

No 60. ing was null, the denunciation not being at the market cross of the head burgh of the regality of Torphichen, within which the lands did lye.—It was *replied*, That albeit Torphichen was a regality, yet no denunciations or other legal executions have been in use to be made there past memory of man; and therefore, being in desuetude, the lieges were not obliged to denounce there, as was found by a practise observed by Spottiswood on that same reason, No 59. p. 3723.—THE LORDS did sustain the defence, unless the pursuer did offer to prove, that there was a public officer and clerk of the regality, who kept the record of all executions and hornings; seeing the said regality did comprehend the most part of the Temple lands of Scotland; and might be of a great consequence to frustrate all legal executions upon that pretence.

*Fol. Dic. v. 1. p. 261. Gosford, MS. No 438. p. 227.*

\* \* \* Stair reports the same case :

MR JAMES SCOT being donatar to the liferent of Boyd of Temple, pursues declarator.—It was *alleged*, That the horning was null, because Temple dwells within the regality of Torphichen, and the denunciation was not at the Thorn of Torphichen, which is the place for the head burgh.—It was *answered*, That it is in desuetude, and that the allegiance was not relevant, unless it were alleged that the said regality had a head burgh in use, and a register for hornings there.

Which the LORDS found relevant and declared.

*Stair, v. 2. p. 44.*

\* \* \* The like was decided 19th June 1674, Murray against Arnot, No 25. p. 3634.

1672. November 20. PATERSON against FERMOUR.

No 61.

Horning found null, as not executed at the cross of Edinburgh, in which city the rebel had his house and furniture.

JOHN PATERSON pursues a declarator of the escheat of John Fermour, who having *alleged* that the horning was null, he being denounced at Cupar in Fife, whereas his dwelling and domicile was at Edinburgh; whereupon the Lords, that they might not give either party the sole probation of the domicile, did, before answer, allow either party to adduce witnesses. The pursuer adduced five, all conform, proving that Fermour, with his wife and bairns, came to Anstruther in the middle of March, and staid at his good-brother's house, being an ale-house, till the date of the denunciation, which was upon the 16th of May, and thereafter till about Whitsunday. The defender proved by as many witnesses, that he had a house taken in Edinburgh from Whitsunday to Whitsunday, and that he dwelt therein during that time; and some of them deponed, that he, his wife, and one bairn, went over and staid about their business of Balcomy in Fife, 20 days;

and most of them deponed, that they were his nearest neighbours, and saw him frequently come and go to his house, but could not depone how long he was there, or how long he was absent about his business.

THE LORDS found, That albeit a domicile by 40 days staying at any place, though in an inn or hired chamber, might be sufficient to sustain a citation made there, yet not to constitute a domicile, whereupon denunciation and escheat might follow, or whereupon the confirmation of a defunct's testament might fall to the Commissary of that place; but as to these the principal domicile behoved to be considered; and found, that by the probation foresaid, Fermour's principal domicile was at Edinburgh, where he had his house and plenishing, and was the most part of his time; and therefore found the denunciation at Cupar null, and assoilzied.

*Stair, v. 2. p. 119.*

1675. July 27. ALEXANDER ARBUTHNOTT *against* HENRY BARCLAY.

IN a declarator of escheat at the instance of the said Alexander against the said Henry, it was *alleged, imo*, No declarator, because the letters of horning whereupon he was denounced were general, not bearing any special cause or debt; *2do*, The defender was relaxed from the horn at the market cross of Edinburgh, within year and day after the execution of the horning.—It was *replied* to the *first*, That the letters were raised upon a registrate contract of marriage, and the defender charged for implement thereof, wherein there were special obligations for infefting the charger, who had married the defender's daughter, in the estate, free of all debt, for performance whereof he was charged, and denounced for not giving obedience.—To the *second* it was *replied*, That the denunciation being at the head burgh of the shire of the Mearns, the relaxation within year and day ought to have been at that same place, and being at Edinburgh was null.—THE LORDS did repell the first defence, and found, That letters raised upon a contract, bearing special heads and articles, albeit the execution did not bear the particular head craved to be performed, yet they could not be called general letters, such as resolved in a naked citation, as when a party is charged upon a presentation to a benefice or any other office, *ad certiorandum*, and who is not otherwise obliged by bond, and so sustained the declarator. They did likewise the second allegiance, in respect of the 75th act, Parliament 6th, James VI. bearing expressly that all relaxations should be at the same head burgh of the shire where the rebels were denounced, and did dwell the time of the denunciation, otherwise to be null.

*Fol. Dic. v. 1. p. 262. Gosford, MS. No 792. p. 498.*

No 61.

No 62.

Relaxations must be executed at the head burgh of that same shire where the denunciation was made, otherwise they are null.