

that the gift and disposition of his escheat was made and disponit before the time or he was lawfullie put and denunciit to the horn, and against the tenour of the act of Parliament made be James Earl of Murray; and also that he was not denunciit lawfullie and orderlie, in so far as he was not denunciit at the heid burgh of the shyre where he dwelt, after the manner of the act of Parliament made in *anno* 1579, cap. 75. 'anent the punishment of persons that contempt-ouslie remain at the King's horn,' that relaxations and denunciations of hornings sould be made at the heid burgh of the shyre where the partie dwells. And also it was reasonit be the advocate, that the act of adjournal buir that the said Earl sould be denunciit at the croce of Edinburgh, and uther places neidfull; and thir words, ' uther places neidfull,' were put *copulative, et debent aliquid operari*; and so he behovit to have been denunciit not onlie at the mercat croce of Edinburgh, but also at uther places neidfull, whilk was the head burgh of the shyre where he dwelt and had his residence at that time. To all this was *answerit peremptorie*, That they offerit them to prove that it was and has been ane custom inviolablie observed be the space of 100 years, and sundrie and diverse sentences given thereupon, and sundrie and diverse hornings containeid into the register of the same tenor; and of the law, *inveterata consuetudo est vice legis*, that the partie has been put to the horn, and denunciit rebel at the place where the compearance sould be, and specially that be the foresaid space, that parties being summoned to compeir at Edinburgh to underly the law, and them not compeiring, have been denunciit rebels, and put to the horn at the croce of Edinburgh, and no uther place, and this to have been observit dayly to this present.—THE LORDS, after long reasoning, pronuncit be interlocutor, That the reason of the summons was relevant, notwithstanding of the exception whilk was appearandlie to be verie particular. THE LORDS were movit be the act of Parliament before rehearst, and *leges predict., de quibus consuetudo habet locum quando non est lex scriptum*.

*Fol. Dic. v. 1. p. 261. Colvil, MS. p. 366.*

1626. June.

STIRLING against ABERNETHY.

HORNING against a person dwelling in a regality, is sufficient, if he be denounced at the head burgh of the shire, except the defender would allege, that there is a head burgh of regality and a clerk resident with a register, who was in use to registrate hornings before the time contraverted.

*Fol. Dic. v. 1. p. 261. Spottiswood, (HORNING.) p. 146.*

1672. January 11. JAMES SCOTT against BOYD of Temple.

MR JAMES SCOTT being donatar to the liferent of escheat of Boyd of Temple, did pursue a general declarator upon the gift.—It was *alleged*, That the horn-

No 58.  
nounced at the head burgh of the shire where he resides, otherwise the denunciation is null, and this notwithstanding of 100 years uninterrupted custom to the contrary.

No 59.

No 60.  
Found as in No 59.

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;