

1724. *January 22.*The CREDITORS of HOUSTON *against* SIR JOHN HOUSTON.

No 23.

THE LORDS sustained the execution of a general charge against Sir John's tutors and curators, though it was not at the head burgh of the shire but of the regality where they lived; in respect that Glasgow was the head burgh of the regality, and that such executions were common there; but because of the obscurity of several head burghs of regality, they found that this was not to be extended.

For Sir John, *Pat. Grant.*Clerk, *Dalrymple.**Fol. Dic. v. 3. p. 186. Edgar, p. 4.*1744. *June 19.*

Competition, JOHN CAMPBELL with the other Creditors of SIR JAMES CAMPBELL of Auchinbreck.

No 24.

An execution of inhibition need not express that it was executed at the head burgh of the jurisdiction where the debtor resided.

THE said John Campbell, being creditor to Sir James, inhibited him, and in a ranking of his creditors, craved to be preferred to the debts contracted posterior to the date of his inhibition. *Objected* for the creditors; That the execution of the inhibition at the market cross of Inverary against the lieges, did not bear or express that Sir James's residence was within the shire of Argyle, but only that his whole estate lay there; and though it be true, that his residence is at his mansion-house of Lochgair, upon that estate, yet as this was not expressed in the execution, the same was null and void, and the inhibition of no use to the creditor.

Answered, That there is no law or statute that prescribes the precise form of executing inhibitions, but only for the registration thereof for the more certain notice and publication to all the lieges; and though the form of execution at the market-cross be still necessary to be observed, it is the registration which in reality makes the certain publication, by which every person may know the condition of the party inhibited; and, in this execution itself, every thing is done which the law or custom requires, namely, that the inhibition is executed against the lieges at the market cross of the head burgh where the inhibited person dwells. The obvious reason and use of which place of execution is, that it is presumable, a man's ordinary and most frequent dealings or commerce will be with persons living in his neighbourhood, within the same shire or jurisdiction where he himself resides; and that strangers dealing with him will naturally make such inquiry at one or other of the debtor's neighbours; the necessity of which is, in a great measure, superseded by registration: But yet, as to the form of such executions, if the lieges in reality be inhibited at the

No 24.

market-cross of the shire where the debtor lives, where the prohibition is addressed to persons who are supposed to know the debtor, or that they most readily may come to have dealings with him, it is unnecessary to tell those people, that the debtor lives in the same shire or district with themselves; for if it be true that he lives there, which is notour in this case, the lieges are duly certified not to have any dealings with him; and if in fact the debtor does not live there, the party is not duly inhibited. In a word, if the inhibition is published at the market-cross where the debtor resides, there is no necessity that the execution should express it: And as there is no law prescribing the form of the execution, the thing itself is settled by custom, that the place at which the lieges ought to be inhibited to contract with the debtor, is the market-cross of the head burgh of the shire where the debtor resides. See 8th July 1713, Bailie, Div. 4. Sec. 1. *b. t.*; 15th January 1706, Loch, Div. 4. Sec. 4. *b. t.*; 14th February 1710, Gray against Hope, Div. 2. Sec. 6. *b. t.*

Replied, That legal diligences, which must be executed conform to certain formalities, and at certain places, determined either by statute or practice, cannot be available, unless the execution express that the messenger has done and fulfilled all that the law enjoins, and that the formalities requisite were observed and done at the appointed places; and if any thing is omitted to be expressed in the execution, it cannot be supplied by a proof by witnesses, or what the inhibitor calls notoriety, which is no evidence of a fact in a court, for if such executions, particularly of inhibitions, could be supplied in so far as they are defective, by oral evidence, nobody could be sure of their property. It is not enough to execute inhibitions; they must likewise be registrate for publication to the lieges; since it is only from that they can know with whom *in tuto* to contract, since they can only be put in *male fide* from what appears in the register. Now, it is obvious that, upon inspecting this execution in the record, for any thing that appeared from it, the execution was null; for, although a personal creditor might have known so much of his debtor as to have heard that he had an estate in Argyleshire, and might have known that Inverary was the head burgh of that county; it does not therefore follow, that he must have known that Sir James's dwelling-house was in Argyleshire, or that his residence for the time was there; or that this his residence did not ly within some regality, or other particular jurisdiction. This execution on record certified the creditor of none of these things; and if he is now only to be informed by evidence brought of the fact, then, to be sure, there be no reliance on the faith of the record, since parties may be injured by a proof by witnesses. And if the rule hold, that executions must stand or fall upon their own footing, without the aid of any foreign support, it will import nothing though some creditors might have known that Sir James really resided in that county, at the time of execution; because such creditors, though they knew the fact, yet knew also, that the execution was null, as not expressing what the law requires. And

whatever may be the case in ordinary executions of summonses, executions of diligences, which the law has appointed to be registrate for publication, must fully express all that the law requires to be done. And with respect to the notoriety, it imports nothing whether it was known to all the creditors or not, since notoriety cannot be understood to extend further than the vicinity; and personal creditors lending their money, cannot be supposed to have inquired where their debtor dwelt.

No 24.

Fol. Dic. v. 3. p. 187. C. Home, No 267. p. 431.

1745. July 27. DUNBAR and the other Creditors of DUNBAR, competing.

No 25.

WHERE an inhibition is regularly executed, and published against the party, it is no absolute nullity that it is not recorded in the books of every jurisdiction wherein his lands lye, but only *quoad* such lands as lye in a jurisdiction where it is not recorded; but where the inhibition as against the debtor is not duly published, however duly it may be published against the lieges, it will be of no effect whatever; and so it was here found. See this case reported by Lord Kames, No 34. P. 3705.

Fol. Dic. v. 3. p. 187. Kilkerran, No 6. p. 287.

1756. November 16. MALCOLM GORY *against* ANDREW DONALDSON.

No 26.

IN a ranking of the creditors of Nairn, it was objected by Donaldson, that an inhibition used by Gory was null, for that the execution of it bore, 'That a copy was fixed upon the door of the debtor's house, after the messenger had made six several knocks as use is, because he could not get the debtor personally;' whereas the 75th act, 6th Parliament, James V. authorises this method of execution in the case only when access to the house cannot be got, or the servants refuse to receive the copy; neither of which this execution bears.

It had been objected, that the execution of an inhibition was null, as it bore that a copy was fixed upon the door of the debtor's house after the messenger had made six knocks, because he could not find the debtor personally; which method of execution is authorised by law only when access cannot be got, or the servants refuse to receive the copy. The objection was repelled.

Pleaded for Gory; *imo*, The same objection was made to the execution of a horning 30th July 1696, Sinclair *against* Lord Bargeny, Div. 4. Sec. 7. *b. t.*; and to the execution of an apprising 20th of December 1705, Scrymgeour *against* Beatson, *IBID.*; and was in both cases repelled. As the same act which regulates the form of the execution of hornings and apprisings, regulates the execution of inhibitions, the same judgment ought to be given in this case; more especially as the execution against the lieges was undoubtedly formal and the inhibition registered, so that Donaldson cannot pretend to have contracted *bona fide* with the person inhibited.

Pleaded for Donaldson; The decisions are not in point; for that there the execution bore, that the messenger gave six knocks; and this implied that he sought entrance: the execution of inhibitions must be precisely formal; for that by them the preference of creditors is regulated. And therefore an execu-