

(DUE *ex mora.*)

No 25.
 cient for cap-
 tion, yet not
 for annual-
 rent. Escheat
 falls not, but
 upon registra-
 tion.

ent for caption, and so are not null; and therefore annualrents having so much ground, in equity, and by the civil law, being due *ex mora*, such denunciations should be sufficient for annualrent.

THE LORDS found such hornings null, and would not allow annualrent.

Ed. Dic. v. 1. p. 38. Stair, v. 1. p. 257.

No 26.

Found in con-
 formity to the
 above deci-
 sion.

1711. July 3.

GORDON *against* GORDON.

GORDON of Daach *alleging*, That James Gordon, messenger, owed him L.67 Scots, he pursues him before the Baron Court of Huntly, and obtains a decret there: But, because this sentence could not be executed without the bounds of the Baron's jurisdiction, out of which the defender had removed, therefore he pursues him before the Sheriff, for interposing his authority thereto; and, on his decret, he raises horning, and denounces him; whereon Gordon being charged, he suspends on these reasons; *imo*, That there was nothing produced to instruct the debt, but the Sheriff's decret merely in absence; whereas the Baron's decret, as its warrant, ought likewise to be in the field, that it may appear what was the ground of the debt, and on what probation it goes.—*Answered* by the charger, I am not master of the baron-decret, for that is detained by the sheriff-clerk, and lies as his warrant: And if you desire to see, you may call for it in a reduction; but the Sheriff's decret is the immediate warrant of my charge of horning.—THE LORDS found him not obliged in this suspension to produce the Baron's rolment of Court.—Then he repeated his *second* reason of suspension, That he could not insist for the annualrent of the sum charged for since the denunciation, because it was only made at the market-cross of Edinburgh; whereas he then lived in the north. It is confessed, That such a denunciation is a good enough warrant for a caption, but cannot infer annualrent, nor make the escheat fall. It is true, the 20th act 1621, ordains annualrents to be due after denunciation, but it does not regulate where the denunciation is to be made. That seems to be set down in the 268th act, 1597, appointing hornings, inhibitions, &c. to be execute at the market-crosses of the respective jurisdictions where they dwell; which imports, that executions at Edinburgh are not legal, except either the debtor dwell there, or be out of the kingdom; and Sir G. Mackenzie, in his observations on that act 1621, seems to think so; albeit he says, he cannot see great reason for it, except that debtors in other shires cannot know exactly when they are denounced at Edinburgh.—*Answered*, That denunciation anywhere is good enough to produce annualrent; for the act 1621, introducing it, mentions nothing but denunciation; *et ubi lex non distinguit, nec nos distinguere debemus*; yea, the Lords have thought the case of the creditor's getting annualrent so favourable, that were he only denounced, and did not so much as proceed

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to registration, yet annualrent became due, though a horning unregistrate, will neither infer escheat nor caption; Stair, 11th Feb. 1673, Smith *contra* Waugh, No 24. And if it be good without registration, *multo magis*, a horning duly registrate and execute at Edinburgh, ought to have that effect. They likewise drew an argument, *a contrario sensu*, from the decision 30th Jan. 1663, Rig *contra* his Creditors, No 30. where the Lords found annualrents due, though the debtor dwelt in the regality of Muffelburgh, and was only denounced at the market-crofs of Edinburgh; and the *causa decidendi* given is, because it was in Oliver's usurpation, when regalities were abolished. *Ergo e contra*, if regalities had been then in force, the denunciation would have been null *quoad* the effect of annualrents.—The LORDS demurred; for though the cause was small, and could not bear the expence of a trial, what has been the custom in such cases; yet the decision was of moment, and of great importance.

No 26.

July 17.—THE LORDS decided the point debated *supra* 3d July 1711, between Gordon of Daach, and Gordon; and having perused the former practice, they found the case precisely determined by their predecessors, 26th January 1665, Hutcheson *contra* Dickson, No 25. where the Lords found that a denunciation at the market-crofs of Edinburgh, if the party dwelt elsewhere, did not make the sum bear annualrent; and this being a meith in this dubious case, the Lords determined conform, and refused annualrent.

Fol. Dic. v. 1. p. 38. Fount. v. 2. p. 654. & 661.

* * * The same case is thus mentioned by Forbes :

JAMES GORDON of Daach, having charged James Gordon, messenger, for Sixty-six pounds, contained in a decret, and annualrent thereof since the denunciation was used on the decret, and he having suspended : At discussing the suspension, the LORDS found no annualrent due upon the denunciation. In respect it was only at the market-crofs of Edinburgh, and the party denounced lived not within the shire of Edinburgh.

Forbes, p. 526.

* * * A case, Dunbar of Burgie, *against* Creditors of Castlehill, November 1733, not collected, was decided in the same manner.

Fol. Dic. v. 1. p. 38.