

No 49.

him; and it being controverted, if such letters should be direct so summarily, the depositar not being called in this process of redemption, nor any compearance made for him, but that it was called in doubt, if horning could so proceed, except that he had been convened and pursued in some ordinary action for the money, where it might be lawfully tried if the money was really consigned and remained still in his hand; for as the instrument of the alleged consignation was not enough, nor could not be found enough, if he being pursued for the money, denied the consigning thereof; so it could not be found enough now, he not being heard, nor pursued *via ordinaria*, to be put to the horn for the same; notwithstanding whereof the LORDS found, that letters of horning should be direct to denounce him, seeing he suspended not the first charge; albeit it was granted only *incidenter* against him in an action of redemption, wherein he was not called, nor was a party.—See REDEMPTION—SUMMAR DILIGENCE.

*Durie, p. 604. 613.*

1665. July 28.

SCOT against SOMERVAIL.

No 50.

BESSY SCOT having charged Somervail, who was cautioner in a suspension, for payment of a sum of money contained in a bond suspended; he suspends on this reason, That the money was consigned in the hands of Mr George Gibson, clerk to the bills for the time. It was *answered*, That Mr George Gibson was now out of office, and insolvent, and the consignation behoved to be upon the peril of the consigner. It was *answered*, That the consignation must be upon the peril of that party who was the cause of consignation, and that was the charger; in so far as it was instructed by an instrument produced, that the suspender offered the annualrent, and so much of the penalty as the charger would have declared upon her oath, that she had truly paid, which she refused, unless the whole penalty were paid, whereupon he consigned through her fault.

THE LORDS sustained the reason, and ordained the notary and witnesses to depone upon the truth of the instrument, for instructing thereof.

*Fol. Dic. v. 2. p. 59. Stair, v. 1. p. 304.*

No 51.

Found, that money consigned is not at the risk of the consigner, if he consign warrantably *sine culpa*.

1673. February 15.

MOWAT against LOCKHART.

MARCUS MOWAT having charged James Lockhart upon a decret arbitral containing many distinct articles, he did suspend, and consign L. 200 for the value of certain gilders, which by the decret arbitral was modified to 40s. the gilder, and he consigned 22s. for the gilder in the hands of Henry Hope, treasurer of the Court in *anno* 1658, and Henry having broken, the consigned

money is lost; and in the discussing of the suspension, the question arose, Whether the consignation should be upon the peril of the consigner, or of the charger.

No 51.

Whereanent, the LORDS found that it was not upon the peril of the consigner if he consigned warrantably *sine culpa*; and found, that he being charged for the whole articles of the decreet arbitral, and that by the decreet discussing the suspension less was found due than he was charged for, that he was not *in culpa* to consign, albeit he had no reason of suspension against the article for which consignation was made, without necessity to him to have offered what was due as to that article before consignation; because having received one charge for the whole articles, upon six days, he neither should nor could seek the charger to offer the sums due by that article before consignation; and found, that albeit the gilder was now modified by the Lords to 30s., and that the charge was for 40s.; that the consignation of 22s. was not the consigner's fault, seeing it was the order of the Judges for the time who ordained 22s. to be consigned for the gilder, and caution for the rest.

*Fol. Dic. v. 2. p. 60. Stair, v. 2. p. 173.*

1675. July 9.

EARL OF QUEENSBERRY *against* The DUKE OF BUCCLEUCH.

THE EARL of Queensberry, as sheriff of Nithsdale, having charged the Duke of Buccleuch for the cess of his lands, imposed by the convention of estates *in anno* 1665; he suspended and consigned. The question arose, on whose charges the consigned sums should be lifted. Queensberry *alleged*, that he having charged but *ex officio* as Sheriff, ought not to be burdened. It was *answered*, That the party who was in the fault by suspending, should bear the burden; but Queensberry was in the fault, because he charged for more nor was due, as was now found by the event. It was *replied*, That Queensberry had charged for no more than the Duke's proportion, and therefore he ought to have offered what was due, and shown a discharge of what was paid, and upon refusal consigned, otherways he had not warrantably suspended, and therefore should bear the burden, in lifting the consigned sums,

Which the LORDS sustained.

*Fol. Dic. v. 2. p. 60. Stair, v. 2. p. 343.*

No 52.

Sums consigned in a suspension must be taken up and delivered on the suspender's expenses, if he has not warrantably suspended.