SECT. II.

What is understood to be a party's dwelling-house.

1674. *February* 11. M'CULLOCH *against* GORDON.

No 29.
A charge of horning given at a debtor's house in the country, was sustained, though he had lived more than 40 days in Edinburgh, prior to the charge.

SIR ALEXANDER M'CULLOCH having taken a gift of the escheat and liferent of William Gordon, in name of John Blain his servant, pursues declarator. The defender *alleged* absolvitor, because the horning and gift were null, whereupon he had raised reduction and improbation, and repeats his reasons by way of defence, viz. That the charge of horning was given in the night time, whereas poinding and all legal executions should be in the day time, especially being done at dwelling-houses, and not personally. 2*do*, The messenger or witnesses employed by Sir Alexander, did take back the copy, that it might not come to William's knowledge, being then at Edinburgh. 3*tio*, William had been more than 40 days at Edinburgh, and so his domicile was changed into Edinburgh, and he was not charged there. 4*to*, The gift was null, as being surreptitiously obtained from the King, containing an extraordinary clause, 'to be 'without back-bond,' which clause was not mentioned in the docquet, which docquet, or the draught thereof, was drawn at Edinburgh by Sir Alexander, or his writer, by advice and consultation to leave out that clause out of the docquet, dispensing with the back-bond. To all these it was *replied*, That the reduction and improbation could not be received by defence, not being seen and returned; for it was so found against Sir Alexander in the declarator at William's instance against him; and as to the particular reasons, it was *answered*, that no law had determined the time of giving charges of horning; and if a nullity were sustained upon that account, it might be the foundation of quarrelling of most hornings, both to the prejudice of the King and creditors; and as to the taking away of the copy of the charge, it is not relevant in itself, nor can be made use of against the pursuer, unless it had been done by his warrant or direction, probable only by his oath; for he is not countable for the fault of the messenger or witnesses, nor is it relevant that he was 40 days in Edinburgh, and not charged there, because the domicile remained in Galloway, where he had *larem et focum*, so that a charge against him in either place might be sufficient.

THE LORDS found, That seeing the reasons of reduction were fully debated, they would take them in by exception, but would supersede extract till Sir Alexander's reduction were also discussed; and found that reason of reduction relevant, that the messenger or the witnesses employed by the pursuer did take

No 29. away the copy of the charge, without necessity to allege any further command, than that he employed them; but found not the giving of the charge in the night time relevant *per se*, nor the residence in Edinburgh 40 days; and found that the tenor of the docquet did not annul the gift, but reserved to the defender to make application for obtaining a back-bond in favours of the creditors, for making the pursuer countable, as if a back-bond had been granted, as accords, and that the Exchequer was proper in that case, which had already past the pursuer's gift without a back-bond; the same allegeance being proponed upon the docquet.

Fol. Dic. v. 1. *p.* 259. *Stair, v.* 2. *p.* 264

1702. *December* 30.

Captain Gordon, brother to Earlston, *against* Sir Alexander Campbell, *alias* Home, of Cesnock.

No 30.
An advocate who had retired to the country after the Session, was cited at his house in Edinburgh, which he had hired till Whitsunday, and where his furniture remained. The citation was found null.

Captain Gordon being married to a daughter of the late Cesnock's, and being creditor to him in 30,000 merks for his wife's provision, and in sundry other sums, he pursues Sir Alexander, who had married the other sister, and by her had got right to the estate, for payment. *Alleged*, No process, because the summons is not execute at his right dwelling-house, in so far as he is cited at a house in Edinburgh, where he once dwelt, but was retired to his country-house at Mounton before the citation. *Answered*, Is is notour that he dwelt in that house the winter immediately before his citation; that he had taken it to the Whitsunday thereafter, and kept possession of it by his plenishing remaining in it; that his going to a country-house in the summer-time did not alter his domicile; that whatever might be said if this were the execution of a horning, or any inhibition, yet it was more than sufficient for a summons, if it be execute where a defender is commonly habite and repute to reside, the other being but a *diversorium*. *See* the 20th November 1672, Paterson *contra* Farmer, Div. 2. Sec. 5. *h. t.*, and 11th February 1674, M'Culloch *contra* Gordon, No 29. p. 3701. Likeas, the defender, being an advocate and a commissary, his residence is presumed to be at Edinburgh; and so Stair's Institut. lib. 1. tit. 12. § 16. shews it was decided, Archbishop of Glasgow against Logan, *voce* Public Officer. To this last it was *replied*, That this citation being in April, neither the Session nor Commissary-court were then sitting, but it was close *feriat*, and it were very hard to make the members of the college of justice liable on citation at their houses in Edinburgh in the time of vacance, when they and their families are in the country, and never hear of such executions; and this were to put them in a worse case than the other lieges, and to make them convenable *et sortiri forum* in two several domiciles at once. The Lords, by a plurality of five against four, sustained the dilator, and found the citation null.

Fol. Dic. v. 1. *p.* 259. *Fountainhall, v.* 2. *p.* 170.