1024. *July* 15. DICKSON Apothecary *against* L. COLDINGKNOWS.

No 8.
The verity of a libel being referred to a defender's oath, the Lords found the pursuer could not exclude the defender from deponing, by a horning.

IN an action pursued by Thomas Dickson apothecary, *contra* the L. Coldingknows, where the summons being admitted to the pursuer's probation, and referred to the defender's oath of verity *simpliciter*, and at the terms assigned to that effect, the defender offering to depone and give his oath, he was debarred by a horning produced by the pursuer against him, whereby he *alleged*, That he could not depone but should be holden as confessed, being rebel. THE LORDS found, That in this, and the like cases, the pursuer could not exclude the defender to depone, nor obtrude horning against him to debar him, seeing he craved his oath for his probation, and had warned him to compear to give his oath; and therefore could not refuse that whereof he himself had made election, and which was desired by him; and so the horning was not admitted, in respect it was a severe consequence to hold the defender *pro confesso* upon a libel which might possibly contain more than the defender was worth being so debarred, and there being no other probation; but it is to be adverted, that in all the causes almost, where parties defenders are summoned, this reason may exclude all pursuers to debar the defenders by horning; for it may be alleged, that seeing they are summoned to hear decreets given against them, or else to allege a cause in the contrary; by the same reason, they may say, that seeing he is summoned to allege a cause why the pursuer should not have his intent, he ought not to be debarred by horning to propone lawfully that which by the pursuers summons is permitted to him to do; and in these cases, the defenders not the less may be debarred by hornings.

Act. *Chaip* & ——. Alt. ——. Clerk, *Hay*.

Fol. Dic. v. 2. *p.* 84. *Durie, p.* 138.

1626. *June* 14. DONATAR of the L. FOULIS's Escheat.

No 9.
A person pursued declarator of another's escheat, and produced a separate horning, by which he offered to debar him from defending. Found, that the defender ought to be relaxed, before he could proceed in his defence.

IN a declarator sought of the Laird of Foulis's liferent, the gift being granted upon diverse hornings therein specially mentioned, whereof some were produced and used by the donatar, whereupon he craved the declarator; and another was produced to debar the defender *a defendendo*, which he declared he used only to that effect to debar him, because he was rebel unrelaxed, and used it not to recover declarator thereon, albeit it was also expressed in the gift; and the defender offering to improve the same, and alleging, that so he could not be debarred thereby till it was tried if it was false or true; and the pursuer *answering*, That he could not be heard to compear to propone either improbation or any other allegeance so long as he stood rebel unrelaxed. THE LORDS found, That he ought to be relaxed or ever he could be heard to propone im-