No 147.

Queen Mary, Parliament 6, cap. 33. But the common stile of executions of denunciations mentions the delivery of copies to such as are personally apprehended.

Harcarse (COMPRISINGS) *No* 268, *p*. 63.

1682. *February*. Mr JAMES CUNNINGHAME *against* M'LEOD and HAMILTON.

No 148.

A MESSENGER's execution of arrestment, bearing that the letters were duly and lawfully executed, but not that a copy was left, found null and informal, and second arrester preferred, albeit the said first arrestment mentioned that the person against whom it was executed, was personally apprehended.

Fol. Dic. *v*. 1. *p*. 270. *Harcarse* (ARRESTMENT) *No* 77, *p*. 14.

1709. *July* 30. CROMBY *against* ROBERTSON.

No 149.
An inhibition was sustained though the execution did not bear that a copy was delivered to the party inhibited, in respect it bore that he was duly and lawfully inhibited and personally apprehended.

JOHN CROMBY, sheriff-clerk of Roxburgh, pursues a reduction against James Robertson chirurgeon in Jedburgh, for reducing a disposition of some lands made to him by one Scougal *ex capite inhibitionis*; against which Robertson excepted, that the inhibition was null, because, though the execution bore personally apprehended, yet it did not mention that a copy was delivered. *Alleged*, The inhibition was good, notwithstanding that defect; for being against him personally apprehended, law presumes *omnia fuisse solenniter acta*, and that a copy was given; and being duly published and registrated, that was sufficient to put him *in mala fide* to purchase; and, in a late case, No 159, p. 3805; where an execution bore the messenger had delivered a just and authentic, before the following witnesses, without saying 'copy' or 'double,' the LORDS found it an omission suppliable, and sustained the execution. *Answered*, The delivery of a copy was one of the most necessary and essential parts of an execution; and the 141st act, 1592, ordains copies of summonses, &c. to be delivered to the parties; and by act 75, 1540, the manner of the delivery of copies is there set down; and in executions against parties out of the country, a copy must be affixed on the market-cross of Edinburgh, and pier or shore of Leith. And Stair, p. 427, and 683, of his institutions, is most positive and express therein; and so is Hope, *Tit*. Horning, Monteith *contra* Kirkwood, No 93, p. 3754; and Durie, 24th December 1628, Potter *contra* Baillie, *voce* JUS TERTII, so that a personal execution will never suppose or presume the delivery of a copy. Neither can this defect be supplied by any other equivalent whatsoever; and where law or custom require a special solemnity, the want of it makes the deed null, *et quod nullum est nullos sortitur effectus*; and the publishing and registration does not supply the defect, for *bonum est ex integra causa, malum vero ex singulis defectibus*. *Replied*, There is no statute requiring the delivery of a copy where

he is personally apprehended, which sufficiently certiorates him, what is the party's design, viz. in hornings to pay; and as to inhibitions, not to sell to my prejudice; and there is no more necessary, and such formalities cannot be reduced by remote consequences; and law presumes a copy to have been delivered. THE LORDS thought this point of more importance than could be decided in the last day of a session, and therefore superseded to determine it till November.

No 149.

THE LORDS have been so nice on such executions, that where one, instead of three oyesses, said by wrong writing and mistake, 'the oyesses,' wanting only the letter R, they found it for that very defect, null.

November 18. 1709. The case mentioned, 30th July 1709, between Crombie and Robertson, was this day decided; and THE LORDS, by plurality, found the want of these words in the execution of the inhibition, 'that he delivered to 'the party a copy,' was not a sufficient nullity, but was supplied by these words, 'that he lawfully inhibited him personally apprehended;' which word 'lawfully' implied, that all solemnities were legally adhibited, law presuming *pro instrumenti veritate*. But several of the Lords thought this too great a latitude to messengers, and made them judge what was a legal execution, and what not; and it was *in terminis*, contrary to the decision, on the 28th July 1671, Keith *contra* Johnston, No 143, p. 3786, where the case is much stronger than here; and yet the inhibition was found null in favours of Sir John Keith, brother to my Lord Marishall, and afterwards created Earl of Kintore.

THE LORDS, least this decision should prove dangerous, did afterwards ordain the custom and general stile of such executions to be tried from the registers.

Fol. Dic. v. 1. p. 270. Fountainhall, v. 2. p. 521. & 528.

*** Forbes reports the same case:

IN a reduction *ex capite inhibitionis*, at the instance of John Crombie against James Robertson; the defender *alleged*, That the pursuer's inhibition is null, in respect the execution doth not bear delivery of a copy to the party inhibited; which is indispensably requisite in the executions of all summonses or letters, Stair, Instit. lib. 4. tit. 38. § 15. lib. 3. tit. 3. § 3. act 75th, 1540; act 141st Parl. 12th James VI. July 28th 1671, Sir John Keith *contra* Sir George Johnston, No 143. p. 3786., and not suppliable by intimation to the party, December 4th 1628, Potter *contra* Baillie, *voce* JUS TERTII. The reason why a copy is necessary is, that the parties, who are often ignorant of their own business, may shew their copies to their lawyers to answer for them, or advise them what to do.

Replied for the pursuer; The execution quarrelled is most formal, although it bears not delivery of a copy; there being no statute expressly requiring such

No 149.

a solemnity. For the act 141st Parl. 1592, ordains only the copy to be subscribed by the officer; and formalities are not to be introduced by inference. The act 75th, concerns only the method of execution at the dwelling-house in absence of the party, where a copy is absolutely necessary to be left for intimation, as it is in the case of executions at the market-cross of Edinburgh against persons out of the country; whereas the pursuer's execution bears, that the party was duly and lawfully inhibited, and personally apprehended. And as personally apprehended implies that the party was certiorated, which is all that the giving a copy is designed for; so lawfully inhibited infers that a copy, if necessary, has been delivered; *nam præsumitur pro solennitate instrumenti.* The decisions founded on by the pursuer do not meet; for that on the 4th December 1628, finds only intimation to one personally, supplies not a charge, which indeed it cannot do; seeing a charge requires to be by execution. The practic betwixt Sir John Keith and Sir George Johnston, besides that it is but a single decision, hath this speciality, that the execution bore not lawfully inhibited, as in this case, but only inhibited according to the will of the letters; so that neither did that execution bear, nor imply delivery of a copy. As to my Lord Stair's opinion, that is only delivered in the places cited, concerning the executions of hornings and summonses, which materially differ from inhibitions; in so far as in horning a person being charged to pay under a severe certification, the execution ought to be very solemn and formal; and the executions of both hornings and summonses concern only the party cited or charged; whereas the execution of inhibition doth chiefly concern the lieges, to warn them not to contract or bargain with such a one; and they are put sufficiently *in mala fide* to do it by the copy affixed at the market-cross.

Duplied for the defender; The validity of the execution against the lieges, doth not supply the defect of the invalid execution against the party; for the whole must be valid, or the whole is null; as *bonum est ex integra causa, malum ex singulis defectibus.* It is not the execution against the lieges that puts them *in mala fide* to purchase from persons inhibited, or denounced, but the registration thereof; and when purchasers find in the register the execution against the party null, they regard not the execution against the lieges, as being null in consequence. *2do,* Where law requires a special solemnity, the messenger's execution must bear expressly that it was performed. And the custom of giving copies is so prevalent, that we may say in the words of the law, *in tantum probatum est, ut non fuerit necesse scripto id comprehendere.* *3tio,* The fancied disparity betwixt a horning and inhibition, is no more to the purpose, than to say, horning is not inhibition. Are not all prohibitory diligences restraining the exercise of property, and prejudicial to fair purchasers, odious as well as horning? There is no material difference betwixt the decision 1671, and this case; for nothing can be due and lawful in the execution, but what is according to the command of the letters; and it were dangerous to allow messengers to be judges of what is due and lawful.

No 149.

THE LORDS repelled the nullity objected against the inhibition, that the execution doth not bear a copy.

Here it was observed by some of the Lords, That there was a speciality betwixt the decision 1671, and this case; because the former bears, that the messenger executed conform to the command of the letters, and these bore a warrant to inhibit lawfully. Besides, that to sustain such an execution, would not only make a messenger judge of what is law; but also would prove a temptation to perjury, and unsecure purchasers who acquired by advice of lawyers, upon the faith that an execution not bearing delivery of a copy, was null.

1709. *November* 30.—Upon advising a reclaiming bill and anwers, the LORDS ordered the registers to be searched, to know if constant and uniform executions of inhibitions do bear delivery of a copy to the party though personally apprehended. And, 30*th June* 1710, it being reported, That about the time of executing the pursuer's inhibition, many inhibitions are found to have been executed in the same terms, the LORDS adhered to their former interlocutor sustaining the inhibition, and decerned in the reduction thereupon.

Forbes, p. 353.

1771. *January* 25. ALEXANDER GILLIES *against* ADAM MURRAY.

No 150.
An execution of inhibition bearing to have been *lawfully* done, was found null, because it did not mention 'three oyesses and public reading.'

GILLIES being creditor to James Braid, raised an action against him before the Sheriff of Edinburgh, proposing to use inhibition on the dependence. A summons was accordingly given to an officer to be executed as on the 3d of July 1769; but the execution returned, instead of the 3d, was dated the 5th July. The diligence, however, was followed out, a bill for letters of inhibition was presented, and alongst therewith the summons and execution were produced; letters of inhibition were issued, and on the 3d were executed against Braid, and published, and on the 4th of July the inhibition and execution were recorded.

Upon the diligence detailed, the pursuer brought a reduction *ex capite inhibitionis* of a sale by Braid of his property to Murray the defender, also concluded upon the 3d of July 1769. To this it was *objected*, That the dependence of the decreet could not be the warrant for the inhibition, for that bore date the 3d, whereas the citation *ex facie* of the execution was dated the 5th; and the LORD ORDINARY 'sustained the defence, and assoilzied.' The pursuer represented and offered to prove, by the officer who gave the citation, by the writer employed, and by the clerk to the bills, that although the execution of citation bore date the 5th, all these things had been acted and done upon the 3d of July 1769, the insertion of the 5th being merely a mistake of the messen-