this sentence liberated him from both, they did *ex proprio motu* interdict him as a prodigal and lavish person, and did appoint two of their number to be interdictors, and ordained the interdiction to be published and registrated.

No 13.

Stair, *v.* 2. *p.* 861.

1681. *December* 2. GORDON of Park *against* ARTHUR FORBES.

No 14.

THE execution of an interdiction found null, because it bore not 'after three 'oyesses,' but only 'after proclamation and public reading of the letters;' but this was stopped.

Harcarse, (INTERDICTION.) *No* 643. *p.* 177.

*** Fountainhall reports this case.

Dec. 1.—AN interdiction was found null, because its execution did not bear three oyesses to have been given.

Fountainhall, *v.* 1. *p.* 165.

1682. *February.* Sir JOHN GORDON of Park *against* ARTHUR FORBES.

No 15.
An interdiction which had been published before the custom of oyesses was established, was not found ineffectual, altho' they were a-wanting.

A REDUCTION of an interdiction against my Lord Salton, in the year 1601, being pursued by persons to whom he had disponed some lands after the interdiction, upon these reasons; 1*mo*, The executions were null, because they bore not the oyesses; nor, 2*do*, That a copy was left on the most patent yett, but only that it was left on the yett; 3*tio*, It did not bear that a copy was left, because he could not be personally apprehended; 4*to*, The execution did not say, after publication and public reading, but only, after reading and open proclamation.

Answered; The formality of the oyesses was not introduced by statute, but established custom, long after the year 1601, as appears from the registers, where, within five years after the 1601, upwards of two hundred and fifty inhibitions and interdictions want oyesses, whereof some were raised at the instance of the President of the Session, and others of the Lords Register and advocates, who best knew law and custom. 2*do*, When the execution bears that a copy was left on the yett, that is to be understood of the most patent yett; besides, the interdiction being raised by the party's own knowledge, needed not to be personally executed. 3*tio*, The act 33d Parl. 6. Queen Mary, and act 86th Parl. 11. James VI. speak not of oyesses or public reading, but of open proclamation; which is a compendious expression of the calling the people and public reading, &c.

No 15. THE LORDS considering that this interdiction was older than the foresaid custom of making oyesses, were unwilling to determine this point.

Then the pursuer *insisted* on this reason of reduction, That the interdiction was loose and discharged, which was enforced from these presumptions, viz. Salton having sold his lands over cheap to Ochiltry, his heir raised reduction *ex capite lecti et minorenitatis*, and in *anno* 1617, applied to the parliament for an extraordinary remedy, without mention of the interdiction, which had been an easy and obvious method. And after the registers were carried to London, the Lord Salton, pursuant to an order from Cromwell, having caused search them, got up several papers concerning his estate without receipt, and probably a discharge of the interdiction was among them; and the registers having perished at sea, the thing cannot be otherwise made out. Again, the interdicted person's wife narrated in a suspension 1605 that the interdiction was loosed, and she being one of the interdictors, knew that matter of fact best; nor was ever the interdiction libelled on till the year 1658, after that Salton and James Abernethy his agent, had been among the registers.

Answered; The interdiction is opponed, of which there is no discharge produced; and it cannot be taken away by presumptions.

THE LORDS found the interdiction to have been loosed upon the foresaid presumptions; and therefore assoilzied from the interdiction *ex capite interdictionis*. *See* PRESUMPTION.

Harcarse, (INTERDICTION.) *No* 644. *p.* 177.

*** Sir P. Home reports this case:

THE Lord Salton, in the year 1612, having disponed the lands of Salton-park and others to the Lord Ochiltree, who having disponed the lands of Park to Sir Adam Gordon of Park; as also, the Lord Salton being debtor to Sir Adam in several bonds, who thereupon apprised the said lands of Park; and the Lord Salton having recovered a decreet of reduction against Sir John Gordon now of Park, oye to Sir Adam; and the Lady Park his mother, and others, reducing this disposition granted by my Lord Salton to the Lord Ochiltree, and lands granted to Sir Adam, whereupon the comprising followed upon this reason, that the Lord Salton was interdicted before the granting the disposition and bonds; and Sir John Gordon having raised a reduction of that decreet and interdiction upon these grounds, that the decreet was in absence as to Park, he being then at London about his ward and marriage; at least that there were only some dilatory defences proponed, which cannot now prejudge the pursuer in reducing of the decreet; as also, that he was minor, and that the same has been made up by the collusion of his tutors and curators; and that the interdiction was null, as not being lawfully executed, in so far as the execution at the market-cross does not bear public reading and three several oyesses; and the execution against the party at his dwelling-house does not bear that there was a copy affixed at the most patent gate; nor does it bear the reason of executing the interdiction at

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his dwelling-house, which is, that he could not apprehend him personally; as also, there were many strong presumptions that the inhibition was discharged: *Answered*, That the decreet in *foro* against Park was opponed, where he is so far from pretending that the interdiction was discharged, that in the contrary it is expressly *alleged*, That he had right to the interdiction by a prior apprising, which was repelled for the reason mentioned in the decreet; and the execution is not null, albeit it wants the foresaid solemnities, because it bears to be after the reading of the letters and by open proclamation, which is a sufficient publication to the lieges, and there is no law nor statute requiring these solemnities; and the register being searched, above 257 inhibitions in five or six years time want these solemnities, which, if they should be reduced upon that ground, would be a dangerous preparative and infinite prejudice to the lieges; and it can be made appear by the registers, that before the 1601, there are above 600 inhibitions and interdictions which may be quarrelled upon these grounds; and interdiction being executed in the year 1601, it cannot now be quarrelled upon that ground after so long a time, especially being prescribed; and interdictions and inhibitions which are the grounds of many mens rights, cannot be taken away upon presumptions that they are discharged, unless the discharge were produced and the tenor proven; and, albeit these reasons had been relevant, yet being competent and omitted, cannot now be received after a decreet in *foro*. *Replied*, That it has been the style of writs, and has been the constant custom and practice for above these 100 years bypast, that such solemnities as these should be adhibited to the executions of interdictions, inhibitions, and other legal diligence, otherwise to be null; and constant custom is equivalent to a law in these legal executions as well as in other things; for there is no law in case of denunciations that there should be three blasts of an horn, or a copy affixed upon the cross, or that resignation should be by staff and baton, or that sasine of lands should be of earth and stone, or of a mill by clap and happer, or of an annualrent penny money, and the like as to many other solemnities; for which, albeit there be no law but constant custom, yet if the right want any of these solemnities, they are *ipso jure* null; and by the 75th act, Par. 6. Ja. V., it is expressly provided, That if the person to be cited, cannot be gotten personally, the execution shall be left at the gate or door of the principal dwelling-house where the party resides, and that all this be expressed by the messenger in the execution; so that this execution of the interdiction wants a solemnity expressly required by the law; and that such executions are null, is clear by the constant practice; and particularly, 28th July 1671, Keith against Johnston, No 143. p. 3786. where the Lords found an inhibition null because the executions as they were registrate, did not bear a copy given to the party inhibited, notwithstanding that the messenger had thereafter added upon the margin, that a copy was delivered; and that not being inserted before the registration, could not be thereafter inserted, nor at all supplied by proving by the witnesses inserted, that a copy was truly given, and that the defender

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was a singular successor, who had bought for a just price; and likewise in the action Stevenson against Innes, No 145. p. 3788, an inhibition is found null, because the execution does not bear public reading of the letters of inhibition at the cross, and three several oyesses, notwithstanding it was alleged for the pursuer, That the messenger lawfully inhibited the lieges and offered to prove, that the letters were truly read and three oyesses given; and such like Hay against Powrie, No 146. p. 3790. and No 28. p. 6962, the Lords found the inhibition null; because, albeit it bears several knocks at the debtor's dwelling-house, yet it did not bear specify six several knocks, notwithstanding that the inhibiter offered to prove by witnesses in the execution, that six several knocks were truly given; and in an action ——— against ———, an execution being quarrelled, that it did not bear three blasts of an horn at the cross, but only the blasts of an horn, the Lords found the execution null, notwithstanding it was alleged it was only the omission of the writer in writing *the* for *three*, and that the party offered to to prove that there were three blasts given, by the witnesses inserted; and there are so many pregnant presumptions that the interdiction was discharged, which being conjoined with the nullities of the interdiction, is sufficient to take away and annul the same; and the decreet *in foro* cannot be obtruded as being competent and omitted, because these grounds of reduction were not competent by way of exception, but only by reduction: And the Lords, before answer to the nullities, having ordained Park to condescend upon such grounds as may give any probability that the interdiction was loosed and discharged; and accordingly he gave in a condescendence that the Lord Ochiltree was known to be a very wise and understanding man, and was so well acquainted with the Lord Saltoun's affairs, that he would never have taken the foresaid dispositions from the Lord Saltoun, if he had not known the interdiction was loosed and discharged; and the minute book of acts and decreets before the Lords, betwixt the year 1604 and 1612, bears several acts and decreets, the Lord Saltoun against the Laird of Buckie and others, to whom the Lord Saltoun was interdicted, which certainly was for annulling or loosing of the interdiction; but the registers and warrants of these times being lost, the pursuer cannot get an extract of these acts and decreets; and the Lord Cranston did procure a warrant from Oliver Cromwell, the usurper, to search the registers, and to take out what belonged to him relating to the estate of Saltoun; and, at that time, it is probable, that Abernethy, or some other of Saltoun's agents, might have abstracted the book of the register, where either the discharge or the decreet of reduction was inserted; which is the more probable, because Abernethy grants an obligement to the Laird of Rothemay, whose estate likewise fell under that interdiction, that the Lord Saltoun should recover no decreet against him; and, at the Parliament 1617, the Lord Saltoun and his friends having given in a complaint against the Lord Ochiltree for his taking of the foresaid dispositions from his father without any onerous cause, and the

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Parliament having appointed a committee for trying thereof, who having made report that it was granted for a most onerous cause, Ochiltree was assoilzied, and the interdiction being a clear ground in law to have reduced the disposition, if there had been any such thing, the Lord Saltoun would not have made use of such an extraordinary remedy as to apply to the Parliament to have obtained the disposition reduced upon that ground as not being granted for an onerous cause, if there had been an interdiction, which was a clear ground to have reduced the disposition, and would certainly have insisted on that reason rather than the other, that it was granted without an onerous cause; but it seems things being then recent and sufficiently known that the interdiction was loosed or discharged, they thought it needless to have insisted on that reason; and the Parliament, upon the report, having found, that the disposition was granted for an onerous cause, the Lord Saltoun did ratify the disposition, which he would never have done if he could have quarrelled the same upon the interdiction; as also the Lord Saltoun's friends not being satisfied with the foresaid decision in Parliament, notwithstanding he had ratified the disposition, the Lord Saltoun grants a bond to Sir Archibald Stuart of Blackhall for L. 100,000, upon which he had an apprising of the estate of Lord Saltoun; as also Walter Stewart, one of the gentlemen of the Privy Chamber, obtained a gift of the Lord Saltoun's ward and marriage, non-entry, single and liferent escheat, and thereupon obtained general declarators, and pursued several actions, as reduction of the foresaid disposition made by my Lord Saltoun *ex capite lecti*, wherein there was much debate, and many witnesses examined, and Ochiltree was assoilzied; and thereafter there was a reprobator raised against the testimony of these witnesses deduced in that process, and there was a reduction raised of the decreet of absolvitor, and there was a summons of compt and reckoning and reduction, at Walter Stewart the donatar's instance, and summons of mails and duties, in all which processes, there was considerable progress made, and certainly the Lord Saltoun and his friends would never have been at the trouble, charge, and expenses in intenting these actions upon such strained grounds, if there had been an interdiction, which was a short and easy way to have reduced the disposition, and to have taken away Ochiltree and Park's right; and they finding, that none of these processes could be effectual, then they make up a summons of reduction, at my Lord Saltoun's instance, of the foresaid ratification, by battering the tail of an old summons to a sheet of new paper, and making the same as if it had been subscribed by one Litefoot a writer, in the year 1643, whereas he was born in the year 1640, and so could not be subscribed by him as a writer; and the reason of reduction is upon minority, and not upon the interdiction, and the summons was only made up by James Abernethy, the Lord Saltoun's agent; so that these summonses and executions by a decreet of the Lords, February last, *in foro*, were improven, and found to

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be false and feigned; and it cannot be supposed they would have been at the pains or hazard to have made up such a summons and execution upon minority, if Saltoun could have quarrelled the disposition upon the interdiction; and his interdiction was never heard of till the year 1658 or 1659, that these reasons were filled up in the blank summons of reduction raised the year 1655; so that it was never motioned from the year 1601 to the year 1655, and for the space of forty years, there was no action moved for reducing that interdiction; yet prescription cannot be obtruded in this case, the interdiction being null upon these intrinsic nullities, which do not prescribe; and albeit these nullities could prescribe, as they cannot, yet they could only prescribe from the time that the interdiction was made use of; but so it is, that it is not 40 years betwixt the time of the reduction mentioned upon the interdiction against Park, and the time that Park has raised the reduction of the interdiction upon the foresaid nullities; and albeit there had been several decreets founded upon the interdiction, reducing several rights, yet it cannot be made appear that these nullities were proponed and repelled; and if there were any such decreets, they are *res inter alios acta* as to the pursuer; and albeit there are several witnesses, who being examined upon the loosing and discharging of the interdiction, who are alleged to have denied the same, there was no such thing made appear by the depositions; and albeit the witnesses had denied the same, yet being but a negative, doth not take off the foresaid presumptions, which doth sufficiently evince the loosing and discharging of the interdiction, and especially seeing Park likewise produces an act of continuation, dated in February 1605, which proceeds upon and relates to a reduction raised at the Lord Salton's instance against John Gordon of Buckie, and the other persons to whom he is interdicted, for reducing of the interdictions, as being renounced and discharged, by a discharge dated at Rothie; as also an extract of an act of continuation in an improbation at the Lord Salton's instance, against the persons to whom he is interdicted, dated in February 1650; as also an extract of a discharge granted to the Lord Saltoun and his mother, who was one of the persons to whom he was interdicted, in favour of John Urquhart, tutor of Cromarty, for the sum of 10,000 merks; which certainly Cromarty would not have paid upon their discharge, but would have taken a discharge from Saltoun, with consent of a quorum of the persons to whom he is interdicted, if the interdiction had not been discharged and loosed; and albeit Park had offered any sum of money to the Lord Saltoun, for a ratification to redeem his trouble and expenses at law, yet that cannot be understood that he was anywise doubtful of his right; and therefore he conjoins the foresaid presumptions, that the interdiction was loosed or discharged with the foresaid grounds of nullity of the executions of the interdiction, which are sufficient to take away the interdiction; and in an action of Mercer of Calbage against the Lady Aldie, * the LORDS found that a bond for a considerable sum of money was satisfied upon such presumptions, albeit the discharge was not produced nor the

* Examine General List of Names.

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tenor of it proven. *Answered* for the defender, That no respect ought to be had to the foresaid presumptions, which cannot be sustained to take away the defender's right, unless the discharge were produced or the tenor proven; and for that effect a proving of the tenor ought to be raised, in the which the tenor of the discharge must be libelled, and the *casus amissionis*, and that the tenor of the discharge were offered to be proven by the witnesses insert, or that the same was seen by other witnesses, and that there were adminicles produced for instructing thereof, which is always observed in making up the tenor of writs of the least importance; as was done in the case of Turnbull against the Lord Cranstoun, * in the reduction and improbation of a doom of forfeiture; which the Lord Cranstoun having alleged was lost and miscarried, the LORDS appointed the tenor to be proven; which they allowed to be taken *incidenter* in the same process; but will not allow to be proven that there was such a doom of forfeiture, unless the tenor thereof were formally proven; so that all the presumptions condescended upon are not proper to be considered in this process, but only in the proving of the tenor; and if the pursuer were in a proving of the tenor, no weight could be laid upon these presumptions; for albeit the Lord Ochiltree had been a wise and understanding man, yet he might have been mistaken in taking a disposition from my Lord Saltoun, after the interdiction, seeing the wisest of men are many times mistaken in their own affairs; and albeit the Lord Saltoun did insist upon other grounds of reduction, in which he was at great expense, yet it does not follow but that he likewise might have made use of that ground of the interdiction; and this is expressly proponed and repelled in the decreet *in foro*; and albeit there was a reduction intented and continued, yet it does not follow that ever it took effect by a sentence; and the decreets at that time in the year 1605 are yet extant in the register; and as to the petition given in to the parliament 1617, in the name of the Lord Saltoun, against Ochiltree, and that thereafter there was a ratification granted by Saltoun, yet that ratification is not granted upon that ground that Saltoun had granted the foresaid disposition for equivalent onerous causes; but the true reason was, the Lord Saltoun, who had granted the disposition, being in great debt, Ochiltree, for payment of the debt, sold the hail estate in the north, except only the lands and barony of Saltoun, which, by the foresaid contract, Ochiltree is obliged to dispone in the favours of the Lord Saltoun, without the burden of the debt, for which the Lord Saltoun, being freed of his father's debts, was to enter heir, and to ratify the rights made to Ochiltree, and the rights to others, for payment of the Lord Saltoun's debts; which was rather a presumption, that Ochiltree was conscious to himself of the invalidity of his right, when he was content to dispone such a considerable part of his estate to the Lord Saltoun, which was, in effect, all that remained over and above the payment of the debt; and nothing followed upon the foresaid contract; but, on the contrary, the Lord Ochiltree thereafter disponed these lands of Saltoun to

* Examine General List of Names.

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the Lord Innerpeffer, who thereafter, as can be made appear, being conscious of the insufficiency of his right, did pay 5000 merks to the Lord Saltoun for his ratification; and, albeit the Lord Saltoun got an order from Oliver Cromwell, the Usurper, for getting access to the registers, and to take out any papers that concerned him, or the estate of Saltoun, and so the discharge of the interdiction might have been abstracted, that pretence can be of no moment; for, not only is it competent and omitted, the declaration being in the year 1661 dated, and the decreet against Park in the year 1666, but such declarations not being upon commission of the Lords, cannot make any faith, especially seeing it is very well known, that such declarations might have been procured for a little money, and the registers are extant from the year 1602, and there is no vestige of any such discharge; and, albeit James Abernethy, Saltoun's agent, does give his obligement, that Saltoun shall recover no decreets against Rothemay, whose estate fell likewise under that interdiction, yet that obligement does not at all concern Park, and that defence is expressly proponed and repelled in the decreet, and Rothemay has homologated that decreet, he having, since that time, entered into a contract with my Lord Saltoun, whereby he is obliged to denude himself of the estate of Rothemay, in favour of my Lord Saltoun, upon payment to him of the sum contained in the contract; and Park was so conscious to himself of the weakness of his right, that he has several times offered a sum of money to the Lord Saltoun, to redeem the hazard of the plea. THE LORDS found the reason of reduction relevant, and reduced the decreet, and found the interdiction was discharged.

Sir P. Home, MS. v. 1. p. 69. No. 46.

*** The case without names alluded to in page 7138, is Gordon against Gray, No 115. p. 3767.

No 16.
A sum being only moveable, the Lords found, that an interdicted person needed not the consent of his interdictors to uplift it.

1684. *January* 22.

BERNARD DAVIDSON and SISTERS *against* THE TOWN of EDINBURGH.

THE case of Bernard Davidson and his three Sisters, children to Sir William Davidson, Conservator, against the Town of Edinburgh, mentioned 14th March, 1682, *voce* FOREIGN, No 9. p. 4444. was reported by Redford. This affair having been submitted, there was a decreet-arbitral, ordaining the Town to pay them L. 20,000 Scots, in full of their claim. When the discharges came to be drawn, they refused to discharge their elder brother Sir Peter's part of it, which had fallen in amongst them by his death, and alleged the L. 20,000 was decerned to them for their own parts only, seeing, by their summons, (which was the ground of their submission and decreet-arbitral,) they did not pursue for his part, not having as yet made up a title to it, by confirming executors to him, or otherwise. *Answered*, By the oaths of the arbiters and communers, it will be found, that the sum decerned was in satisfaction of the whole debt *quomodocunque* due to them. "THE LORDS found, they behoved