

1626. *November 29.* L. SMETON *against* RELICT OF SPIERS.

No 30.  
A horning  
found null by  
exception.

IN a special declarator, at the instance of L. Smeton, donatar to the liferent of — Lidderdale of St Mary's Isle, against the relict of William Spiers, who was convened as intromissatrix with a debt of the rebel's; — THE LORDS found an exception of nullity proponed against the horning, whereupon the general declarator was decerned, to be relevant, bearing, ' That the charge of that horning, was a charge to find caution of lawborrows; ' likeas before the denunciation, and within the days of the charge, caution was found; and he produced the act of caution, which was dated before the denunciation, the date of which denunciation was contained in the decret of general declarator; in respect whereof, the same being instantly verified, the horning was found null, notwithstanding of the sentence of general declarator; for this was proponed for a creditor, who was not called in the general declarator.

Act. *Lawtie.*

Alt. *Foullis.*

Clerk, *Gibson.*

*Fol. Dic. v. I. p. 172. Durie, p. 239.*

1629. *January 11.* EARL OF GALLOWAY *against* GORDON.

No 31.  
Decided as  
No 28. *supra.*

IN a declarator, pursued by the Earl of Galloway against Gordon, the defender offered to prove that he dwelt *alibi* the time of the charge, than where the executions did bear him to have then dwelt. — But the LORDS would not receive the allegiance by way of exception, but reserved his action thereanent for reduction of the horning thereupon.

*Fol. Dic. v. I. p. 171. Spottiswood, (HORNING.) p. 153.*

1630. *November 30.* DOUGLAS *against* WARDLAW.

No 32.  
In a declarator of escheat, it was found not enough to except that before denunciation the debt was paid and discharged, but the horning behoved to abide a reduction, to which the Officers of State must be called, because the

JAMES DOUGLAS, macer, being donatar to the escheat of Mr John Wardlaw, and pursuing declarator thereon, the defender *alleged*, That the horning was null, because, before the denunciation, the party had made payment of the sums charged for, so that thereafter he could not be lawfully denounced; and the party having paid, he needed not have suspended, having in due time obeyed the charges. This exception was not received *hoc loco*, to stay the declarator, being proponed by way of exception, to take away a horning standing, summarily, which could not be taken away but by an ordinary action, whereto the King's Advocate and the party charger behoved to be called, and wherein trial must be taken upon the true date of the acquittance of payment, which is not proper in this process; therefore action of reduction was reserved to the party upon that reason.

Clerk, *Gibson.*

*Fol. Dic. v. I. p. 171. Durie, p. 544.*

\* \* \* Spottiswood reports the same case :

In a general declarator of an escheat, it being *alleged* that the horning is null, because before the charge, or denunciation at least, the debt was paid, and discharge thereof given by the creditor ; it will not be received, but the horning must abide a reduction, whereunto the King's Advocate and Treasurer must be called ; for otherwise the rebel and the creditor might collude together in prejudice of the fisk and the donatar, by granting a discharge antedated. Found betwixt James Douglas, council macer, and the Creditors of umquhile Mr John Wardlaw, whose escheat James was seeking to be declared.

*Spottiswood, (ESCHEAT.) p. 104.*

No 32.  
rebel and creditors might collude in prejudice of the fisk, by antedating the discharge.

1662. July 22. WILLIAM MONTGOMERY *against* THEODORE MONTGOMERY.

WILLIAM MONTGOMERY, as donatar to the escheat of Theodore Montgomery, pursues a general and special declarator in one libel, and insists, first, in the general.—The defender *alleges* absolutor, because the horning is null, the denunciation being at the cross of Edinburgh, where the defender had not his domicile. The pursuer opposed the horning standing, bearing, the defender to dwell in Edinburgh, and the horning could not be taken away by exception, *alibi*, not instantly verified.

THE LORDS repelled the defence, but prejudice of reduction thereupon.

*Fol. Dic. v. 1. p. 171. Stair, v. 1. p. 132.*

No 33.  
Found in conformity with No 28, p. 2713, and No 31, p. 2714.

1712. June 18.

WILLIAM KER of Chatto *against* The CREDITORS of SIR WILLIAM SCOT of Elieston.

ROBERT SCOT of Elieston, succeeding to the estate of Harden, on the death of his brother Sir William ; and being much pressed both by his relict and creditors ; he prevailed with William Ker of Chatto to engage cautioner for him in considerable sums ; for relief whereof, the said Robert Scot gave him a disposition to his whole heritable and moveable debts ; and Chatto pursuing some of the debtors, compearance is made for Scot of Wall, and other creditors to Sir William, who craved preference to these debts ; *imo*, Because they are creditors to Sir William the defunct, and Chatto is only creditor to Robert the apparent heir ; which is founded on the 24th act 1661 ; and the debts being originally due by Sir William, their debtor, and they having done diligence within three years of his disease, they were preferable to the creditors of the apparent heir.

No 34.  
Decided likewise in conformity with the above mentioned cases.