

1741. *February 3.*

M'DOWAL and Others, Tutors of Janet Marshal, Complainers.

No. 8.

Found, That the abstracting of the person of a pupil was competent to be complained of, by the tutors, by summary petition.

The like had many years before been found, at the instance of the Tutors of Sir Robert Gordon, No. 10. p. 8910. *voce* MINOR.

*Fol. Dic. v. 4. p. 309. Kilkerran, (SUMMARY APPLICATION) No. 1. p. 524.*

1743. *July.* ALEXANDER HOME CAMPBELL, Supplicant.

No. 9.

Whether execution of an order of the House of Lords to pay a sum can be obtained by summary application?  
See No. 5.

The House of Lords having reversed a sentence of the Court of Session, with regard to John Sinclair, writer in Ediuburgh, "ordering and adjudging, that the said John Sinclair do forfeit and pay to the appelland the sum of £.500 Sterling; and further ordering, that the Court of Session do give all the necessary and proper directions for carrying this judgment into execution," the appelland, Alexander Home Campbell, applied to the Court of Session, praying for a warrant to cite the said John Sinclair, that he might be heard, and to decern for payment of the said sum awarded by the House of Lords.

A doubt arising among the Judges about the competency of such a summary application, instead of a regular process, they appointed precedents of the Court to be laid before them; which was accordingly done. And this produced an additional petition, praying now to have a warrant for letters of horning, for the following reasons: *1mo*, By the law of Scotland, the decrees of every Judge who has authority and jurisdiction within this kingdom, are entitled to the privilege of summary execution. By the present constitution of this part of the united kingdom, the House of Lords, standing in place of the Scots Parliament, in matters of appeal, they must have all the powers, in such matters, which the Scots Parliament enjoyed. And, in fact, they exercise these powers every day, by decerning, ordaining, and adjudging. In the present case, they have "ordered and adjudged, that the said John Sinclair do forfeit and pay to the appelland the sum of £.500 Sterling;" which is a clear decerniture for a liquid sum, capable to be put directly in execution. And as the House of Lords have a complete jurisdiction in Scotland, so far as concerns causes brought before them by appeal, there can be no reason why the judgment pronounced by them should not be put directly to execution; and to say that such a decree requires the interposition of the Court of Session, is, in other words, to say, that the House of Lords have no direct or immediate jurisdiction in Scotland. *2do*, In the decree itself, it is ordered, "That the Court of Session do give all the necessary and proper directions for carrying this judgment into execution." What is this, in other words, but ordering that the Court should direct letters of horning and poinding, or other proper executorials? For it is the judgment of the House of Lords which

must be carried into execution ; and yet if a process be necessary, it would be the judgment of this Court which would be carried into execution, not the judgment of the House of Lords *3tio*, With regard to the precedents of this Court, there is not a single instance where a new process was found necessary : The form has always been, that if a depending process was removed to the House of Lords by appeal, the parties, after discussing the appeal, took up the process where it left off, and proceeded to obtain a final determination ; and that a summary application was always admitted, where a cause finished in this Court was carried to the House of Lords. *4to*, No defence can arise to John Sinclair ; but that of payment, which he has access to propone in a suspension ; but the possibility of such a defence ought no more to be a bar to a charge of horning in the present case, than it is in ordinary cases.

“ The Lords pronounced a decree ; and avoided granting letters of horning, for no better reason than that a decree was only demanded in the first petition.”

*Rem. Dec. v. 2. No. 44. p. 72.*

1747. February 17.

JAMES COUTS and Others, claiming to be Magistrates and Councillors of Montrose, against DAVID DOIG and Others, claiming to be Magistrates and Councillors of Montrose.

There having been no election of Magistrates and Councillors of the burgh of Montrose at Michaelmas, 1745, a warrant was granted by his Majesty in Council, 16th June, 1746, authorising the Magistrates and Councillors of the former year to proceed, on the 10th of July, to the election of others, in the same manner as they ought to have done if they had not been prevented by the Rebellion, and appointing the persons so elected to serve till the time of the ordinary change of Magistrates in 1746.

Before the diet of election, three of the Council had been apprehended, on suspicion of treasonable practices, and committed to the tolbooth of Perth, upon a warrant issued by his Royal Highness the Duke of Cumberland, by means of whose absence the election was carried for Mr. Doig and his friends, as was evident by the declarations of these three, produced at the election, containing their votes, which, joined with the votes of others there present, made a majority, and would have carried the election another way.

A complaint was given in to the Lords of Session by James Coutts and others, setting forth, That this warrant had been impetrated upon a false information, fraudfully exhibited to his Highness by the respondents, that these three Councillors might thereupon be detained from the election ; and therefore, that not only the election made ought to be reduced, but the votes of the absentees, as contained in their declarations, be sustained, and the election made by that party in the Council affirmed. On the other hand, it was pleaded, That these three being absent, not detained by

No. 9.

No. 10.

An election of Magistrates being made, on a warrant from the King in Council, upon a failure of Magistracy in a burgh, it is competent to try the validity thereof by a summary complaint before the Court of Session.