in the Bailie court books of Carrick, and if it was only *actus necessitatis* or optional to them. But it was not decided, because it was remitted to some of the Lords to settle them. No 124.

Fol. Dic. v. 1. *p.* 267. *Fountaidhall, v.* 1. *p.* 731.

*** The like was found 20th December 1705, Scrimzeour against Beatson, No 103. p. 3758.

1702. *July* 17. BIGGAR *against* WALLACES.

No 125.
An execution being left with some of the family at the defender's house, there is no necessity for the execution mentioning the knocks being given.

WILLIAM BIGGAR of Wolmet, as creditor to the deceased Sir William Wallace of Craigy, pursues Mrs Jean and Margaret Wallaces, his daughters, as lawfully charged to enter heirs, to the effect they might renounce, and he adjudge. —*Alleged*, No process; for the summons is executed on the same day with the charge to enter heir, and both executions are given *simul et semel*; whereas the 40 days on which the charge proceeds ought to be expired and run before the summons can be executed, because the libel narrates, they are lawfully charged to enter heir, and is expressly relative thereto, and so in the order of nature ought to precede the summons.—*Answered*, By the fixed custom and practice they may be both executed in one day, the charge to enter heir being first given, providing there be 21 free days given after the out-running of the 40 days appointed for the general charge, for the first diet, and six free days for the second; all which is punctually observed here, and which is introduced for the ease of the subjects, and diminishing their expenses on messengers.——THE LORDS repelled the dilator in respect of the answer.—2*do*, *Alleged*, No process; because, though the execution bears not personally apprehended, but only a copy left with some of the family at the defender's dwelling-house, yet it does not mention six knocks given, as the law requires.—*Answered*, This is no nullity; because the 75th act 1540, regulating these citations, only requires six several knocks at the most patent door, where the messenger is denied entry and access, and he finds the doors shut; but here there was patent access, and copies left with persons in the family, and so no need for the knocks; and it was expressly so determined by the Lords on the 11th of December 1679, the Countess of Cassillis against the Earl of Roxburgh, No 19. p. 3695.——THE LORDS likewise repelled this dilator, and sustained process.

Fol. Dic. v. 1. *p.* 267. *Fountainhall, v.* 2. *p.* 154.

1707. *June* 12. DUFF of Drummoir *against* GORDON of Achintoul.

No 126.
An execution of an inhibition was

DRUMMOIR having purchased in the preferable rights upon the estate of Anderson of Westertown, he pursues a sale and ranking of the creditors; wherein

No 126. found null, because it bore only three knocks instead of six, to have been given at the most patent door of the debtor's dwelling house.

compearance is made for Achintoul, and others, who *alleged*, 1*mo*, His rights purchased from Major Anderson, the debtor's brother, must be restricted to the sums duly paid out by the Major, because he was no more but trustee for Westertown, his brother, and so the eases and abatements got must accresce to him. 2*do*, He cannot even charge the sums paid by him, because both the Major and his authors, from whom he derives right, had great intromissions with the common debtor's rents and estate, which would exhaust, satisfy and pay what is resting. *Answered*, To the 1*st*, The trust is denied, and no backbond is produced; and, to the 2*d*, It is *res jurata*, because the Major has deponed, That the debts to which he has right are yet truly resting and owing, and were not for the common debtor's behoof. *Replied*, No regard to that oath, for it is only taken to facilitate rankings by the Lords *ex officio*, and not *deferente adversario*, not being craved by the creditors; and such oaths never hinder the alleging, that the debts were simulate, or extinguished by payment, intromission, compensation, or the like. *Duplied*, Here it must be understood to be upon the creditors application; for they gave in interrogatories, upon which he depones, and after which there can be no more inquiry. The Lords remitted the trial of this matter of fact to Lord Minto, Ordinary in the ranking. In the *third* place, Drummoir *objected* against an inhibition produced by Achintoul against Westertown, that its execution was null, because it only bore three knocks given at Westertown's dwelling-house door; whereas, the 75th act 1540, requires six. *Alleged*, That act relates only to summonses, and not to inhibitions and other diligences. 2*do*, Though that act enjoins six knocks, yet the omission does not annul the execution, but only punishes the messenger-executor, as the act 74th, immediately preceding, inflicts deprivation on him, if he omit to stamp his executions; and so it was found in a parallel case, Durie, 9th November 1624, Hope *contra* the Minister of Craighall, *voce* Kirk Patrimony, in a tack set by a churchman for his life, and five years after, without the patron's consent, that the penalty was not the annulling of the tack, but only deprivation of the setter; because, where the act adjects another penalty, without annulling the act, there it subsists; but the sanction only is inflicted and applied. *Answered* to the 1*st*, The act not only relates to summonses, but to all letters passing the signet, and so must include inhibitions, as well as other writs. To the 2*d*, If the want of the six knocks did not infer a nullity, the party would be in a very bad condition; for the depriving a messenger, or making him liable in damages, is but a very sorry relief. And the 5th act 1681, and 4th act 1686, regulating executions of hornings and inhibitions, taking away stamping, and introducing subscribing, and the date of the delivery, are all under the pain of nullity. And Hope, in his lesser practics, *cap.* 12. distinguishes *inter leges prohibentes et jubentes*, and thinks *ipsa prohibitio reddit ipsum actum, nullum et invalidum, sine clausula irritante.* The Lords did not regard these nice subtle distinctions, but found the bearing only of three knocks (it seems the messenger has been dreaming of the three oyesses in the publica-

tion of such letters), instead of six, was a nullity of the execution, and thereupon reduced the inhibition. No 126.

Fol. Dic. v. 1. p. 267. Fountainhall, v. 2. p. 370.

*** Forbes reports the same case:

IN a competition of the creditors of Westertown, the execution of an inhibition, used by Alexander Gordon of Auchintoul, against John Anderson, younger of Westertown, being quarrelled as null, for that it bore three knocks only to have been given at Westertown's dwelling-house; and the act 75, Parliament 6, James V., requires six knocks, which not being a ceremony, but an essential requisite for certiorating of the lieges, cannot be dispensed with; and, by constant custom, executions not bearing six knocks, are always reduced and found null.

Answered for Achintoul; Albeit the said act 75. requires the giving of six knocks, it doth not declare executions otherways given to be null, but only inflicts a punishment upon the executor, and *casus omissus habetur pro omisso.* And lately, an execution not bearing that the copies delivered contained the date of the delivery, and the witnesses names and designations, as the act of Parliament prescribes, was yet sustained, in respect that the statute did not annul the execution wanting such a clause.

THE LORDS sustained the nullity.

Forbes, p. 173.

SECT. VIII.

Stamp.

1610. *November* 22. HOME *against* PRINGLE. No 127.

IN an action pursued by Thomas Home, brother to Coldingknows, against James Pringle of Quhytbank, a horning was found null, because it wanted thir words, 'my signet is affixed.'

Kerse, MS. fol. 217.