

1633. *January 31.* ALEXANDER LAW *against* JOHN STEVENSON.

No 37.

A PARTY may be charged by a burghess to find caution to answer as law will, if the debt be for merchandize or furnishing, whereupon there is no bond granted to the creditor. But if the creditor have a bond for sums of money, he may not charge the debtor to find caution to answer as law will, and this cautioner is only obliged to present the debtor before the court of the burgh upon fourteen days warning; which, if he do, he is liberated of his cautionry, and the Baillies take another course with the debtor, by warding him, until he find a new cautioner. But if he present not the party for whom he is cautioner, upon lawful warning, the process is given to the creditor against the cautioner, although the principal debtor be not dwelling within the jurisdiction of the burgh. That is a special privilege granted to burghs for maintaining their trade, as was found in an advocacy raised by Alexander Law against John Stevenson, because the said Alexander had found caution to answer as law will to the said Stevenson.

Auchinleck, MS. p. 26.

1634. *July 29.* L. INNERWEIK *against* HAMILTON.

No 38.

A DECREET being recovered by the L. Innerweik, declaring the corns growing upon the defender's lands to be thirled to the pursuer's mill of Bancrief; which decret being suspended, and craved to be reduced by the defender, the reasons thereof were not found relevant; therefore the decret and letters were found orderly proceeded. And the defender thereafter *alleging*, That seeing this decret was only a declarator of the thirlage, whereupon no execution was presently to follow, that therefore no letters of horning ought to be granted thereupon against the party; but that thereupon the pursuer, when occasion should so fall out, might pursue his action for abstracted multures, and not to have liberty whenever he pleased to charge him, under the pain of horning, to come and grind his corns, which he might do at unseasonable times, and put the party always to unnecessary toil and charges of suspensions. THE LORDS found, that upon this declarator the pursuer might charge the party to grind his corns and pay the multures thereof, conform to the thirlage, at convenient times; and, if the pursuer should execute these charges in malice or unjustly, they would consider thereof and grant the party suspension, and have regard to modify expenses to him; but they found that he might charge him to come and grind, &c., the same being done in due time, and that he ought not to be debarred from the like charges, as if the same could not be permitted in law to proceed so summarily, and as it were merely necessary and only competent in these cases to intent action for abstracting multures; which, albeit it

Although a decret of thirlage is only declaratory; found that a charge of horning might be given upon it.

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;