

and they had a very pretty formula of interdiction of such delapidators, *qui nec finem nec modum impensarum habent.*

No 39.

Fol. Dic. v. 1. p. 260. Fountainball, v. 1. p. 783.

1705. June 12. COCHRAN against UROUHART.

A PARTY having industriously absconded, the LORDS granted a diligence to cite him edictally.

No 40.

Fol. Dic. v. 1. p. 260. Forbes.

* * * See This case, No 10. p. 3686.

1710. July 29.

JAMES FAIRHOLM, Merchant in Edinburgh, against KENNETH M'KENZIE of Assint.

No 41.

PROCESS was sustained upon a summons at the instance of James Fairholm, against Kenneth M'Kenzie, as representing Mr John M'Kenzie of Assint, his father, for payment of 1000 merks, with annual rent and penalty; for which Mr John stood engaged to the pursuer, as cautioner for the Lord Duffus; albeit the defender was minor, and Mr Alexander M'Kenzie Colonel in his Majesty's foot-guards, his sole tutor, was in Spain, and not cited upon 60 and 15 days, as one out of the kingdom; nor yet edictally at the market cross of Dornock in Sutherland, where the minor's lands lay; and the summons was enrolled only against Kenneth M'Kenzie, though his tutors were concluded against in the libel; in respect Kenneth M'Kenzie was personally cited in Dr M'Kenzie's house at Fortrose, where he resided at school; and his tutors and curators in general, were cited edictally at the market cross of the head burgh where the minor dwells; and it was needless to enroll against tutors, who are only called edictally *pro interesse*, and not concluded against in the libel *nominatim*, but only as tutors in general *ex stilo*.

Found in conformity with No 37. p. 3707.

Fol. Dic. v. 1. p. 260. Forbes, p. 438.

1715. December 2. ASHURT, and his FACTOR, Supplicants.

ASHURT, and his Factor, having offered a petition to the Lords, showing, that he had raised horning, containing arrestment, against one Congalton his debtor; which Congalton is engaged in the present rebellion, as are also several of his debtors, at the least, severals of the said debtors have their residence be-north Forth, in the shires which are now in the power of the rebels, to which there

No 42.

Arrestments and citations on furthcoming, allowed to be executed at the market cross of Edinburgh.

No 42.
and pier and
shore of
Leith, a-
gainst per-
sons dwelling
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which there
was no *tutus*
accessus.

is no *tutus accessus* to arrest in their hands, or cite them in furthcomings thereupon; and therefore desiring special warrant to arrest at the cross of Edinburgh, as being *communis patria*, and nearest to Fife, which, and the more nothern counties, are in the enemies power; and likewise warrant to arrest at the pier and shore of Leith, and that citations in furthcoming might proceed in the same manner; as also desired, that the Lords would declare, that the said arrestments and citations should be as effectual as if the same had been personal, or at the parties dwelling-houses.

There being no contradiction, the Lords did consider and reasoned upon the bill the more fully; and it was observed, that the only law allowing citations against parties within Scotland, otherwise than personally, or at the party's dwelling-house, is the 66th act, Parliament 11th, James VI. which provides, that all warnings or executions in the King's causes, *ubi non patet tutus accessus*, be made at the market cross of the head burghs of the next shires, which can be no preparative in this case; as also, that if this were granted, the like would be demanded in the case of hornings, inhibitions, adjudications, and all other diligences, some of which have penal consequences; and further, that persons in whose hands arrestments were craved might pay *bona fide*, without having the means afforded to know of any such diligence. But, on the other hand, it was argued, that the Lords had been in use to allow citations against parties at the adjacent market crosses, where there was not *tutus accessus*, and likewise in case the parties to be cited were vagrant persons, having no certain domicile; as was lately done in the case of Rob Roy, upon which several diligences, real and personal, have proceeded; which the Lords were sufficiently authorised to do by the institution of the College of Justice, whereby the Lords were commanded to conclude upon rules and statutes to be kept in their order of proceeding. And, as to the inconveniency to the parties in whose hands the arrestments might be made, and furthcomings raised thereupon, the Lords were not at present to determine how far the *bona fides* of such debtors might operate their exoneration; that would be competent to be pleaded in the actions and diligences to follow. At present, the Lords were only to authorise arrestments to be used, and furthcomings raised in the manner desired, to the effect that the user of such arrestments might have the preference to co-creditors using posterior diligence, so long as the subject arrested was *in medio*; but they were nowise to determine upon the defences that might be competent to the debtor in case of payment *bona fide*, or any other defence. Neither did any of the Lords incline to declare what should be the effect of such diligence, but only to give special warrant for the using of the same. And it was thought more safe and reasonable to grant arrestment than any other diligence, because the effect of the arrestment was only to stop payment to the common debtor; and that the arrester might be put in his place by the furthcoming. There might indeed be greater questions in the case of horning, where the effect is penal, if denunciation follow; yet, even in that case, denunciations are oft times allow-

ed to be a ground of caption, when no escheat or other penal casualty follows upon it.

No 42.

THE LORDS allowed arrestment and citation on furthcomings to proceed as desired; the petitioner first condescending upon the persons in whose hands he desired the arrestments to be laid, that the Lords might be satisfied, by sufficient documents or their proper knowledge, that these persons did reside in shires, to which there was not *tutus accessus*.' .

Fol. Dic. v. I. p. 260. Dalrymple, No 152. p. 211.

1724. *January 22.* CREDITORS OF SIR JOHN HOUSTON *against* The HEIR.

No 43.

THOUGH in a process against a minor, his tutors and curators must be cited at the head burgh of the shire, it is otherwise in legal diligences, which must be executed at the head burgh of the regality; and therefore, a general charge executed against the minor personally, and against his tutors and curators at the head burgh of the regality where he dwelt, was sustained.

Fol. Dic. v. I. p. 260. Edgar.

. See This case, No 23. p. 3697.

S E C T. IV.

When the party is out of the kingdom.

1611. *July 4.* LADY CARMICHAEL *against* Her SON.

No 44.

A MAN being furth of this realm, being summoned upon 60 days warning at the market cross of Edinburgh and shore and pier of Leith, it is sufficient, because it is esteemed *communis patria*, and it is not necessary to summon him at the dwelling place where his wife and bairns remain, or where he dwelt before going furth of the country.

Fol. Dic. v. I. p. 260. Haddington, MS. No 2256.

1631. *February 22.* MURRAY *against* LO. YESTER.

No 45.

In a redemption of the lands of Drumelzier, by virtue of the legal reversion competent to the Lord Drumelzier, whereto the pursuer was made assignee by

An order of redemption, used at Edin.