

No 88.

place, whereof he was styled by the said execution, and the pursuer abode at the horning, as executed at that dwelling-place. Thereafter the defender *alleging*, That he offered to prove, that the rebel dwelt in another place the said time of the charge, and the pursuer *replying*, That that exception being *in fact*, ought not to be received to annul his horning so summarily, by way of exception, but he ought to reduce thereon, and then he should answer thereto, the LORDS received the same exception *hoc loco*, without necessity to urge the defender to reduce thereon, in respect of the execution foresaid, which, as said is, made no clear special expression of the place *nominatim*, whereat the party was charged. And thereafter, the pursuer *replied*, That he dwelt then at that same place whereat he was charged, which was sustained, and admitted to probation.

Act. *Stuart & Gilmore.*Alt. *Cunninghame.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 263. Durie, p. 651.*

No 89.  
Found as  
above.

1684. *February 8.*CREDITORS of CREIGHTON *against* HIS MAJESTY'S CASH-KEEPER.

THE Creditors of Creighton of Castlemayns against Mr George Dickson advocate, and Hugh Wallace, cash-keeper, for his Majesty's interest, seeking to reduce a horning whereon a gift of escheat was taken, on this nice point, that the messenger's execution of the charge of horning given to the debtor, did not design his dwelling-house, whether in town or in the country; and which nullity was sustained in *Durie*, 14th July 1626, *Adam* against the Bailies of *Ayr*, No 87. p. 3748; yet, see a contrary decision in *Durie*, 9th November 1632, *Montgomery* against *Fergushill*, No 88. p. 3749.

This being advised on the 12th of February, the LORDS found this horning to be in the case of *Durie's* second decision in 1632, where the rebel's house was found sufficiently designed, because the rebel is designed in the execution of the charge of horning by his style of Castlemayns, and they offered to prove, in fortification of the horning, that he then dwelt there.

*Fol. Dic. v. 1. p. 263. Fountainball, v. 1. p. 268.*

\*.\* President Falconer reports the same case:

IN the action of general declarator, pursued by Mr George Dickson of Buchtrig, advocate, as donatar to the escheat and liferent of Crichton of Castlemains it was *alleged* for Mr James Nasmith, John Riddoch, and several others, Creditors of Castlemains, That the horning was null, in regard the charge did bear, that the same was given at his dwelling-house, and did not design the place. It was *answered*, That this being a third gift, the horning was twice declared in

the two former gifts against the rebel ; so that the rebel could object nothing against it ; and if the rebel could object nothing, no more could any of his Creditors since the rebellion, or who had any voluntary rights derived from him since the declarator ; and that there was no act of Parliament, nor instruction given to the messenger, appointing executions of charges of horning, to bear the particular designation of the dwelling-house ; likeas, by a decision in *anno* 1632, betwixt Montgomery and Fergushill, No 88. p. 3749, the Lords sustained the horning, albeit the dwelling-house was not particularly designed, the rebel's style and dwelling-house being all one ; and so it was presumed, that the dwelling and place of designation was the same. It was *answered* for the defenders, That the designation of a dwelling-house, was absolutely necessary, or otherways it were impossible to prove an execution : Likeas, in *anno* 1626, No 87. p. 3748., there was an express decision, annulling an horning used against a burgess in Ayr, in respect his dwelling-house was not particularly designed ; and by warrant of the LORDS, the register having then searched whether it was usual, in executions of hornings, to design the dwelling-house, he made report, that there were in the records several hornings about that time, in which the dwelling-house was not designed. THE LORDS found it relevant to sustain the horning, that Castlemains' dwelling-house was called Castlemains, and that being proven, it was presumeable he was charged thereat, according to the foresaid practique 1632.

*Pres. Falconer, No 80. p. 54.*

\* \* \* Harcarse also reports the same case :

In a general declarator of escheat, it was *alleged* for the defender, That the horning was null, in so far as the execution of the charge bore, that the party was charged at his dwelling-house, without designing the dwelling-house, as was decided July 14. 1626, No 87. p. 3748. For horning, that is of so great import against the lieges, ought to be executed with its due solemnities ; and if the dwelling-house had been wrong designed, the designation could not have been altered ; whereas, now the charger may condescend upon any place he finds most convenient.

*Answered* ; There being neither act of Parliament, nor fixed custom, for designing the dwelling-house in the execution of a charge, the want thereof cannot nullify the present horning. And it appears by a report from the Clerk-register, that some executions in the year 1657, (about the time that the quarrelled execution was used) did likewise want the designation of the dwelling-house ; and to sustain such a nullity in executions might overturn many diligences. As to the practique 1626, that was a single decision, and the Lords never so determined since ; but, on the contrary, November 9. 1632, Montgomery *contra* Fergushill, No 88. p. 3749., an execution not designing the dwelling-house was sustained ; and this execution ought the rather to be sustained,

No 89. that it was never quarrelled till now, though three gifts have been expedite upon the same horning, and former donatars obtained full satisfaction and payment.

*Replied* ; As to the practise 1632, Fergushill being both the rebel's style and the name of his house, the execution bearing that he was charged there, was sustained, as being a compendious designation of both.

*Duplied* ; Castlemain's house went commonly under the name of that same title ; and so the defenders are in the precise terms of the practise 1632.

THE LORDS, waving the other points of debate, ' Found the duply relevant to sustain the execution, and assoilzied from the reduction.'

*Harcarse, (HORNING.) No 515. p. 143.*

1693. February 21.

GULMAN *against* WATSON.

No 90.  
Found in conformity with  
No 85. p.  
3748.

THE LORDS assoilzied from the process of declarator of the escheat, and found the horning null, because it did not design the rebel's dwelling-house, whereby the mean of probation is cut off, albeit it designed her relict of Gulman in Monachie, and so her dwelling-house was to be presumed to be there. Durie observes the like, 14th July 1626, Adam, No 87. p. 3748., where a horning was found null for not designing the dwelling-house, though it called him burges of Ayr, and so he might be supposed to dwell in Ayr ; yet he might be an honorary burges : And, in an execution of a summons, a defender being designed by his style, it was found to supply the name of his house, because the Lords presumed he dwelt there.

*Fol. Dic. v. 1. p. 263. Fountainball. v. 1. p. 563*

### S E C T. III.

Whether the Execution must bear the date of the Letters.

No 91.

1595. June 3.

L. of ARNCAPELL *against* L. of KILCREUCH.

A horning was executed against several debtors on different days. The execution was sustained, tho' it

THE Laird of Arncapell pursued the Laird of Kilcreuch for contravention of an act of Lawburrows. Kilcreuch offered to compear. Arncapell debarred him by horning. It was *alleged* by Kilcreuch, That the horning was null, because that upon the 20th, 21st, and 22d days of ———— respective he had charged such and such persons to underly the law within six days, which execution was