the act of Parliament, which the execution produced can admit, and fixed form will not admit different days of compearance in the same cause, when there is one conclusion against all that are cited. It was *answered*, That there was no law requiring one day of compearance for all parties in the summons, and though it hath been so ordinarily, yet it cannot be shown, that ever a summons was casten for the contrary.

THE LORDS refused to sustain the different days of compearance, but allowed the day of compearance for all to be inserted, so as it would answer for all the executions, and that the same might be continued and a diligence granted for a second diet to all the defenders.

*Stair, v. 2. p. 739.*1710. *July 27.*JOHN VERE-KENNEDY, Supplicant, *against* JOHN STUART, Writer to the Signet.

No 40.

The raising horning on an act of the general convention of the Royal Burghs, appointing one to pay a sum to another, found warrantable.

UPON a complaint at the instance of John Vere-Kennedy, against John Stuart, for raising letters of horning against the complainer, upon an act of the General Convention of the Royal Burghs, appointing him to pay L. 500 to Mr Alexander Clark and John Fraser, as a part of the damage they sustained through their being unjustly incarcerated and detained prisoners at Campvere, to which the complainer was accessory; the LORDS found the raising of the horning warrantable; in respect it was *answered* for Mr Stuart, That the act 6th Parliament 19. James VI. allows to raise horning upon acts of the Burghs;

and, it doth not alter the case, that the act appoints the complainer to pay, and doth not decern him to pay; for most of the acts of the Burghs run in that strain, and an appointment to pay is the same with a decerniture.

Forbes, p. 436.

No 40.

1742. December 2. MURDOCH KING, Supplicant.

MURDOCH KING, upon a decree *cognitionis causa*, having obtained an adjudication before the Sheriff of Stirling, containing a precept against the superior to infest him in the lands adjudged, did apply in common form to the Lord Ordinary on the bills, to direct letters of horning against the superior. The Lord Ordinary, after advising with the Court, having recommended to the keeper and writers to the signet, to search into the practice, their report was, ' That they know of few instances of adjudications before inferior courts, and ' that they never observed a horning pass thereupon where there was no abbreviate, though some of the society have seen such adjudications without abbreviates, but had no opportunity to know whether horning followed or not; ' that the society is of opinion they are sufficiently warranted to present bills ' and expedite letters of horning upon such adjudications, though there be no ' abbreviate, provided such decrees contain precepts directing horning against ' superiors.'

No 41.
An adjudication pronounced by the Sheriff, not a foundation for a horning against the superior.

What occurred to the Lords for refusing to direct letters of horning was, that a decree *cognitionis causa*, according to its present form, contains no decerniture against the superior, who is not so much as called for his interest; that therefore, though in obedience to the act 10th Parl. 1606, horning must be granted upon every decree pronounced by a Sheriff, it will not follow, that horning must be summarily issued against a person not called in the process; and that the proper course, in this case, is, to pursue the superior *via ordinaria*; and, when decree is obtained against him, horning will follow of course.

It was also *urged*, That, if the Court should think itself empowered to issue out summary diligence against the superior, instead of an ordinary process, it would not be for the public interest to exert a *nobile officium* in this case; that there is no law for recording adjudications *cognitionis causa* pronounced by the Sheriff, which makes them an inconvenient diligence; and that, therefore, it would be reasonable to come to a resolution, and to publish an act upon it, always to refuse horning upon such an adjudication, unless it be recorded.

" THE LORDS accordingly refused the bill."

Rem. Dec. v. 2. No 34. p. 53.

* * See C. Home's and Kilkerran's reports of this case, No 22. p. 5743.

voce HORNING.