

1683. *Marob.* ELIZABETH STEVENSON *against* EDWARD GILLESPIE.

No 30.

THE execution of an inhibition being quarrelled as null, for that if executed personally, it did not bear that a copy was left; and if executed at the dwelling-house, it did not bear that six knocks were given;

*Answered*; The execution bears, that the messenger went to the dwelling-house and left a copy, and immediately thereafter acquainted the party that he had done so. *2dly*, The ground of the inhibition is only a destination in a contract of marriage in favour of heirs or bairns, which imports not a debt in a competition with true creditors.

THE LORDS waved the first allegeances as to the execution, and found, That the users of the inhibition, viz. the children, are to be looked upon as heirs of provision to the father, in so far as they compete with the father's true creditors, and so preferred the creditors, notwithstanding of the inhibition founded on the contract of marriage. See PROVISION TO HEIRS AND CHILDREN.

*Harcarse*, (INHIBITION.) No 632. p. 174.

1684. *February.* ANDREW FOOT *against* JOHN KEIRY of Gogar.

No 31.

AN inhibition being quarrelled, as not duly executed at the head burgh of the regality where the lands lay;

It was *answered*, That the execution was used in the English time, when regalities were suppressed, and the lieges did generally execute all diligence at the head burgh of the shire.

*Replied*; Regalities were only suppressed *quoad* their jurisdiction, and not *quoad* the place of execution appointed by the laws of this kingdom.

THE LORDS sustained the execution as lawful, for the reasons foresaid.

*Harcarse*, (INHIBITION.) No 635. p. 174.

1685. *March.* SIR JAMES COCKBURN *against* TROTTER of Mortonhall.

No 32.

SIR JAMES COCKBURN having inhibited Mr Alexander Spottiswood upon a wadset for a great sum, and thereafter lent 8000 merks to him as principal, and Mortonhall as cautioner, whereof Mortonhall made payment upon distress, and got an assignation to the bond from Sir James, with warrandice from fact and deed, and apprised Mr Spottiswood's lands; Sir James raised reduction of his apprising *ex capite inhibitionis*.

*Alleged* for the defender, That Sir James's assignation with warrandice imports a *non repugnantia* of all rights that then stood in his person. *2do*, The sums contained in the bond were paid for the back tack duties of the wadset,

A creditor inhibited his debtor, upon a wadset for a large sum, and thereafter lent her another sum upon a bond with caution. The cautioner paid on distress, and got assignation with warrandice.

No 32.  
from fact and deed. The cautioner apprised the original debtor's lands. It was found the inhibition did not affect this diligence.

and being surrogated in place thereof, must have the like privilege as if Mortonhall had been cautioner for the back tack-duties, and assigned thereto. *3tio*, The money being lent by Sir James himself, for his own use and advantage, cannot fall under the prohibition of the inhibition.

*Answered* for the pursuer, The warrandice is qualified, viz. that Sir James had made no assignation, &c. and so restricted to such facts and deeds. *2do*, The bond bears borrowed money, without any relation to the wadset; and Sir James had no advantage by the lending of the money more than if it had been borrowed from another person to pay him; and it is ridiculous to think, that for his back tack-duties (for not-payment whereof he could have declared the back tack null) he would have weakened his security by the inhibition. *3tio*, If the inhibition should not take place against the apprising, Sir James would be prejudged, seeing the debtor's estate is very much incumbered; and the comprising, if it had the privilege of back tack-duties, would come in *pari passu* with the wadset for mails and duties; nor is the cautioner in any better case by the assignation from the cedent, than if he had comprised upon the clause of relief without an assignation.

THE LORDS found, That the warrandice of the assignation did not extend to the inhibition, which he was not obliged to assign; and that the bond and sums were surrogated in place of the back tack-duties for which they were paid, and had the privilege not to be prejudged by the inhibition. But this interlocutor not being consonant to decisions in other cases, the LORDS did not pronounce the same, but ordained the points to be debated *in presentia*.

*Harcarse, (INHIBITION.) No 636. p. 175.*

No 33.  
If a party is within the kingdom, but absconds, inhibition may be executed against him at the market cross

1687. February 22. MUSHET of Calzihall against LORD MARR.

IN a reduction of a disposition *ex capite inhibitionis*, it was alleged for the defender, That the inhibition was null, in so far as it was not executed against my Lord Cardross, the party, personally, or at his dwelling-house, but at the market-cross of Edinburgh, pier and shore of Leith, and at the head-burgh of the shire, against the lieges, as if the party had been out of the country, whereas he was within the kingdom. *2do*, The inhibition proceeded upon a conditional debt, before the condition was purified. *3tio*, Bonds containing obligations to infest in annualrents out of the debtor's lands in general, anterior to the inhibition, were the ground of the disposition.

*Answered*, The execution at the market-cross of Edinburgh, &c. was as sufficient a notification as if it had been executed personally, or at the debtor's dwelling-house; and if the debtor was then in the kingdom, he was absconding, and lying darned, and was reputed to be out of the country. *2do*, Inhibition may proceed upon conditional obligations, or *ante terminum*, to take effect after purifying of the condition, or elapsing of the term. *3tio*, The in-