

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 allegiance 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 horn-ing, 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. *b. 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. Fountainball, v. 2. p. 170.