No 142. burgh; so that the casting of these executions would introduce a great confusion and disorder, and annul many diligences; and as *error communis facit jus pro præterito*, so it may be obviated by an act of sederunt discharging such practices for the future, according to the doctrine of the commentators, *ad l.* 3. *D. de off. prætor.*——The Lords, in this case, found the messenger had sent alongst with the blank execution a short note or minute under his hand, containing some few of the essentials of an execution, and therefore sustained it, unless Barak would, by the witnesses insert, disprove that the solemnities of six knocks, and leaving a copy, &c. were not used; and as *ex malis moribus bonæ oriuntur leges*, so, for preventing such a pernicious practice *pro futuro*, they made an act of sederunt, discharging such blank executions in all time coming, under the pain of nullity, and depriving the messenger; and ordained it to be published, printed, and intimated to the Lord Lyon and messengers.

Fol. Dic. v. 1. *p.* 271. *Fountainhall, v.* 2. *p.* 234.

SECT. XII.

Executions bearing in general to have been lawfully gone about.

1671. *July* 28. Sir John Keith *against* Sir George Johnston.

No 143. Execution of an inhibition not bearing that a copy was delivered, but only "that the "debtor was "inhibited "personally "apprehend-"ed," was found null.

The estate of Caskieben being apprised by Dr Guil, Sir George Johnston the apparent heir, acquired right to the apprising in the person of Phillorth, who by a missive letter, acknowleged the trust; upon which letter, Sir George raised action against Phillorth to count for his intromission, and denude himself, and upon the dependence, raised inhibition; yet Phillorth sold the estate to Sir John Keith, who, to clear himself of the inhibition, raised a declarator that the inhibition was null, and that his estate was free of any burden thereof, because it wanted this essential solemnity, that the execution against Phillorth did not bear a copy to be delivered; and that the executions being so registrate, he being a purchaser for a just price, and seeing no valid inhibition upon record, he ought not to be burdened therewith. The defender *alleged* absolvitor; because, 1*st*, The delivering of a copy was no essential solemnity, neither does any law or statute ordain the same; much less any law declaring executions void for want thereof; and albeit it be the common stile, yet every thing in the stile is not necessary; for if the messenger should have read the letters, and shown them to the party, he could not say, but that he was both certiorate and

charged not to dispone. 2*dly*, The executions bear, that Phillorth was inhibited personally apprehended. 3*dly*, The inhibition comprehends both a prohibition to the party inhibited, and to all the lieges at the market-cross, at which the execution bears a copy was affixed, so that whatever defect might be pretended as to Phillorth, this pursuer and all the lieges were inhibited to block or buy from him, so that the pursuer has acted against the prohibition of the letters, and cannot pretend that he purchased *bona fide*, being so publickly inhibited, and the inhibition put in record, he neither should nor did adventure to purchase without special warrandice, to which he may recur. 4*thly*, Such solemnities when omitted may be supplied; for there is nothing more ordinary than in summonses to add any thing defective in the executions, and abide by the truth thereof; and many times these solemnities are presumed done, though not expressed; as a sasine of a mill was sustained, though it bore not delivery of clap and happer; yet bearing a general 'with all solemnities requisite,' it was sustained; and a sasine of land, though it bear not delivery of earth and stone, seeing it bear 'actual, real, and corporal possession,' and the clause *acta erant hæc super solo, &c. ut moris est;* yea, in other solemnities which the law expressly requires as three blasts in the execution of horning, and six knocks, and the affixing of a stamp, have all been admitted by the Lords to be supplied, by proving that they were truly done, hough not exprest in the execution, though horning be odious and penal, inferring the loss of moveables and liferent; therefore it ought much more to be supplied in the case of an inhibition, which is much more favourable to preserve the creditors' debt; and here the messenger hath added to the execution, that a copy was delivered and subscribed the same on the margin, and it is offered to be proven by the witnesses in the execution, that it was truly so done. The pursuer *answered*, That there was nothing more essential in an execution than delivering of a copy, for showing or reading of letters was no charge, but the delivering of the copy was in effect the charge; and albeit executions which require no registration, and may be perfected by the executor, at any time may be amended as to what was truly done; yet where executions must necessarily be registrate within such a time, else they are null, after the registration the messenger is *functus officio*, and his assertion has no faith; and seeing the giving of a copy is essential, and if it be omitted, would annul the execution; so after registration it cannot be supplied, because in so far the execution is null, not being registrate, *debito tempore*; for as the whole execution would be null for want of registration, so is any essential part; and whatever the Lords have supplied in hornings, yet they did always bear, that the same was lawfully done according to the custom in such cases; and this execution does not so much as bear that Phillorth was lawfully inhibited, but only according to the command of the letters which do not express any solemnity; and it hath been found by the Lords, that a horning being registrate, and not bearing a copy delivered, it was found null; because that part was not in the register, nor was it admitted to be

No 143.

No 143. supplied any way, but that it were proven by the oath of the keeper of the register, that that clause was on the margin of the execution, when it was presented to the register, and was only neglected to be insert by him; which shews how necessary a solemnity the Lords have accounted the giving of a copy, and registrating thereof; and if solemnities of this kind, be by sentence passed over, it will not only encourage messengers to neglect all accustomed solemnities, but in course of time may encroach on all other solemnities; whereas, if this be found necessary, none will ever hereafter omit it, or any other necessary solemnity.

The Lords found the inhibition null, and that the delivering of a copy was a necessary solemnity, which not being contained in the register, they would not admit the same to be supplied by probation, in prejudice of a singular successor, acquiring for a just price.

Fol. Dic. v. 1. *p.* 269. *Stair, v.* 1. *p.* 767.

1675. *January* 29. M'Intosh *against* M'Kenzie.

No 144.

A decreet against a person holden as confest before the Lords of Session about 20 years ago, was questioned as null; upon that pretence, that it did not bear, that the party, against whom it was given, was personally apprehended, but only that he was lawfully cited.

The Lords found, that after so long time, the said decreet could not be declared null and void, upon pretence of an intrinsic nullity; in regard the said decreet did bear, that the defender was lawfully cited to give his oath; and he could not be thought to be lawfully cited, unless he had been personally apprehended; and *præsumitur pro sententia*, and that *omnia* are *solenniter acta*; unless it were made appear by production of the execution, that the defender was not personally apprehended; and therefore the said reason of nullity was repelled; reserving action of reduction as accords.

Clerk, *Munro.*

Fol. Dic. v. 1. *p.* 269. *Dirleton, No* 232. *p.* 110.

1676. *July* 11. Stevenson *against* Innes.

No 145.
An inhibition was found null, because the execution bore not public reading of the letters and three

William Stevenson pursues reduction of a wadset granted to James Innes, as being after inhibition. The defender *alleged* absolvitor, because the execution of the inhibition at the market-cross against the lieges is null, not bearing 'the public reading of the letters at the cross, and three several oyesses.' It was *answered* for the pursuer, That the execution bears, 'that the messenger 'lawfully inhibit the lieges,' which although general, is sufficient. 2*do*, In for-