THE LORDS repelled the nullity objected against the inhibition, that the execution doth not bear a copy. No 149.

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, *30th 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-

No 150. ger. The Lord Ordinary allowed the persons suggested to be examined, and their depositions to lie *in retentis;* and appointed informations to report to the Court.

Pleaded for the pursuer:

The proceedings founded on being a formal and regular diligence issuing from the Court, must have full effect given them, unless taken out of the way by a reduction and improbation. The date in the execution was merely a mistake; and that the summons had been actually executed on the 3d was evident from the letters of inhibition, which assigned as the cause of granting, 'That 'the Lords have seen the dependence above mentioned;' and it would be proved by the clerk to the bills, that the execution, &c. were then produced. Braid the common debtor had judicially declared he had sold the subject to the defender the very same night he was summoned in the present action; so that, upon the whole, there was sufficient evidence that the dependence was really created upon the 3d, as the inhibition bore. It would farther be proved that the summons was truly executed upon the 3d of July. Parole evidence was competent to instruct the real date of writings; and such had been the practice of the Court in repeated instances. Stair, 21st June 1665, Brodie *contra* Lord Fairnie, *voce* Proof; 29th June 1665, Thornton *contra* Milne, Ibidem; 23d February 1667, Lord May *contra* Ross, Ibidem.

Pleaded for the defender:

Though a bill, being a judicial act, passed of course, it was still competent to any party having an interest, to object when it appeared in judgement against him; and as the bill for inhibition, in the present instance, bore date two days prior to that of the execution of citation, upon which it was said to proceed, it must, with all that had followed, be null and void. All these proceedings rested upon the execution said to be erroneous, which must either stand or fall in its present form, and could not be altered to the defender's prejudice, either by the declaration of the common debtor, or by parole testimony. The declaration of the common debtor, however it might bind himself, could not hurt the interest of the defender, or any third party. Stair, 28th July 1671, Keith, No 143. p. 3786. And though the pursuer might, if he thought proper, attempt to improve the execution; yet if it was to be supported, it must stand as it was. It was a public act, like the proceedings of a judge, which could only be proved by the minutes and interlocutor, or other instruments extended at the time. Lord Bankton, v. 2. p. 505. 25th June 1714, Haswel *contra* the Magistrates of Jedburgh, *voce* Proof. Dirleton, No 102, Duke and Dutchess of Monmouth *contra* Scot of Clerkington, Ibidem.

It was farther *objected* to this inhibition, that the execution at the market-cross did not bear the particular solemnities of 'three several oyesses and public 'reading,' though omitting any one of them was fatal to the inhibition, Stair,

11th July 1676, Stevenson *contra* Innes, No 145. p. 3788. Stair, 19th November 1680, Hay *contra* Lady Ballegerno, No 146. p. 3790. No 150.

To which it was *answered*, That as the execution in question bore every thing to be lawfully done according to the will of the letters, it was fulfilling the intention of the law to all rational intents and purposes. The judgements cited were exceedingly rigorous and critical, and in many instances, executions, though neglecting to set forth similar *minutiæ*, had been sustained.

It was *observed* on the Bench, That it would be dangerous to supply the defects of legal executions by parole evidence; that a defect in the execution of an inhibition could not be supplied; and it was the same thing when the objection lay to the execution of the dependence, upon which the inhibition was raised. The proof offered was at any rate insufficient; for the oath of the clerk to the bills would not be enough, unless he could swear to the very summons; which would put too much in his power. Their Lordships were equally clear as to the second objection.

They therefore 'sustained both objections to the inhibition, and assoilzied the defender from the reduction.' *See* PROOF.

Lord Ordinary, *Barjarg.* For Gillies, *Sol. H. Dundas, Crosbie.*
Clerk, *Campbell.* For Murray, *B. Hepburn.*

R. H. *Fac. Col. No 70. p. 207.*

1782. *January 24.* Ranking of the CREDITORS of JARVIESTON.

IN this ranking, an inhibition was found null, because the execution did not bear the three oyesses, nor the open proclaiming or reading the letters. No 151.

Lord Ordinary, *Braxfield.* For the Inhibiting Creditor, *Cullen, Ross.*
For the other Creditors, *Maclaurin, Henry Erskine.* Clerk, *Menzies.*

C. *Fol. Dic. v. 3. p. 189. Fac. Col. No 24. p. 45.*