

No 45.  
burgh, was sustained, though the lands lay in another sheriffdom, the debtor being out of the country.

him from the Lord Yester, having right thereto, as is noted 12th Feb. 1631, *voce* REDEMPTION, the LORDS found, That the conclusion of the summons, craving the defender to be decerned to renounce all right and title which he had to the lands any manner of way, ought not to be sustained; and that no sentence could follow, but to decern the defender to renounce all right which he had to these lands by virtue of these rights, whereto the legal reversion, which was the only ground of this pursuit, did extend, and no further; and the LORDS did sustain the order of redemption, albeit used at Edinburgh, and the lands lay in the sheriffdom of Peebles, where the defender alleged the order ought to have been used, seeing this was a legal reversion near expired; and so if the order was not good, the comprising should expire before any other order might be used; likeas the time of the order the Lord Yester was not in the country, and Edinburgh is *communis patria*.

Act. Nicolson.

Alt. Stuart & Hay.

Clerk, Gibson.

Fol. Dic. v. 1. p. 261. Durie, p. 573.

1631. June 4.

CHRISTIE against JACK.

No 46.  
A decree of apprising against a person out of the country was reduced, because the summons was not executed at the market-cross of Edinburgh, though it was executed at the pier and shore of Leith, the market-cross of the head burgh of the shire, and the cross of the town where the defender's family lived.

In a reduction of a comprising upon this reason, That the party debtor, against whom this comprising is deduced, was out of the country, and by the citation in the denunciation, albeit it be used against him, as out of the country, yet he is not lawfully cited, being only cited at the market-cross of Dundee, and Forfar, and pier and shore of Leith, whereas by common consuetude observed, all citations against parties out of the country, ought to be at the market-cross, of Edinburgh, as *communis patria*, and has been so done heretofore. This reason was found relevant, and the comprising reduced therefor, albeit the party was cited both at the pier of Leith, and at the market cross of that burgh where he dwelt with his family, viz. Dundee, and also at the market-cross of Forfar, which is the head burgh of the sheriffdom, which the defender *alleged* to be a citation, which might more probably come to his knowledge (which is the end of all citations) than if it had been done at Edinburgh; for albeit by custom, citations of parties out of the country are used at the market-cross of Edinburgh, and being so used, are lawful, yet that permissive custom will not infer any prohibitory consequence, that citations otherways used, are unlawful and null; for albeit it be lawful to do the one, yet there is nothing in law nor practice, to make the other unlawful, except it might be shewn, that there were either some warrant in law, or by sentence extant, to prohibit citations to be otherways, except at Edinburgh; likeas by warrant of the letters, the direction thereof appointed the party to be cited at Dundee, Forfar, and Leith, which he has done, and so obeying the warrant of the Lords letters, the citation conform thereto cannot be found unlawful, especially tending to annul a

comprising, which is a perfect act now 20 years after it is complete, and clothed with possession. Which allegiance was repelled, and the reason sustained, in respect the custom has been to cite at Edinburgh, and all citations otherways are unlawful, albeit there be no sentence to warrant that custom, and to disallow the other citations in any contradictory judgment, which was found needed not, seeing it was never questioned. And as to the warrant of the letters, the same bore also, to summon at all other places needful; and such letters are granted always *periculo petentis*; but by the 32d act, Parliament 6th, Queen Mary, summons of persons passing out of the country after citation are mentioned to be done, at the market-cross of the head burgh of the shire. And by all other acts, which mention citations of parties at market-crosses, ever mention is made of the head burgh of the shire, and never of any other, as by the 86th act, Parliament 11th, James VI, of charges of law-borrows, which are either personal, or at the dwelling place, and at the cross of the head burgh, and the 33d act, Parliament 6th, Queen Mary, for citation in criminal causes, and therefore no more in civil; and the 66th act Parliament 11, James VI, anent summoning of Highlandmen, never mentions Edinburgh. And as by the 119th act, Parliament 7. King James VI. inhibitions are ordained to be registered in the clerks-Books of the head burghs of the shire, where the party inhibited dwells, or where his lands lye, where there is no word of Edinburgh; and sicklike by the 268th act, Parliament 15, James VI, the same should be executed at the head burgh of the sheriffdom, or regality, within which the party dwells, far more may citations be so used in comprising; for seeing the lands are denounced at the market-cross of the head burgh, it would appear to agree with reason, that the party should be cited at the same place; for albeit the consuetude, to cite parties out of the country, had been usually done at Edinburgh, and that such deeds done are lawful, because that consuetude is permitted, and therefore deeds so done are not quarrellable, yet there is no probation, neither in law nor practice, or by decision, to annul deeds otherways done; for it were an hard inference to draw from a consuetude permissive, a conclusion prohibitive of all acts otherways done, differing only in circumstance, for place of execution, and not material to the essence of the act; neither is it reasonable, that the same should be everted, for the omitting of an act not so material and necessary, as that act which is used, viz. the execution at Dundee, where the party dwelt, and at Forfar, which is the head burgh of the shire, and which so executed, was more probable to have come to his knowledge, than if it had been made at Edinburgh; and that is the end of all citations, that the party may know thereof, the same is ordained in executions, charges, and denunciations of parties to the horn; likeas charges and denunciations of parties at the horn done at Edinburgh, where the parties dwell not in that sheriffdom, albeit passing by express contract, and consent of parties, by the 140th act, Parlia-

No 46. ment 12, James VI, are declared null : but the comprising was reduced, notwithstanding of the argument proponed in the contrary, as is before noted.

*Fol. Dic. v. 1. p. 260. Durie, p. 588.*

No 47.

A special place being appointed in a reversion for consigning money, and the wadsetter being abroad, the Lords granted warrant to cite him at the market cross of Edinburgh and pier and shore of Leith.

1632. February 8.

DYELL against BRUCE.

IN a declarator of a redemption, pursued by Thomas Dyell of Kinnes against Mr Robert Bruce, it is *alleged*, that conform to the reversion, premonition was not made at the said — house. It was *answered*, that the defender was out of Scotland, in France, *animo remanendi*, these thirty years; whereupon THE LORDS granted the pursuer letters to make admonition to the defender, at the market-cross of Edinburgh, pier and shore of Leith; and conform to the Lords' deliverance, he made admonition at the said places, which THE LORDS sustained.

*Fol. Dic. v. 1. p. 261. Auchinleck, MS. p. 181.*

No 48.

A denunciation at the market cross of Edinburgh against a person out of the country is sufficient, tho' his lands lye in another sheriffdom.

1666. July 4.

CUNNINGHAM against CUNNINGHAM.

JEAN CUNNINGHAM donatar to the liferent escheat of umquhile Sir David Cunningham of Robertland, pursuing a general declarator, the horning was quarrelled upon this ground, that Sir Robert being in England the time of the denunciation, and the denunciation being at the market-cross of Edinburgh, the samen was null, because it should have been executed at Irvine, the head burgh of the bailliary within which the lands lye, especially Sir Robert having been for the time prisoner in England, and so absent *republicæ causa*. THE LORDS, notwithstanding of the allegiance proponed, sustained the horning, and found it sufficient to denounce at Edinburgh, and pier and shore of Leith, *tanquam communis patria*.

*Fol. Dic. v. 1. p. 261. Newbyth, MS. p. 68.*

No 49.

Requisition against a party out of the country should be at the market-cross of Edin-

1669. July 15.

LEITH against EARL MARSHALL.

IN the action betwixt Leith and the Earl of Marshall, after the right made to Leith's brother by his wife was reduced upon minority and lesion, it was *alleged* for the husband Leith, that he had right to the sum of 1200 merks, contained in the wadset of the lands of Troup, in so far as his wife, with consent of her