

‘hoof; in that case, the creditor having used the first lawful diligence shall be preferred.’

The defender *alleged*; That he was a fair purchaser for an adequate price, which he had truly paid, and applied for purging of real diligences, or to true onerous creditors without fraud; and was not bound to notice the pursuer’s diligence of horning and denunciation, because the said denunciation was only used at the market-cross of Edinburgh, where the party did not reside, and so could have no effect as to escheat, single or liferent; and consequently the same was not a lawful diligence duly to affect his debtor’s lands purchased by the defenders; neither had the pursuer prosecuted his diligence by adjudging, or otherwise affecting the debtor’s estate; and, though the Lords do often favour the diligence of creditors, so as to annul all voluntary deeds to their prejudice after the first step of diligence by horning, yet that is when they are careful to proceed to consummate their diligence without delay; but inchoate diligence not prosecuted, is not comprehended in the words, nor meaning, nor design of the act.

“THE LORDS found the pursuer’s horning not being executed at the head-burgh of the shire where the party dwelt, nor any other diligence done for affecting his debtor’s lands disposed, that he had not the benefit of the act of Parl. 1621.”

Dalrymple, No 75. p. 95.

1708. November 27.

JOHN FORBES in Tombeg *against* GEORGE FORBES of Shiels.

JOHN FORBES in Tombeg, having charged George of Shiels with horning, for payment of the sums in a bond, principal, penalty, and annualrents resting unpaid due by George to him, the LORDS assoilzied the debtor from the penalty, in respect, some annualrents had been paid, and the charge should have been restricted to so much annualrent as was truly resting; albeit the debtor could not say, that when charged he offered to pay the annualrents truly resting, and that the charger refused to accept thereof.

Forbes, p. 284.

1742. December 9.

MURDOCH KING *against* JOHN HUNTER.

MURDOCH KING having obtained a decret of adjudication upon a decret *cog. causa*, before the Sheriff of Stirling, containing a precept against the superior for infesting him, he applied, in common form, to the Ordinary on the bills, to direct letters of horning against the superior.

No 20.

lands, found not to give the creditor the benefit of act of Parl. 1621, cap. 18.

No 21.

A charge of horning was given on a bond for payment of principal, penalty, and annualrents resting unpaid in general, without restricting to so much annualrent as was truly resting. This sustained as a sufficient ground to assoilzie the debtor from the penalty.

No 22.

Horning against a superior cannot pass on a decret of adjudication ob-

No 22.
tained before
a Sheriff, on
a decree *cog.*
causa. There
is no record
of abbreviates
of such de-
crees.

THE LORD ORDINARY recommended to the keeper, and writers to the signet, to give their opinion what their practice was in such cases. The report was in the following terms: ' That they never had observed a horning pass thereupon, where there was no abbreviate, though some of the society have seen such adjudication, without abbreviates, but had no occasion to know whether horning followed or not: That the society are of opinion they are sufficiently warranted to present bills, and expedite letters of horning upon such adjudications, though there be no abbreviate, provided such decreets contain precepts, directing horning against superiors.'

On report of the Lord Ordinary, the Lords refused the desire of the bill.

C. Home, No 214. p. 355.

* * * The same case is reported by Kilkerran :

December 14.

THE said Murdoch King having an adjudication upon a decree *cognitionis causa* before the Sheriff of Stirling, against John Hunter cutler in Stirling, containing a precept against superiors for infesting the adjudger, applied in common form to the Ordinary on the bills for letters of horning against the superior.

Which the Ordinary having reported to the Lords, it was recommended to the keeper and writers to the signet to give their opinion, What the practice was in such cases?

And they having reported, that they knew of very few instances of such adjudications before inferior courts, and that they never observed a horning passed thereupon; but that the society were of opinion, they are sufficiently warranted to present bills, and expedite letters of horning upon such adjudications, though there be no abbreviate, provided such decree contain precepts, directing horning against superiors. Notwithstanding of this report, the LORDS, after having fully reasoned the case among themselves, " refused the bill of horning."

It was observed to be a matter of more consequence how the Lords should determine this case, than at first sight might occur; for, as there are no abbreviates of adjudications *cognitionis causa* by Sheriffs, should horning go against superiors upon such adjudications, whereby they may become the first effectual adjudication, it would be a great defect in our records.

And whereas a remedy had been proposed for this on first moving the petition, by an act of sederunt, requiring abbreviates on such adjudications, and appointing them to be recorded; it was doubted if the Lords had power to appoint such record. In the case of resignations within burgh, it required an act of Parliament to appoint their being recorded.

But whatever be in this, so far was agreed, that the Lords might refuse horning, except upon such conditions as they should require by act of sederunt; one of which may be, that there be an abbreviate recorded.

But now as to the question itself, How far the Lords are obliged by law to give warrant for horning in this case? It was observed, that while apprisings were in use, the superior was by statute bound to receive the appriser, as now the adjudger; but then he could not be charged so to do upon the apprising, as being only pronounced by messengers as Sheriffs in that part; but such charge proceeded upon the allowance, which was in effect a decree of interposition by the Court of Session, and wherein there was an express decerniture against the superior.

But where adjudications *cognitionis causa* proceeded before the Session, the custom originally was, after such decree of adjudication *cognitionis causa*, to raise a new process against the superior, and upon the decree following thereon, the charge against the superior proceeded. But this process the Lords came to dispense with as unnecessary; and, in the very decree of adjudication, to decern against the superior. From the example whereof, it seems to be, that Sheriffs have in their decrees also fallen into the use of decerning against the superiors, which was agreed to be beyond their power.

For as to the act of Parl. 1606, cap. 10. which requires the Lords to direct letters of horning on the decrees of Sheriffs, it was plain, that only respected decrees for payment or performance against parties regularly called before them. Whereas, in this case, the decree against the superior is a decree against a blank person, and who may even not have been resident within the Sheriff's jurisdiction at the time.

THE LORDS therefore found as above, as there was no law whatever authorizing such horning.

Kilkerran, (ADJUDICATION and APPRISING.) No 13. p. 9.

1743. November 2.

HOME CAMPBELL, Petitioner.

No 23.

THE House of Lords having, upon appeal, reversed a decree of the Court of Session, and remitted back with orders for that Court, to give all necessary aid for carrying the judgment into execution; application was made by the prevailing party, for warrant for letters of horning in common form. THE LORDS thought the proper method was to give decree for the sum in the judgment, on which letters of horning might, in common course, be applied for.

Fol. Dic. v. 3. p. 275.

* * See Lord Kames's report of this case, *voce* SUMMAR APPLICATION.

1750. February 24.

FERGUSSON against HERON.

No 24.

HERON of that ilk, becoming purchaser of the lands of Clouden, at a judicial sale before the Lords, Fergusson of Halhill, was, by the decree of division,

A bill of horning cannot be stopped upon