

1663. *February 19.* LADY SWINTON *against* TOWN of EDINBURGH.

No. 18.

Horning granted against Magistrates of a town upon their act of Council.

The Magistrates and Council of Edinburgh having granted them to be debtors to the Lady Swinton, by way of act, conform to their custom, the Lady supplicated, That the Lords would grant letters of horning upon the said act: Whereupon the Magistrates, being cited upon twenty-four hours, alleged, They were not convenable *hoc ordine*, by suiting letters of horning upon a bill, but it ought to have been by an ordinary summons, either craving payment, or letters conform.

The Lords, notwithstanding, granted letters of horning.

*Fol. Dic. v. 2. p. 404. Stair, v. 1. p. 184.*

1699. *February 28.*

CREIGHTON of Auchingoull *against* VISCOUNTESS FRENDRAUGHT.

No. 19.

Creighton of Auchingoull, now apparent heir to the Viscount of Frendraught, gives in a bill, craving to remove the last Viscount's Lady from the manor-place, orchards, and parks, in regard she suffered them to go to ruin; and, not being liferentrix thereof, he could not charge her on the act of Parliament to find caution to uphold them; the Lords refused the bill, because, though these removals were to be summary by our law, yet it behoved always to be on a citation and process. See No. 1, 2, & 8.

*Fol. Dic. v. 2. p. 403. Fountainhall, v. 2. p. 49.*

1699. *July 25.*

ROBERT YUILLE *against* JAMES RICHARDSON, Merchant in Glasgow.

No. 20.

Within what time summary diligence on a bill is competent.

A bill of exchange for £.200 Sterling is drawn by Mr. Richardson on Mr. Kite, a corn-factor at London, payable to Yuille. It is dated the 15th October, 1698, and payable at a month's sight thereafter. It is not protested for not payment till the 20th April, 1699, against Kite, and the 27th of April against Richardson, the drawer, and it then is registered, and Richardson charged; who suspends, That, by the act of Parliament 1681, bills must be registered within six months after their date, otherwise no summary execution can pass thereupon; but *ita est* this was protested after the six months, and so the charge is unwarrantable. Answered, The act of Parliament distinguishes two cases; either it is protested for non-acceptance, and then it must be registered within six months of the date of the bill, or for not payment, and then within the term the bill falls due: But so it is, this protest was for non-payment, and the protest and registration being within six months of the day at which it was payable, it was both legal and warrantable. Replied, There ought to have been a protest for non-acceptance first, which was not here; and, by supine negligence for five months, you suffered the debt to

perish, by Kite's breaking *medio tempore*, and therefore should not recur against me, the drawer. Duplied, Where a bill is not payable at sight, but at a day, there is no need, by the custom of merchants, to protest that bill for non-acceptance, but only for not payment; and I was not *in mora*, because, by your letter, you was willing to have given me the bill on another. The Lords found the registration and charge warrantable; but desired to try what was Mr. Kite's condition at the time the bill fell due, if it could have been recovered, then, if demanded, and if it was lost by the delay, and he only broke afterwards.

*Fountainhall, v. 2. p. 64.*

No. 20.

1710. July 27. COLONEL JOHN ERSKINE of Carnock, Supplicant.

The Lords, upon a petition given in by Colonel John Erskine, craving a warrant to the Clerks to register a bond of presentation granted to him by John Anderson, Sheriff-clerk-depute of Aberdeen, and Alexander Charles, procurator there, found, That the bond could only be registered in order to conservation, and not in order to diligence, in respect it bore only, constitute our procurators.

*Fol. Dic. v. 2. p. 403. Forbes, p. 437.*

No. 21.

1711. January 18.

AYTON of Kinnaldy *against* MARGARET SCOT.

Sir John Ayton of Kippo having disposed his estate to Ayton of Kinnaldy, he burdens him with 2500 merks, to be paid to Scot of Balmouth, his nephew; who dying, Margaret and Marjory Scots, his sisters, as executrices to him, pursue Kinnaldy for payment of the foresaid legacy. He defends, That it was extinct by their brother's death, and not transmissible. The affair being dubious, they enter into a submission to two of the Lords of Session; and, in regard the said two gentlemen were pupils, Mr. Rolland, their father-in-law, submits for them, and takes burden; and a decret-arbitral following, Kinnaldy is decerned to pay the 2500 merks to them, but without any annual-rent. Accordingly, Kinnaldy makes payment of it to Rolland, the tutor, and recovers his discharge; but not thinking himself sufficiently secure, he registers the decret-arbitral, and, raising horning thereon, charges Margaret to give him a discharge. She suspends, on this reason, That the charge is most unwarrantable and illegal, (and the writer who raised it deserves censure); because, though our names be in the submission, yet we are not submitters, but only the said Mr. William Rolland taking burden for us *tanquam quilibet*, without so much as designing himself our tutor-dative; and though we be decerned to give a discharge, yet that is *ultra vires compromissi*, we not being submitters, and are minors lesed; seeing, if the plea had been prosecuted, we would have got more in the event than this decret gives us; neither can tutors submit or transact their pupils' interest, but on their own peril, if it be

No. 22.

No summary diligence against a pupil for a debt contracted by his tutor.