

1621. *November 22.* LD. MUCKHALL *against* STEWART.

No 5.

A DECLARATOR of liferent escheat requires continuation; because the superior of a subject must prove that the lands hold of him.

*Fol. Dic. v. 2. p. 178. Durie.*

\*.\* This case is No 297. p. 11623. *voce* PRESUMPTION.

\*.\* In the case of Lochinvar against Lindsay, 24th March 1632, No 42. p. 8358. *voce* LITIGIOUS, it was found, that if the superior produce his own infeftment of the lands libelled, this will save continuation.

1626. *November 8.* PRESTONGRANGE and DICK *against* HAMILTON.

No 6.

IN an action pursued at the instance of the Laird Prestongrange, and William Dick, against John Hamilton, burgess of Edinburgh, for delivery of an obligation of 2000 merks made to him, by the pursuers, to be destroyed by them, in respect of a back-bond, made by the defender to them, whereby he obliged him to redeliver the same bond to them, in case he fulfilled not a condition expressed in the said back-bond, which condition the pursuer subsumed the said defender had not fulfilled, and therefore they concluded, conform to the said back-bond, redelivery of their said bond. The defender *alleged*, That this action should abide continuation, being for delivery of writs, and in effect resolving in a declarator of a failzie, for not fulfilling the tenor of the back-bond, which nature of action he alleged ought not to be sustained without continuation. This allegiance was repelled, and the action was sustained, without continuation, upon the first summons, seeing the pursuer produced the back-bond, whereupon the summons was founded, instantly, and the not fulfilling of the condition thereof, was a negative which proved itself, nothing being alleged to purge the same; but this reason will appear to militate, in all declarators upon failzies, wherein albeit the evident, which bears the condition, be instantly produced, and that the failzie be a negative, which proves itself, yet continuation is ever found necessary, that the party being twice summoned, may be heard to compare to purge the failzie, or to propone his other competent defences; neither will decret be given upon the first citation; yet the LORDS found here no necessity of continuation, no more than if any party had by his bond obliged himself to deliver any writ; and if he had been pursued for delivery thereof, in that case, the bond being produced, there was no ne-

A process to deliver an obligation, conform to a back bond, obliging the defender to deliver it, in a certain event, was sustained upon the first summons.