1692. *November* 25. CLELAND *against* FALCONER.

No 70.
An inhibition was found null, because it was not executed at the head burgh of the jurisdiction in which the lands of the inhibited person lay.

IN the reduction *ex capite inhibitionis* pursued by William Cleland, usher to the Exchequer, against David Falconer and William Allan, the LORDS, in July 1688, having found the inhibition null, because it was not executed at the market cross of Dalkeith, within which jurisdiction and regality the lands annailzied lay; and William Cleland now reclaiming against the said interlocutor, (which was not yet extracted,) he *alleged* that no law obliged him to any more but to execute and publish it at the market cross of the head burgh where the party inhibited dwells; as appears by the 119th act 1581, the 268th and 269th acts 1597, and the 13th act 1600, *et non debemus esse sapientiores lege*. *Answered*, Our diligences and their solemnities were not only introduced by statute, but also by custom, which had prevailed generally, that they were not only executed at the market cross, whereby the party dwelt, but also where the lands lay; and this founded on the analogy of law, that all real diligences be on the ground of the lands, as Skene observes, *cap.* 3. *Quon. Attach.* as appears in warnings and apprisings, which last were found null, if not executed at the head burgh where the lands lay, 19th June 1561, Blanern against Restalrig, No 57. p. 3722. *Replied*, That if some curious persons for superabundance did more than the law required, by executing both at the cross where the lands lye, and where the debtor dwelt, that laid no obligation on others to do the like; and though it was vulgarly received as an opinion, that publication was necessary at both crosses, yet many inhibitions have gone no further than where the debtor dwelt; and it were hard to find all these diligences null for precisely following the letter of the law, and to heap that vast expense on the lieges to execute at all the market crosses wherever the debtor had lands; and though Hope, in his Larger Practiques, and in his Observations on inhibitions, in the case between Inglis and the Laird of Corstorphine, in 1616, *voce* INHIBITION, inclines that it should be executed where the lands lie; and many decisions since look upon that as granted, yet it never has been fully debated, *et in dubiis, ea interpretatio rapienda est, ut actus potius valeat quam pereat*. The President thought, where an inhibition was registrate in the particular registers of the shire where the lands are situate, that it should be likewise execute at the market cross of that shire; but where they were registrate in the general register at Edinburgh, that then they needed not be executed any where save at the cross where the inhibited party dwelt; seeing the registration was what certiorated and secured the people; and the edictal publication at the market cross, was but a piece of form regarded by few or none: THE LORDS, being eleven then present, there were two *non liquets*, and the rest being equally divided, the President gave his casting vote, that Cleland's inhibition, though only executed at the market cross where the party lived, was a good, valid, and legal inhibition.

No 70.

1694. *January* 19.—The Lords advised the debate between William Cleland usher in the Exchequer, and David Falconer, and Allan; and consequently the parallel case between Sir William Hope and Ramsay of Kirkland, No 71. p. 3373. This was a reduction of an inhibition, because not executed at the market cross of Dalkeith, within which regality the lands disponed, craved to be reduced by that inhibition, lay. *Alleged*, All that the law requires is only to execute at the market cross where the party inhibited dwells, as appears by the 268th act 1597; and if any has inhibited also at other market crosses where the lands lay, it was not from any necessity of law, but *ex superabundanti*, by cautious persons, and messengers projecting their own advantage, by putting the lieges to more pains and expenses; and that the intimation at the market cross was indeed no certioration of the lieges, but their only security now lay in the registration, introduced by the act of Parliament 1581. It was *answered*, That no law prohibited executions at the several market crosses where the lands lay; and custom and practice could add and superinduce further solemnities than what the statutes precisely required; and that this was one of them, and that Craig, Hope, and all our ancient lawyers were of this opinion; and they cited many decisions where it had been so found, both in the precise case of inhibitions and in the parallel case of apprisings, annulled where they were not executed at the market cross of the regalities where the lands lay, as well as where the parties dwelt. The Lords thought it hard to burden the lieges with unnecessary formalities, and so expensive, and therefore sustained the inhibition as legal, being executed at the market cross where the person inhibited dwelt, though not executed at the market cross where the lands lay; and, of this opinion are Sir George M'Kenzie, Tit. Inhibitions, and President Stair, IV. 50. But several of the Lords differed, and thought it a great innovation, and surprise, debording from the common sentiments of former lawyers; and thought that an act of sederunt might be made for the future, discharging these unnecessary publications in time coming, but that bygone inhibitions wanting that solemnity should have been found null. The President moved to put this speciality in the interlocutor, that there was no register kept for inhibitions in the regality of Dalkeith, and that publications were not necessary, but where registers also were. But the Lords not thinking this a solid ground, keeped it in the general.

1694. *February* 7.—The Lords, on a bill and answers, did again review the process between William Cleland and David Falconer, mentioned 19th January 1694, with a fuller Bench than formerly, (there being present 12 Ordinary, the Chancellor, and two Extraordinary); and seven Ordinary Lords being for sustaining the inhibition as valid, and sufficiently executed, being at the market cross where the party inhibited dwelt, and registrated in the ge-

neral register; and five Ordinary, with the two extraordinary Lords, thinking the inhibition null, in regard it was not published also at the market cross of Dalkeith, within which regality the lands lay; it came to the Chancellor's casting vote, who determined the cause in favours of the inhibition. At which interlocutor there was a great outcry, alleging it was an innovation of a general custom, and that it should have been left to a Parliament; and others thinking the law required no more than publication at the market cross where the party dwells, they were not for allowing messengers in order to get more payment, to lay an unnecessary burden on the people, and to make that introduce a law. No 70.

1694. *July* 26.—THE LORDS again heard the famous cause, mentioned 7th February 1694, between David Cleland and Andrew Falconer, about the inhibition; if it was null, because not published nor executed at the market cross of the regality where the lands lay. *Answered*, The law requires no more but publishing at the market cross of the jurisdiction or shire where the party inhibited dwells. *See* 268th act 1597. *Replied*, This is superinduced by custom, *cujus non minor est auctoritas quam juris scripti;* and there is a vestige of it *in Quon. Attachiament. cap.* 3. § 4. where all such real actions are appointed to be executed on the ground of the lands; and Skene gives the reason, *quia hæ summonitiones sunt reales et afficiunt fundum. Duplied*, No such uniform custom, but introduced by the covetuousness of writers and messengers to make long accounts. THE LORDS having oft varied in this case, at last now found the inhibition null, by a division of ten *contra* six.

1694. *July* 28.—DAVID FALCONER gave in a petition *contra* William Cleland, mentioned 26th July 1694 founded on the acts of King James III. and V. Queen Mary, and James VI., that malicious pleyers who tyne the cause, should pay the other party damage and expenses. And subsumed, that on an uncontroverted principle anent the nullity of the inhibition, he has put him to upwards of L. 1200 Scots of expenses, &c. THE LORDS found, seeing there were different interlocutors, and so *probabilis causa litigandi*, there could be no expenses modified. For the lawyers say, that *opinio unius doctoris* is sufficient to liberate from expenses. *See* COPENSES.

Fol. Dic. v. 1. *p.* 262. *Fountainhall, v.* 1. *p.* 522. 593. 604. 639. & 640.

1710. *January* 11.

RAMSAY of Galry, and my LORD GRAY, *against* SIR WILLIAM HOPE.

No 71.
Found, that it is not necessary to execute an

MR GEORGE CAMPBELL being debtor by bond in a considerable sum to Creighy, now Lord Gray, he served inhibition againt him, after which Sir