

No 11. his oath, or the absolvitor thereon; the verity whereof he referred to the pursuer's advocate's oath. It was *answered*, That judicial processes cannot *ex intervallo* be made up by clerks, either upon their own memory, or the advocates', or even the Judges, but must be minuted *ex incontinenti*, albeit once minuted and lost, the tenor of it might be proved; otherwise the lieges would be in great insecurity.

THE LORDS found, That the minute never having been written, could not *ex intervallo* be made up by the oath of the advocate, against whom the minute was alleged, and the like as to the clerk or Judge; for there was a reduction at one Buchannan's instance, against Lieutenant Colonel Osburn, of a decret of the English Commissioners, bearing, His compearing and consenting to a determination upon a judicial submission to these Commissioners, which was not minuted when done but some months thereafter, which therefore was reduced by the LORDS.

Fol. Dic. v. 2. p. 212. Stair, v. 2. p. 796.

1680. November 19. HAY against LORD BALLEGERNO.

No 12. EXECUTION of an inhibition, bearing to be at the dwelling-house, and not mentioning six knocks, but only several knocks, was not allowed, after registration, to be supplied by a proof that six knocks were actually given; for if one defect may be supplied by witnesses, every defect may be so supplied, and so it would come out, that solemn instruments are not requisite for vouching *actus legitimi*, but that the same may be proved *prout de jure*, like any ordinary fact.

Fol. Dic. v. 2. p. 213. Stair. Fountainhall.

* * * This case is No 146. p. 3790., *voce* EXECUTION; and No 28. p. 6960. *voce* INHIBITION.

No 13.
The executions of an inhibition sustained, tho' not bearing three o-yesses, but only lawful publication, it being offered to be proved by the witnesses, that three o-yesses were made.

1681. June 21. LUNDIE against TROTTER.

MR JAMES LUNDIE pursues reduction of an inhibition at the instance of Alexander Trotter, upon this reason, that the execution at the market-cross doth not bear, that the messenger, before reading of the letters of inhibition, did make three o-yesses, which are necessary in all citations and intimations at market-crosses, the design whereof being to publish to the lieges, that they may know, and that it may by common fame be carried to all parties having interest, which cannot be done by reading of the letters, which the messenger might do clandestinely; and though he did affix a copy, yet the user of the inhibition might cause any person take it immediately down, and yet the messenger might say that he left a copy affixed, because, when he began to leave the cross, the copy was up, and immediately taken down, and therefore, the only secure way

to publish the letters to the people, is by three cries with a loud and audible voice; for though the messenger should thrice say o-yes with a low voice, if that were known, it would annul the publication; and as the law requires six knocks to executions in absence, where the doors are close, that these within may hear to open, so it doth require three o-yesses to precede all public citations and intimations. The defender *answered*, That he oppones the executions, bearing, that the messenger made lawful publication of the letters of inhibition, which necessarily implies more than the reading of the letters, and so the premitting the o-yesses; and if need be, he offers to prove, that he made three o-yesses with a loud and audible voice immediately before the reading of the letters. *2do*, Though he had omitted three o-yesses, the public reading of the letters with an audible voice is sufficient, and the law doth not precisely require three o-yesses; for if the messenger had sounded a trumpet, or blown a horn, it would have made the people to flock to him better than three o-yesses; and there is no consequence from the six knocks, because there is a particular act of Parliament enjoining the same, but there is neither statute nor fixed custom for three o-yesses, seeing many public executions do not bear three o-yesses, but only making publication of the letters. It was *replied*, That albeit there be not a statute for three o-yesses at publications, yet there is a fixed custom so to do, and if they were expressed and improved, the executions would be rescinded as false; and albeit the executions of some messengers are so informal as not to express the same particularly, yet no messenger durst ever pretend that they were not truly given, and a fixed custom cannot be supplied by any equivalents.

THE LORDS having caused the clerk of register in a former case inspect the registers of hornings and inhibitions, what was the ordinary stile of the executions as to this point, who having reported, that the ordinary stile was three o-yesses, yet many bore only that the messenger made publication of the letters; therefore the LORDS did not simply annul these executions for not expressing the three o-yesses, but sustained the allegiance, that three o-yesses were truly given immediately before publishing of the letters, to be proved by the witnesses inserted in the executions. The contrary seems to be decided the 10th July 1676, *Stevenson contra Innes*, No 10. p. 12267.

Fol. Dic. v. 2. p. 213. Stair, v. 2. p. 876.

1684. February.

THREAPLAND against STRAGHAN.

AN execution of a warning to remove being challenged as disconform to act 75th, Parl. 1540, the defect was not allowed to be supplied by witnesses, that, *de facto*, a copy was affixed to the most patent door of the house.

Fol. Dic. v. 2. p. 213. Harcourt.

* * * This case is No 99. p. 3730. *voce* EXECUTION.