

he refuses to remove. "THE LORDS found this no nullity, it being only *declaratoria juris*, and for expediting removings; and that it could not be put in execution till after the term." Yet some thought, tenants were favourable in law, (as appears by many of our acts of Parliament,) and were not so strictly to be used; and that the anticipation was contrary to the analogy of law which is to be observed: Yet Stair in his Institutions, Tit. 19. approves of this decision.

No 33.

Fountainball, v. I. p. 142.

S E C T. V.

Solemnities requisite in the execution of diligence.—Purification of condition debts.

1605. June 5.

DRUMLANRIG *against* MAITLAND.

IN a declarator pursued by the Laird of Drumlanrig against the Laird of Auchingassel, and his son Robert Maitland; it was *alleged* by Robert Maitland, That the horning used against him was null, because he was denounced at the market-cross of Edinburgh which was not lawful, he not dwelling within that sheriffdom but in Annandale. It was *answered*, That the horning was lawful, having an act of Secret Council commanding a macer to pass particularly to the market-cross of Edinburgh and denounce the said Robert rebel for his present contempt and disobedience done to them, he being called before them for diverse odious offences; and, after compearance, being commanded to remove and remain in the outer house while he was called, he absented himself contemptuously, and became fugitive, and therefore was denounced, as said is; in respect whereof, the LORDS sustained the horning, and found it sufficient, notwithstanding the allegiance.

No 34.

A horning executed in Edinburgh, while the party was in another district, was sustained, because an order of Privy Council had been issued to denounce them for contempt of authority.

Haddington, MS. No 791.

1623. December 17.

E. of GALLOWAY *against* VAUNS.

IN an action betwixt the Earl of Galloway *contra* Vauns, the LORDS sustained a charge of horning executed by virtue of letters raised before the term of payment contained in the bond whereupon the said letters were raised; seeing the letters bore, to charge the party obliged to make payment when the term of payment was bypast; and that no charge was executed upon the said letters,

No 35.

No 35.

and by virtue thereof, while the term was bypast, albeit the letters were raised before the term; and therefore they repelled the allegiance whereby the horn-ing and letters were impugned for that reason.

Act. Neilson.

Alt. Belsbes.

Clerk, Scot.

Fol. Dic. v. I. p. 538. Durie, p. 92.

1628. July 4.

RACHELET *against* LAUDER.

No 36.

A charge given on Sunday to a magistrate to apprehend a rebel, altho' disobeyed, did not subject the magistrate in damages; but, without a new charge, he would have been liable, if he had not apprehended him the next day, if within his reach.

In an action, Rachelet a Frenchman, against Sir Lewis Lauder, Sheriff of Lothian, who was pursued for payment of a sum addebted to the Frenchman by his debtor, because he was charged by letters of caption to take the said debtor, he being then in his company, and did not the same, the LORDS found the said charge given to the Sheriff null, because it was given to him upon a Sunday, on the which the LORDS found it was not lawful to execute any such charges at no time of the day, neither before sermon nor the time of sermon, nor thereafter; and therefore found the Sheriff, for disobedience of that charge, not liable in the sum, and assolizied him therefrom.

July 30.—In the action of Rachelet *contra* Lauder, mentioned July 4, 1628, the LORDS found, that albeit the charge given to the Sheriff to take a rebel, execute upon a Sunday, was not of force to make the Sheriff liable to the creditor for his disobeying of the charge given that day; yet, it was effectual to make him liable to the creditor if after that day the rebel was in the Sheriff's company upon a week day and within the Sheriff's jurisdiction, and that the said charge was given upon a Sunday, as said is, was sufficient to produce that effect, without any other new charge, albeit the party *alleged*, that the charge given that day was a null charge, and so could not be effectual to work any thing, whereon any act or pursuit might be founded, which was not respected; and also found, that the Sheriff remained obliged to the creditor, if the rebel remained in the Sheriff's house all the night with the Sheriff's knowledge; for, albeit a magistrate cannot be charged in the night to take a rebel, yet he being charged before, and the rebel being all night in the Sheriff's house with the Sheriff's knowledge, he might have detained him upon the morrow, and so obeyed the tenor of the charge, and not doing the same, he was liable to the party for the debt. See SUNDAY.

Act. Bärnet, major.

Alt. Lermonth.

Clerk, Hay.

Durie, p. 382. & 395.