

as having consented for her liferent right, pursues declarator that Mr James hath contravened the clause of the contract, and thereby omitted his right. He *alleges* no process, because by the late act of Parliament 1672, anent second summons, it is statute, that all executions shall bear expressly the names and designations of both parties, otherwise they shall be null; but this execution bears no designation of Mr James Alexander. It was *answered*, that *constat de persona*, that the execution bears Mr James Alexander and Rachel Aiton within written, wherein their designations are exprest, and that act had only its rise for summonses of interruption, where the executions were not written upon the back of the summons, and so might be applied to divers summonses, and therefore such executions as this have never been quarrelled since the said act of Parliament.

THE LORDS sustained the defence, and found the executions null.

*Stair, v. 2. p. 806.*

1687. February.

WALLACE against MAXWELL.

IN an action of adjudication for the fines at the instance of Hugh Wallace his Majesty's cash-keeper, against Sir John Maxwell, it being *alleged* that the execution of the summons was null, in respect Hugh Wallace the pursuer was not designed to be cash-keeper, but it did only contain his name, without any designation, which is declared to be a nullity by the 6th act, Parliament 3, Cha. II.; as also it being *alleged* against another execution, that it was not stamped, as is required by the 74th act, Parliament 6, James V. the LORDS sustained both these dilatory defences, and found the executions null.

*Fol. Dic. v. 1. p. 263. Sir Patrick Home, MS. v. 2. No 899.*

1706. February 14.

THE EARL of LEVEN against NICOLSON of Trabrown and DURHAM of Largo.

THEY being all creditors to Young of Kirkton, and competing, Leven craved preference, though posterior, because first clad with possession; the other repeated a reduction *ex capite inhibitionis*. He *objected* against the inhibition, that it was null, defective, and informal, in so far as the execution designed neither the party inhibitor nor inhibited, which, if it had been on the back of the letters, had been the more tolerable, but is on a paper apart; and the calling them only 'the within designed,' is applicable to any other persons of that name, or any other paper as well as this. *2do*, It wants this solemnity, that the messenger made public proclamation; the design of the law being, that it should be done with such an audible voice, as may come to the ears of all by-

No 79.

summons found null because they did not design the defenders.

No 80.

An execution was found null, because it did not bear the designation of the pursuer.

No 81.

An execution of an inhibition written on a paper apart, and which did not design the parties, was sustained, it having been made before the act of Parliament 1672, chap. 6.

No 81. standers. *Answered* to the 1st, There was no law obliging creditors in such executions to design them ; for the act of Parliament 1672 relates only to summonses, and not to inhibitions ; and even this execution was before that act. To the 2d, The execution bore the three oyesses, and open and public reading, which can be no other but proclamation, and the same thing in other words. THE LORDS having taken trial how the style run in 1667, which was the date of these executions, and having found many of them were conceived in the same manner, so it might be a dangerous preparative to annul them on such omissions, and might open a door to question many diligences and securities, and that the registration of the execution put the matter beyond all dubiety, and ascertained the persons, that one could not be shuffled into the place of another ; therefore they repelled the nullities, and sustained the inhibition.

*Fol. Dic. v. 1. p. 263. Fountainball, v. 2. p. 327.*

\* \* Forbes reports the same case :

IN the competition of the creditors of James Young of Kirkcounie, Durham of Largo, and James Nicholson of Trabrown, having founded on two inhibitions, one in the year 1667, and the other in the 1668, for supporting the preference of their rights, the Earl of Leven *objected* against these inhibitions, that *imo*, No respect could be had to the inhibition 1667, in regard neither the inhibitor nor the person inhibited, are otherways mentioned in the execution, than by their names, with the quality of ' within designed,' although the execution be a paper apart ; which is contrary to the act of Parliament 1672, and might refer to all of the same name though not concerned in the inhibition ; and did not sufficiently certiorate the lieges whom they are discharged to bargain with. *2do*, The execution at the market-cross wants the words open proclamation, and bears only three oyesses, open and public reading, which is a nullity ; For three oyesses might be muttered, and open and public reading signifies no more than it was read at the market-cross, which might have been quietly done. *3tio*, The inhibition 1668, is null, because the execution thereof, though upon a separate paper, inhibits only the lieges in manner within-written, without specifying what they are inhibited to do.

*Answered* for Largo ; There was no law or custom at the time requiring the raiser of inhibition, and the person against whom it was executed to be specially designed. It matters not that the execution is not upon the back of the letters, *imo*, seeing it is duly registered therewith, and the act of Parliament 1672, requiring the special designation of pursuer and defender in ordinary summonses, extends not to inhibitions ; because, the executions of these being registrate with the letters, the lieges cannot be imposed upon by shuffling in one in place of another. *2do*, Open and public reading implies open proclamation ; and three oyesses import a loud proclamation and intimation to all persons with an audible voice. *3tio*, In the executions of the inhibition 1668, the lieges being inhi-

bited and discharged in manner within-written, to the effect and for the reasons and causes within specified, &c. The same are sufficiently formal according to the custom of that time, And the lieges are sufficiently certiorated by the messenger's execution relative to the letters bearing all the prohibitory clauses, and by a copy of the letters affixed to the cross, and inserted in the register. Besides, not only executions of inhibitions and charges of horning are thus relative to the letters, as the warrant, which are registered; but also the executions of all other summonses not in use to be registered are so conceived.

No 81.

THE LORDS having after trial found the stile of many executions of inhibition about the time of these quarrelled to run in the same strain, they repelled the nullities, and sustained the inhibitions; because the sustaining such grounds of nullity might open a door to question many diligences, and the registration ascertained the parties, so as one could not be mistaken for another.

*Forbes, p. 99.*

1713. July 8.

ANDREW BAILLIE of Parbroath *against* ROBERT NISBET of Greenholm, and ARCHIBALD NISBET of Carfin.

IN a reduction *ex capite inhibitionis*, at the instance of Andrew Baillie against Robert and Archibald Nisbets, the defenders objected three nullities against the execution of the inhibition, viz. *1mo*, It doth not design the party at whose instance the inhibition was used, nor the party against whom, otherways than by a general relation to the letters, contrary to the act of Parliament 1672, which, though it mention only executions of summons, includes also executions of inhibitions, horning, and the like; summons and letters being terms of promiscuous use in our law, as is clear from act 45th Parl. 5th James V., and the act 40th Parl. 1695, act 32d Parl. 1469, act 74th Parl. 1540. *2do*, The execution doth not bear delivery of a subscribed copy to the party, which is a necessary solemnity by act 141st Parl. 12th James VI.; for when an execution doth not bear, that the formality required by law was used, it is presumed against it, that such a formality was omitted. *3tio*, The execution doth not bear, that there were any witnesses to leaving of the copy, but only to its affixing.

No 82.  
Execution of an inhibition was sustained, though it did not design the parties otherways than by relation to the letters.

*Answered* for the pursuer; *1mo*, The act 1672 relates only to summons, the commencement and continuation of processes before the Lords of Session to different diets of compareance to pursuers and defenders, &c. Now, there are no such terms used with respect to inhibition, which is a complete security by the execution and publication, and cannot be regulated by the statute aforesaid. *2do*, Law doth indeed require, that copies of summonses and letters delivered to parties, be signed by the executor, but not that the execution expressly bear, that the copy delivered was signed. *3tio*, If the messenger after narration of his having left and affixed a copy, and used the other particular solemnities, had said no more but 'before these witnesses, &c.' and the witnesses had subscribed the execution, it had been certainly good. Now, his