

No 66.

In an action to have the Magistrates liable for a debt, it was found, that the horning, as well as the caption, must be produced.

1624. July 6. BAILIES of KILRINNY *against* _____.

THE Bailies of Kilrinny being pursued at ones instance for not taking of a rebel, conform to letters of caption directed against them, whereby they were charged to take the rebel, he being in their company for the time, and therefore they were pursued for payment of the sum for which the rebel was denounced; in this process, the LORDS found, That they would not sustain this action, by the production of the letters of caption against the Bailies, except the letters of horning were also produced and shown, which was the warrant whereupon the caption was directed; albeit the pursuer *alleged* and *answered*, That he ought not to be compelled to produce the horning, seeing the disobedience of the charge of caption was the foundation of this action, and was sufficient against them, who ought to dispute if there was horning or not, seeing the Judge saw the horning before he granted caption thereupon, and it was not their part to inquire any further, but to obey. Which was repelled, and the horning ordained to be produced to the pursuer.

Clerk, *Scott*.

Fol. Dic. v. 2. p. 181. Durie, p. 137.

No 67.

1627. February 10. DONATAR of STUART's Liferent *against* DEBTOR.

IN a special declarator of a donatar to the liferent of John Stuart of Coldinghame, against a debtor, the LORDS found no necessity to produce the horning in the said declarator, after the general declarator, albeit the debtor was not called, and that he *alleged*, that the horning ought now to be produced to him, that he might see the same, and oppone against it; which allegiance was repelled.

Act. *Craig*.

Alt. *Belbes*.

Clerk, *Gibson*.

Fol. Dic. v. 2. p. 181. Durie, p. 271.

No 68.

1627. June 16. DICKSON *against* ACHANAY.

IN an action betwixt Dickson and Achanay, the LORDS astricted the charger to produce the decret whereupon the charge was executed, and found, that the precept directed by the inferior Judge, giver of the decret, against the suspender, satisfied not the production in the suspension, albeit the sum therein contained was but fifty pounds, or thereby; and albeit there was no reason libelled against the decret, but only that the suspender *alleged*, that if the

decreet were produced, he would propone, and eke out reasons of nullity against the same, which is not in use to be done; for, in matters of little sums, the LORDS found no necessity to produce more than the precept; but the LORDS declared, that if, after production of the decreet, the letters should be found orderly proceeded, they would decern greater expenses against the suspender.

No 68.

Act. *Bellbrs.*

Alt. ———

Clerk, *Scot.**Fol. Dic. v. 2. p. 181. Durie, p. 297.*

1628.

SEATON against SEATON.

IN a pursuit by Seaton, as executor dative to his goodsir, and having licence against Seaton of Schelin, for payment of certain duties of lands pertaining to the pursuer's goodsir, intronitted with by the defender, of many years bygone, contained in the summons, the LORDS found no process upon that pursuit, while the pursuer produced his goodsir's right to the lands whereof he acclaimed the bygone duties from the defender; and found, that his licence and decreet, decerning him executor dative, was not enough to be a title to give him interest to pursue this action *per se*, without the production also of his goodsir's right foresaid, no more than his goodsir, if he were alive, would be heard to pursue, without shewing his right to the lands for his interest; and his executor could be in no better estate; neither was it respected, that the pursuer offered to prove the same *cum processu*; and that he *alleged*, that this should be sufficient to him, who probably could not have his goodsir's right, he not being his heir; which was repelled, and this right foresaid was found necessary to be used for his title.

No 69.

An executor pursuing for bygone rents of lands must produce the defunct's title.

Act. *Nicolson.*Alt. *Mouat.*Clerk, *Scot.**Fol. Dic. v. 2. p. 180. Durie, p. 329.*

1628. July 3.

MAXWELL against LIVINGSTON.

IT was found not competent to an heir pursuing for a debt of his predecessor's, to refer to the defender's oath, that he, the pursuer, was heir served and retoured; but it was found necessary for him to produce the retour.

No 70.

*Fol. Dic. v. 2. p. 180. Durie.**** This case is No 8. p. 9392. *voce* OATH OF PARTY.