November 1680, Hay against Lady Ballegerno, No 146. p. 3790. *voce* EXECUTION, and No 28. p. 6960. *voce* INHIBITION. No 14.

1676. *December* 19. INGLIS *against* HADDOWAY.

No 15.
Inhibition not found null, because the execution did not design the dwelling house, it being afterwards designed and abidden by.

JAMES INGLIS having pursued reduction *ex capite inhibitionis* against John Haddoway, the defender *alleged* absolvitor, because the inhibition is null, the execution at the market crose not bearing 'a copy affixed upon the cross,' which is requisite in all executions; and upon a less informality, an inhibition against Caskieben was found null, because a copy was not delivered to the party inhibited, in the process at the instance of Keith of Caskieben against Johnston, decided upon the 28th of July 1671, No 143. p. 3786.—It was *answered*, That the not affixing a copy when the law requires it, may be a nullity, as in executions at the dwelling house in absence; but there is no law requiring the affixing of an execution of an inhibition upon the cross; nor is there any such thing required by the act of Parliament 1581, cap. 119.; and therefore it hath been the constant custom to have executions of this tenor, without mention of a copy left or affixed at the market cross. But it hath been the constant custom to give a copy to parties inhibited; and the delivery of a copy to the party in Caskieben's case, was not in the execution when it was registrated, but added by the messenger's hand *ex post facto*; whereas here the registration is a sufficient intimation to the lieges.—It was *replied*, That there are many nullities by common law without statute, in case any necessary solemnity be omitted; and as to that act of Parliament, there is nothing prescribed as to the executions of inhibitions in it, nor in any other act, but only as to the registration; and as to the custom, it is denied, and though it were, it is an unwarrantable and an evil custom.

THE LORDS did appoint by act of Sederunt, that in time coming, the executions of all inhibitions should bear a copy affixed upon the cross, or otherwise they should be null: But as to this, or preceding inhibitions, the Lords allowed either party to produce any executions they thought fit, to clear what had been the custom in that case.

December 22. 1676.—IN this dispute, the 19th instant, it was further *alleged*, That the inhibition was null, because, being executed at the dwelling house of the person inhibited, the dwelling house was not designed; upon which reason hornings have been found null, and inhibitions are of more moment.—It was *answered*, That horning is more odious and penal than inhibition, which doth the debtor no hurt, and is an execution for securing of creditors, and therefore the Lords may justly supply it, by condescending on the dwelling house, which is only necessary as a mean of improbation; and here the execution bears, that the person within-written was inhibited, and in the body he is designed; and

No 15. therefore it must be presumed his dwelling house was according to his designation.

The Lords found, That the designation was not in such a place, but of such land; and yet they sustained the execution, upon designing the dwelling house and abiding by the same, as the true place of execution.

Fol. Dic. v. 1. p. 552. Stair, v. 2. p. 480. & 484.

1677. January 12.

The Creditors of the Laird of Wamphray *against* The Laird of Calderhall and the Lady Wamphray.

No 16.
An instrument of registration produced in process, being objected to, for not bearing production of the procuratory, the Lords would not allow the notary to give out another instrument, bearing that the procuratory was produced.

In a competition betwixt the Creditors of Wamphry and Calderhall, as donatar to his escheat, competing for the sum of L. 12,000 due to him by the Earl Annandale;—it was *alleged* for the donatar, That the sum fell under Wamphray's escheat, having been required by Wamphray.—It was *answered* for the Creditors, *1mo*, That albeit requisition had been fully made, the sum bears annualrent, and therefore is not moveable *quoad fiscum et relictam* by the act of Parliament 1661; *2do*, There was an instrument of requisition judicially produced, which was null, not bearing a production of a procuratory.—It was *replied* to the *first*, The act of Parliament is opponed, by which the fisk and relict are in the same condition as they were before that act; and then requisition or a charge did make sums bearing annualrent or infeftment simply moveable, unless past from, by taking annualrent for terms posterior: And as to the *second*, the first instrument of requisition would have been sufficient, though it bore no mention of procuratory, which is presumed to have been known to the party; and therefore the Lords have in many cases sustained requisition or premonition by procurators, without mention of the production or reading thereof, when an anterior procuratory is produced in process, and when the procuratory was not called for, and refused to be produced at the time of the requistion.—It was *duplied*, That though in some favourable cases the Lords have dispensed with, or supplied the not production of a procuratory or warrant, as in redemption of land, or in questions betwixt the heir and executor, yet it was never extended to sustain a requisition to make a sum moveable, and thereby to fall to the fisk, which is penal, loosing the sum to the creditor, and all having interest in him; neither can a second instrument from the same notary be admitted, after the first is judicially produced, albeit the Lords, upon supplication, representing that the notary refused to extend an instrument, without mention of the former instrument extended by him, and judicially produced, did give warrant to the notary to extend it, which passeth in course always.