No 12.

The Lords admitted the pursuer to amend the execution, he biding thereby, and ordained the defender to see the same.

*Fol. Dic. v.* 1. *p.* 552. *Stair, v.* 1. *p.* 431.

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1671. *July* 6. John M'Rae *against* Lord M'Donald.

No 13.
Objected against an execution, that it did not bear that a copy was left. The messenger was allowed to add that clause to the execution, he abiding by it as true.

Jonh M'Rae, as heir to John M'Rae his goodsire, pursues the Lord M'Donald, as heir to his goodsire, for payment of a bond of 400 merks *in anno* 1629, granted by the defender's goodsire to the pursuer's goodsire.—The defender *alleged* absolvitor, because the bond is prescribed.—The pursuer *replied*, That the prescription was impeded, partly by minority, and was interrupted by a citation at his instance, against the Lord M'Donald.—It was *answered*, That the first citation made was null, being at the market cross of the shire, by dispensation, upon an unwarrantable suggestion, that there was not safe access to him, which has been past of course by the servants of the Bill-Chamber; whereas they ought specially to have represented the same, and the consideration thereof to the Lords; and so being surreptitiously obtained, *periculo petentis*, it can import no interruption. 2*dly*, The execution at the market cross bears no leaving or affixing of a copy; and as for the second citation, it is but one day before the 40 years be completed, which being so small a time, is not to be regarded in prescription, *nam lex non spectat minima*, and it is also null, though it be done personally, as falling with the first execution.

The Lords found that the first citation was sufficient to interrupt prescription, although it had not been formal, through want of a copy, and declared they would sustain the process thereupon, if the leaving of a copy were added to the execution subscribed by the messenger, and abidden by as true. They found also, that the second citation was sufficient interruption, though within a day of completing the prescription, which was to be reckoned punctually *de momento in momentum*. See Prescription.

*Fol. Dic. v.* 1. *p.* 552. *Stair, v.* 1. *p.* 749.

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1671. *July* 28. Keith *against* Johnston.

No 14.

An execution of an inhibition null, as not bearing delivery of a copy, and so registered, found not suppliable by production of a regular execution, which the messenger offered to abide by.

*Fol. Dic. v.* 1. *p.* 552. *Stair.*

*** This case is No 143. p. 3786.

*** The like found with regard to the execution of an inhibition, not bearing six knocks, though the question was not with an onerous purcharser, 19th

November 1680, Hay against Lady Ballegerno, No 146. p. 3790. *voce* EXECUTION, and No 28. p. 6960. *voce* INHIBITION.

No 14.

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1676. *December* 19. INGLIS *against* HADDOWAY.

No 15.
Inhibition not found null, because the execution did not design the dwelling house, it being afterwards designed and abidden by.

JAMES INGLIS having pursued reduction *ex capite inhibitionis* against John Haddoway, the defender *alleged* absolvitor, because the inhibition is null, the execution at the market crose not bearing 'a copy affixed upon the cross,' which is requisite in all executions; and upon a less informality, an inhibition against Caskieben was found null, because a copy was not delivered to the party inhibited, in the process at the instance of Keith of Caskieben against Johnston, decided upon the 28th of July 1671, No 143. p. 3786.—It was *answered*, That the not affixing a copy when the law requires it, may be a nullity, as in executions at the dwelling house in absence; but there is no law requiring the affixing of an execution of an inhibition upon the cross; nor is there any such thing required by the act of Parliament 1581, cap. 119.; and therefore it hath been the constant custom to have executions of this tenor, without mention of a copy left or affixed at the market cross. But it hath been the constant custom to give a copy to parties inhibited; and the delivery of a copy to the party in Caskieben's case, was not in the execution when it was registrated, but added by the messenger's hand *ex post facto*; whereas here the registration is a sufficient intimation to the lieges.—It was *replied*, That there are many nullities by common law without statute, in case any necessary solemnity be omitted; and as to that act of Parliament, there is nothing prescribed as to the executions of inhibitions in it, nor in any other act, but only as to the registration; and as to the custom, it is denied, and though it were, it is an unwarrantable and an evil custom.

THE LORDS did appoint by act of Sederunt, that in time coming, the executions of all inhibitions should bear a copy affixed upon the cross, or otherwise they should be null: But as to this, or preceding inhibitions, the Lords allowed either party to produce any executions they thought fit, to clear what had been the custom in that case.

*December* 22. 1676.—IN this dispute, the 19th instant, it was further *alleged*, That the inhibition was null, because, being executed at the dwelling house of the person inhibited, the dwelling house was not designed; upon which reason hornings have been found null, and inhibitions are of more moment.—It was *answered*, That horning is more odious and penal than inhibition, which doth the debtor no hurt, and is an execution for securing of creditors, and therefore the Lords may justly supply it, by condescending on the dwelling house, which is only necessary as a mean of improbation; and here the execution bears, that the person within-written was inhibited, and in the body he is designed; and