

ing used against Carse as out of the country, at the market-cross of Edinburgh, and pier and shore of Leith, and did not mention the three oyesses, which is required by the decision, Gordon against Forbes, No 116. p. 3768.: *answered*, Solemnities have been multiplied by over-cautious creditors, where no law required them, and so can be no rule to others; and the Lord Register being ordained, in the case cited, to try the custom as to the oyesses in arrestments, it was found to vary; and though an act of sederunt was intended then to regulate for the future, yet it was not done, so it has not yet come to any fixed custom; and therefore must be determined on the old grounds till it be otherwise appointed. THE LORDS sustained the arrestment, though wanting the intimation of the oyesses.

Fol. Dic. v. 1. p. 266. Fountainball, v. 2, p. 23.

No 117.
of Leith,
which did not
mention the
three oyesses,
was sustained,
notwithstanding
of the
above deci-
sion.

1705. December 20.

SCRIMZEOUR *against* BEATON.

EXECUTION of apprising sustained, though it bore not three oyesses, but only several oyesses.

Fol. Dic. v. 1. p. 266. Fountainball.

No 118.

*** See this case, Div. 4, Sec. 4, *b. t.* No 103. p. 3758.

1706. February 14.

EARL of LEVEN *against* DURHAM of Largo, and NICOLSON of Trabrown.

AN inhibition was sustained, though the execution at the market-cross bore only *three oyesses, open and public reading*, and wanted the words *open proclamation*; in respect it was alleged that three oyesses, and public reading, import open proclamation, and, after trial, the stile of many inhibitions were found to run in the same tenor.

Fol. Dic. v. 1. p. 266. Fountainball.

No 119.

*** See this case, Div. 4, Sec. 1, *b. t.* No 81. p. 3743.

1715. February 22.

CAPTAIN PRESTON *against* SIR JOHN CLERK.

CAPTAIN PRESTON pursues a reduction of the right of patronage of the church of Laswade *ex capite inhibitionis*, against Sir John Clerk's author.

It was *alleged* for Sir John; The inhibition was null and reducible; because the inhibition which was executed against the party out of the country, did not bear three oyesses, nor public reading of the letters at the pier and shore of

No 120.
An inhibition
against a per-
son out of the
country was
found null,
because the
execution at
the pier and
shore of Leith

No 120.
did not bear
three oyesses,
and public
reading of the
letters.

Leith. *2do*, The inhibition was null, because one of the executions against the party and lieges at the market-cross of Edinburgh, pier and shore of Leith, was not registrate.

It was *answered* to the first; The execution at the market-cross of Edinburgh against the lieges is very formal; but the same formalities are not necessary against the party at the pier and shore of Leith; for it is sufficient to him that any intimation of the inhibition is made, a copy of the letters being affixed; which is the only material formality, and equivalent to the leaving a copy in the lock-hole of the party's dwelling-house, when the messenger gets not access. And, 21st June 1681, Lundin *contra* Trotter, *voce* PROOF, the LORDS found the want of the oyesses was no nullity; which was done very deliberately, after inspection of the records, and a report of my Lord Register that many executions wanted the oyesses; and though an act of sederunt was made to annul such inhibitions for the future, yet this inhibition was anterior.

To the second nullity it was *answered*; The inhibition and all the executions were duly registrate, and the register is the true publication that directs the lieges; and for the principal execution, the party has the custody of it, which is not public; so a creditor or purchaser seeing the registers, are to regulate themselves accordingly.

It was *replied*: The same formalities are required at the pier and shore of Leith, as at the market-cross of Edinburgh; for the pier and shore of Leith being in place of personal executions, or the parties' dwelling-house, when within the country, every formality is necessary to be observed, and especially the publication of letters; and in the case of Lundin against Trotter, the execution bore public reading of the letters; yet the LORDS thought fit for the future that all executions should bear the oyesses; but the LORDS, upon the 11th of July 1676, Stevenson against Innes, No 145. p. 3788., found an inhibition null, because it did not bear public reading of the letters, and three several oyesses.

2do, The want of registration of one of the principal executions, is a separate nullity; for albeit the execution be duly recorded in the register-book, yet the principal letters and executions are the warrant of the register; and the 119th act, Parliament 7; James VI. does expressly require the registration of the letters and executions.

'THE LORDS found both these nullities separately relevant.'

Fol. Dic. v. 1. p. 266. Dalrymple, No 141. p. 195.

* * Bruce reports the same case :

THERE being a competition betwixt Captain Preston, &c. and Sir John, concerning the patronage of the parish of Laswade, by reason of an incident question about the dispose of the vacant stipend; and the Prestons having founded on an inhibition at their instance, prior to the disposition of the patronage, by John Preston to Sir John Nicolson, Sir John Clerk's immediate author; Sir John made two objections against the execution of the inhibition at the market-

cross of Edinburgh, pier and shore of Leith, the party being out of the kingdom, viz. *imo*, That the execution did not bear three oyeses, and public reading thereof; *2do*, That the said execution was not signed or marked by the clerk-register of inhibitions, in the terms of the 119th act, Parliament 7, James VI.

Answered for the inhibitors to the first objection, That the citation of the party at the market-cross, pier and shore, &c. is in place of the personal citation at the dwelling-house, when the party is within the kingdom; and that in neither of these cases the three oyeses are required, and that the affixing of the copy at the said respective places is sufficient to certiorate the lieges, that the party inhibited might be acquainted by and through them; since the inhibition concerns the lieges more than the party himself, if they be duly certiorated, and the formalities observed in the citations to them. *2do*, That there was a decision 15th February 1681, Gordon *contra* Forbes, No 116. p. 3768, remarked by my Lord Stair, and an act of sederunt, made upon that occasion, declaring that in all executions thereafter, it should particularly be express, that three oyeses were given, &c. "otherwise the Lords would not sustain the execution, and the execution now quarrelled being in 1675, before that act, ought to be sustained, the act having no retrospect.

Replied for Sir John; *imo*, That law requiring forms of execution against those out of the country, quite different from those at the dwelling-house, or personally apprehended, the argument cannot hold, that because three oyeses are not necessary to a personal citation or at the dwelling-house, therefore they are not necessary to a citation out of the country: Nor is the bare affixing without the oyeses any better in this case, than the affixing at the dwelling-house without the six knocks, &c. And it is *gratis dictum*, that the affixing is sufficient for certiorating the lieges, for many may hear the citation when openly proclaimed, who cannot read the copy nor have access to see it, it being commonly soon torn off: Nay, the inhibition indeed concerns the party more than the lieges, since it tyes up his hands, and breaks his credit; and when he is duly certiorated, he can stop registration by purging the debt. And as to the decision and act of sederunt 1681, *imo*, The case of that citation was upon a summons, which indeed is not so nice, as that upon an inhibition. *2do*, The Lords did not sustain the execution without the oyeses. *3tio*, The act does plainly declare what had been law, but that the same had been neglected by an evil custom. *4to*, The question only there was, whether the words 'after lawful publication' were sufficient, or if the oyeses ought also to be added: But here the execution against the party, does not bear 'after lawful publication,' nor the 'three oyeses,' nor, 'after reading of the letters.'

THE LORDS sustained the nullity of the inhibition, viz. That the execution thereof at the pier and shore of Leith, did not bear three oyeses, or public reading thereof.

No 120.

As to the second objection or nullity, *answered* for the inhibitors, *imo*, That the execution at the market-cross is marked ; *2do*, That the execution is recorded with the letters, which makes the publication ; and that the signing by the clerk was not designed for the security of the lieges, but for the use of the ingiver, that he might know when and where the executions were registrate ; for at this rate contractors might be put to go to the user of the inhibition, to see whether the execution were marked or not, and oblige him to exhibit them on pretence that if they be not marked, he may lawfully contract. And that the case was like a messenger delivering a copy not bearing the witnesses' names to the execution ; for though he may be punished on that account, yet the execution will not be null.

Replied for Sir John to the *first* ; That this makes against the inhibitors, since it proves what was custom as well as law. To the *second*, *replied*, *imo*, That the words of the act are express, and an irritancy adjected ; *2do*, That the marking the execution does rather concern the lieges than the ingiver, and was calculated that it might not be in the power of parties to change executions after they were registrate ; or in case one of them were lost, to make it up. And it is likewise a check upon the clerk, that he may not registrate a copy instead of a principal ; for otherwise he might registrate a copy before the inhibition were executed, and then the execution might be made up, *ex post facto*. And as to contractors obliging the inhibitor to produce, &c. *replied*, That by the same reasoning a forged execution should be good if registrate, because otherwise, according to this argument, a party might oblige inhibitors to produce the executions to see if they were forged or not ; nor is there any parallel betwixt this and the messenger's not inserting witnesses, &c ; for if such a copy were given, the party would not be obliged to answer.

THE LORDS sustained the nullity of the inhibition, viz. That the execution at the market cross of Edinburgh, was not marked and signed by the clerk, in the terms of the 119th act, 7th Parl. James VI.

Act. Gray. Alt. Sir Walter Pringle. Clerk, Alexander.

Bruce, No 89. 90. p. 106. 108.

See Lundin against Trotter, 21st June 1681, *voce* PROOF.