

ling where he was charged, which allegiance was found relevant, and so that the horning was null, and therefore the Baillies were assoilzied *simpliciter* from the pursuit; albeit the pursuer *replied*, That the horning could not be found null for that alleged defect, seeing it was executed against a burges of Ayr, whose dwelling must be presumed to be in Ayr; and also, that the execution bears, that a copy was delivered to his wife, being then personally present; likeas, it was further *replied*, That the Baillies cannot excuse themselves by that alleged nullity, to put the said rebel to liberty, whom they had apprehended by virtue of letters of caption, and had once incarcerated, after whose incarceration, they could not at their own hands, without a warrant of some sovereign judge, enlarge him thereafter. Which reply was not respected, for the horning was found null for the reason foresaid, and so they had no necessity to have taken him, who was not lawfully at the horn; and, being taken, they had no necessity to retain him in ward.

Act. Miller.

Alt. Belsher.

Fol. Dic. v. 1. p. 264. Durie, p. 217.

\*.\* Spottiswood reports the same case :

THE Baillies of Ayr being convened by Adam N. for letting Robert Dalrymple, (whom by virtue of letters of caption they had first apprehended at that N. his instance) free again, they *objected* nullity against the horning, because the officer in his executions said only that he had charged Robert Dalrymple, burges of Ayr, at his dwelling-place [without further, not saying, *there*, or designing his dwelling particularly] and likewise had given his wife a copy. The horning was annulled for lack of that one word or circumstance, for things that are odious should not be extended.

Spottiswood, p. 148.

1632. November 9.

MONTGOMERY against L. FERGUSHILL.

A GENERAL declarator of the escheat and liferent of ———, being pursued by Montgomery, the rebel's creditor, and which he declared he took and used only to recover payment of his own debt; Fergushill defender being also donatar and creditor of the same rebel, *alleging*, That the pursuer's horning produced, whereupon the gift of escheat was given, was null, because the debtor was not charged, neither personally, nor at his dwelling-house thereby, in so far as the execution bore, that the messenger charged the said debtor, whom he designed by the style of his roun of ———, at his dwelling-place there, and the execution designed no dwelling-place particularly, whereat he charged him, as it ought. This allegiance was repelled, and the horning sustained, for the execution was holden, as if it had borne to be done at the party's dwelling-

No 87.  
'there,' was found null, and the debtor being incarcerated, the magistrates of the burgh were assoilzied from an action at the creditor's instance for suffering him to escape.

No 88.  
An execution of a horning, designing the debtor 'of A,' and bearing the charge to be left at his dwelling-house *there*, was sustained.

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