

1675. *January 20.* LAIRD of MELDRUM *against* The LAIRD of TOLQUHON.

No 14.

A horning executed on shorter *inductia* than appointed by statute, was not annulled, because there was in fact time to have obeyed the charge.

THE Laird of Meldrum pursues a declarator of the escheat of the Laird of Tolquhon, who *alleged* absolutor, because the horning whereupon the gift proceeds is null, as being contrary to the 25th act, Parliament 1600, prohibiting all charges of horning beyond the water of Dee upon less than 15 days, and declaring all hornings upon fewer days null; and also against the 140th act, Parliament 1592, declaring imprestable conditions in contracts to be null; and particularly this condition, that charges and denunciations should be at the market cross of Edinburgh; according to which law there is a decision observed by Durie in 1625, the 4th day of Feb. betwixt Stuart and Bruce, *voce* INDUCTÆ LEGALES.—It was *answered* for the pursuer, That the act of Parliament 1592 had no force in this case, because both parties living in the shire of Aberdeen, there was no impossibility by distance of place, either to perform the obligation there, or in case of any just reason to suspend, to have come or sent to Edinburgh for that purpose; and as for the act of Parliament 1600, the narrative of it bears expressly, 'that the reason of that statute was to remeedy the inconveniences of charges for lawburrows, or for compearance before the Council, or the like,' and cannot be extended to annul hornings on fewer days by consent of parties; and the best interpretation of statutes is from their narratives, and the subsequent consuetude, *nam consuetudo optima legum interpretis*; for immediately after that statute, and till this time, such hornings have been accustomed, and never found null, except in the case of that horning observed by Durie, in which there was concurring this singularity, where the charge was against a debtor living in Orkney, to pay Buhard his creditor, who lived in Fife, which was impossible to perform, and so could not import contumacy, which is the only ground of confiscation for not obeying charges of horning; but here debtor and creditor lived near together, and at near distance to Edinburgh.

*2do*, Laws prohibitory, when they concern the private interest of particular persons, may be renounced, even though they contain clauses annulling the same, as in the law, *Senatusconsultum Velleianum* might be renounced; so in this statute, being only for the conveniency of persons beyond Dee, and neither *contra bonos mores* nor *jus publicum*, the same is effectually renounced by the clause of registration on six days; and there was a late decision, 16th December 1664, betwixt Philorth and Forbes, *voce* INDUCTÆ LEGALES, sustaining a horning upon a clause of registration on six days beyond Dee.—It was *replied* for the defender, That *pactis privatorum non derogatur jure communi*; if parties should agree that apprisings should proceed on six days, yet seeing the law requires 15, they would be null; and there is here a public good, that the lieges being at a great distance be not put to impossibility or extreme difficulty; and as for the late practise, it is clear by it, that albeit the charge was upon six days, yet the denunciation was not for six months.

No 14.

THE LORDS found, That the act of Parliament 1592 had no effect in this case, there being no impossibility of performance; and found the act of Parliament 1600 to be cleared by subsequent consuetude, not to extend to hornings upon clauses of registration upon consent; and they considered that the practise in anno 1625 had in it that it was impossible for a debtor in Orkney to come to his creditor in Fife, or to Edinburgh, in six days, so was without contumacy, and did rather subsist in the act 1592 than the act 1600.

*Stair, v. 2. p. 306.*

\* \* \* This case is reported by Dirleton :

IN a declarator of escheat at the instance of Meldrum *contra* Tolquhon, it was *alleged*, That the horning was null, because the party was charged only upon six days, albeit he dwelt benorth the water of Dee; and by the act of Parliament 1600, cap. 25. all charges of horning against persons dwelling benorth the Dee, should be upon 15 days at the least; and by the 140th act, Parliament 12th, King James VI. it is statute, that in case any denunciations of hornings should be at the market cross of Edinburgh, upon charges upon unlawful and impossible conditions, the same, and horning thereupon, should be null; and that there was a decision in Durie's book in anno 1625, that hornings even upon bonds against persons benorth Dee were null.

It was *answered*, That the act of Parliament in anno 1600 was only in the case of horning upon citations or charges to find lawburrows, or for compearing before the Council, as appears by the narrative of the said act, which doth interpret and regulate the dispositive words of the act.

And that the act of Parliament in anno 1592 doth not militate in the case of hornings upon a clause of registration, seeing after the act, until the said act 1600, such clauses that hornings should be upon six days were not thought, and *de facto* are not, impossible.

And as to the practise, it was *answered*, That there was a late practise in 1664, upon a debate in the inner-house, Philorth *contra* Forbes, *voce* INDUCIÆ LEGALES, whereby it was found, That the act of Parliament 1600 is to be understood in the case forefaid, where hornings are upon charges of the nature forefaid, for appearing before the Council, and such like; but not in the case in question, and others of that nature, where hornings are upon bonds, and clauses of registration therein contained, which do bind, and cannot be questioned by those who do oblige themselves.

THE LORDS considered, That the narrative of the said act doth clear the meaning of the dispositive words; and there needed not to be a law and remedy as to hornings upon clauses of registration, seeing parties could not help themselves as to charges to compear before the Council, and others of that nature without a law; but they were arbiters, and could make a law to themselves as to clauses contained in contracts or writs, if they thought them grievous.

ous or impossible ; and that there appeared to be a singularity in the case mentioned by Durie; seeing the charge was given in Orkney upon six days, which could not well be satisfied ; and therefore the LORDS, for the reasons foresaid, did sustain the horning. *In prasentia.*

Act. *Hog & Thoirs.*

Alt. *Falconer & Forbes.*

*Dirleton, No 222. p. 104.*

\* \* \* This case is also reported by Gosford :

IN a special declarator, pursued at Meldrum's instance as donatar to the escheat of the Laird of Tolquhon, it was *alleged* for the defender, That the horning whereupon the gift was granted was null, and whereof he had a reduction intended upon this ground, That by the 25th act of Parliament 1600, it is provided, that there should be no letters of horning directed against persons benorth the water Dee but on 15 days, whereas this horning was executed upon six days.—It was *answered* for Meldrum, That the reduction could not be sustained upon that reason, because the foresaid act of Parliament whereupon it was founded, did only bear that lawburrows and citations before the Council should be executed upon 15 days ; whereas the charge was founded upon a contract, bearing a consent of both parties that the execution should be upon six days. Likeas the same being registered of consent, had the authority of the Lords interponed thereto, ordering the letters to be so executed. Neither could any writer to the signet write out the letters, nor a messenger execute the same otherwise but conform to the consent of the parties and decret of the Lords.—It was *replied*, That the reduction upon the foresaid nullity ought to be sustained notwithstanding ; because, by the said act of Parliament, all letters of horning in general, without distinction, against persons benorth Dee, are ordained to be directed upon 15 days, *et ubi lex non distinguit nec nos.* Likeas by a decision in anno 1625, betwixt Bruce of Balfargie and one dwelling in Orkney, (*voce* INDUCLÆ LEGALES), where the Lords did find, that letters of horning directed upon a registered bond were null as falling within the act of Parliament ; and further, by the 140th act of Parliament 12th, King James VI. entitled ' Against unlawful conditions in contracts or obligations,' it is expressly statute, not only that parties contractors shall not provide for usury, or any other unlawful deed, but likewise, that in case there be any impossible conditions to be performed, their consent is null as not being prestable, which is the case now in question.—It was *duplied*, That the 25th act of Parliament 1600, being special as to letters of lawburrows and citations before the Secret Council, the statutory part of the act could not be extended to chargings upon contracts, and bonds bearing the consent of parties, if they should be directed upon six days ; the reason of that act being, that parties living benorth the water of Dee, by legal citation to answer before the Council, for they that got lawburrows, should

have a competent time to defend themselves ; whereas they may be ignorant of the cause, and may be absent from their houses ; but that reason will not militate where parties have entered in contracts, and performed deeds, and consented that letters should pass upon six days ; so that it is their own fault that it go out. And for the practise alleged, it could not be obtruded, the full case and reasons not being set down ; whereas in 1664, by a late practise betwixt the Laird of Philorth and my Lord Forbes, (*voce* INDUCIÆ LEGALES,) the Lords did expressly find, that a charge upon a bond consenting the letters to be directed upon six days, was found orderly directed and lawful.—THE LORDS having seriously considered this case, and the acts of Parliament made thereupon, did sustain the horning, and assoilzie from the reduction, being moved upon these reasons, That the parties contractors were near neighbours, and did live together in one shire, and the conditions to be performed by them might have been done where they lived ; and so neither being unlawful nor impossible, could not fall under the acts of Parliament ; but having consented that letters should be directed within six days, and that a decret should be interposed, they ought in time to have provided for fulfilling ; and for the practise in anno 1625, they found the reason that then moved the Lords was, that the bond was granted for a sum of money in Fife, by a person dwelling in Orkney, which was impossible to be done within six days ; whereas in this case the Laird of Tolquhoun was only bound to deliver a security of lands from parties dwelling in Aberdeenshire, who were his near relations, within a certain time, and in case he should fail, consented that letters should be directed within six days.

*Gosford, MS. No 738. p. 451.*

No 15.

1675. February 12.

PRESBYTERY of DUNSE.

THE Presbytery of Dunse having by bill desired that letters of horning may be directed against certain persons who had been cited as witnesses, and did not appear before them,

THE LORDS did demur, in respect letters of horning ought not to be directed, but either by consent of parties, or by warrant of acts of Parliament, as appears by act of Parliament, ordaining horning to be directed upon Sheriff's and Commissary's decreets, and decreets within burgh, and Admiral's decreets.

*Fol. Dic. v. 1. p. 384. Dirleton, No 253. p. 122.*

No 16.

A horning  
found not to  
debar defen-

1676. July 12.

PURVES against SCHAW.

SIR WILLIAM PURVES, as donatar to the escheat of Schaw of Gospitry, pursues declarator. The defender offered to propone defences upon the nullity of the