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

No 71.
Inhibition at the head burgh of the jurisdiction in which the inhibited person's lands lie: It is sufficient to execute it against the inhibited person personally, or at his dwelling-place; and at the market-cross of the head burgh of the jurisdiction in which he dwells, and to record the inhibition and execution, either in the particular register of the jurisdiction where the lands are, or in the general register.

William Hope buys Mr George's tenements lying in the Canongate. The Lord Gray, and Ramsay his assignee, raise a reduction of Campbell's disposition to Sir William, as granted posterior to his inhibition. Sir William repeated a reduction of the said inhibition upon this nullity, that the lands lie within the regality of Broughton or the Canongate, and yet the inhibition was not executed nor published at the market cross of the Canongate, the head burgh of that regality. *Answered*, There was no law requiring its publication at any other market cross than the head burgh of the jurisdiction where the party inhibited dwells; and the two laws relating to inhibitions, viz. act 119th 1581, and act 268th 1597, prescribe no such thing; and where there is no law, there is no transgression; and so it is, this inhibition is executed at the market cross of Edinburgh, where Mr George, the person inhibited, then dwelt, which is all our law requires. *Replied*, Many of the solemnities used in executing diligences by horning, inhibition, &c. are introduced by no positive statute, but purely by custom; such as the three oyesses; and *esto*, there were no law for publishing inhibitions at the market crosses of regalities where the lands lie; yet a long practice and custom is sufficient to establish it, especially when it is backed and corroborated by the Lords decisions when the case occurred. And, *first*, Craig, *feud.* I. 12. 31. lays it down for a principle, that inhibitions must be published *apud crucem foralem* of the head burgh *in provincia et vicecomitatu ubi bona sita sunt.* The *next* time is Sir Thomas Hope in his Major Practiques, *Tit.* Inhibitions, who observes, that the Lords, on the 16th July 1616, Inglis *contra* The Laird of Corstorphin, *voce* Inhibition, found an inhibition could extend to no lands but these lying within the freedom where it was used. Then follows Durie, 30th January 1629, Stirling and Panton, No 66. p. 3728.; and Haliburton and Monteith, *voce* Registration; both which take the necessity of executing at the market cross of regalities, as well as shires, for-granted. Then, in Ellies's case against Wishart and Keith, 27th February 1667, *voce* Inhibition; the same is presupposed in the debate, if it can extend *ad acquirenda.* And, to come down later, in two cases, wherein Sir James Baird of Sauchtonhall was concerned, the one against Watson of Damhead, 26th February 1695, *voce* Inhibition; and the other against Sir James Cockburn of that Ilk, and his Creditors, the Lords found the same. And, last of all, it was *in terminis* decided, in the long depending plea betwixt William Cleland and David Falconer, 26th July 1694, No 70. p. 3731. where the Lords found an inhibition null for not being executed at the market cross of the regality of Dalkeith, within which the lands lay, and was designed to be a rule and standard for all such cases in time coming; and that process was then intented against Sir William, but on that interlocutor was let fall, till now it is thought to be out of head. *Duplied*, That an uniform custom is indeed as binding and obligatory, *nec minoris auctoritatis* than a law; there being as many executed the one way as the other; and though there be a visible *incommodum* to annul hornings and inhibitions that have obeyed the law

No 71.

in all its punctilios, though not in superadded unnecessary practices, yet there can be none in sustaining them; for the truth is, multiplication of solemnities has arisen from two sources, one is the anxious solicitude and care of creditors rather to overdo than fall short; and the *second* is, the covetousness of messengers to heap expenses by going to many crosses. This is *multum scribere multum solvere*; neither are the decisions come to that maturity and consistency as to make a rule; for all of them, except the last case of Cleland's, rather presupposed it by way of concession than decided it. And, in Cleland's case, the Lords varied and fluctuated, till at last it carried by the Chancellor's casting vote. And both Sir George Mackenzie, *Tit.* INHIBITIONS, and Lord Stair, IV. 50. require no such thing, but singly publication at the head burgh where the party inhibited dwells. And if it were not for the law requiring publication, there needed now no more save the giving a copy to the party; and the registration, which is the only true and safe notification to the lieges. And Craig's words, *vicecomitatus et provincia* are not alternative, importing a regality, but synonimous; *See* Dirleton, *voce* INHIBITION. The 128th act Parl. 1581, deciding the question, if the acts of Parliament must be proclaimed at every market-cross and head burgh? finds the publication at the market-cross of Edinburgh shall bind for all; and Edinburgh lying contiguous to the Canongate, the intimation there may serve for both, as *l.* 1. *D. de verb. significat.* says, *urbis appellatio muris, Romæ vero continentibus ædificiis finitur.* And superabundance of law in humorous wary creditors lays no obligation on others to use superfluities. And seeing regalities do locally and teritorially lie within sheriffdoms, the execution in the shire comprehends both, unless the party dwell in the same regality where the lands lie.——THE LORDS being much divided in their reasoning, some thinking the inhibition legal, and others null; and being desirous to make a standard *pro futuro*, they, before answer, ordained a trial to be taken, by searching the registers where the generality of the custom lay, of executing at regalities where the lands lie, that they might conform their decisions to the more universal custom, as should be found after inspection of the registers.

THE LORDS having advised this cause, on the 14th February 1710, found, by plurality, the inhibition legally executed, and repelled the nullity objected against it.

Fol. Dic. v. 1. *p.* 262. *Fountainhall, v.* 2. *p.* 552.

*** Forbes reports the same case:

IN the action at the instance of the Lord Gray, as creditor to Mr George Campbell, against Sir William Hope, for reducing a disposition of a lodging in the Canongate, granted to Sir William by Mr George, *ex capite inhibitionis*,

Alleged for the defender; The pursuer's inhibition is null, in so far as it was not executed or published at the market-cross of the Canongate, head burgh of

No 71. the regality of Burghtoun, within which the lodging disponed lies; but only at the disponer's dwelling-house in Leith, and at the market-cross of Edinburgh, head burgh of the shire where he lives, and his lands lie.

Replied for the pursuer; His inhibition wants no formality required by law or statute, and more was needless.

Duplied for the defender; Most of the solemnities of executions are introduced by custom without any positive statute. And it hath been the constant custom to execute inhibitions at the market-cross of the head burgh of the regality where the lands lie; which solemnity, Craig, I. 12. 31. Hope Maj. Prat. *Tit.* Inhibitions; and Dirleton, in his Doubts, *Tit.* Inhibition, suppose to be necessary; and their opinion is confirmed by a constant tenor of decisions, particularly in the case betwixt Cleland and David Falconer, in November 1691, No 70. p. 3731., and that betwixt Baird and Watson, *voce* Inhibition. *2dly*, The manner of executing inhibitions is not regulated by any act of Parliament; for the statute 119th, Parl. 7. Jas. VI. *anno* 1581, relates only to registration; and its requiring, that, where the person inhibited hath lands in another shire than where he dwells, the inhibition be produced, duly executed and indorsed to the clerk of that other shire, imports and supposes a necessity of executing there, as well as in the shire where the party dwells, since registration and publication go still hand in hand. And the act 268th, Parl. 15. Jas. VI. appoints inhibitions to be executed at the market-cross of the head burgh of the stewartry or regality where the inhibited party lives, and to be registered in the books of that jurisdiction, because they are only recorded where they are published. *3dly*, No where can inhibitions be more effectually published than at the head burgh of the shire where the inhibited person dwells, and of the jurisdiction where his lands lie. And being real diligences affecting lands, they should be published where these lie; as warnings and denunciations of lands to be apprised are executed upon the ground of the lands, and thereafter at the head burgh of the jurisdiction where they lie.

Triplied for the pursuer; It is denied there is any uniform custom of executing inhibitions at the head burgh of each jurisdiction where the inhibited party hath lands; though some may have done it *ob majorem cautelam.* Suppose the custom so to do were universal, it cannot bind such as have not observed it, because not founded in, nor agreeable to law, *L.* 2. *C. Quæ sit longa consuetudo; nam non exemplis, sed legibus est judicandum.* So albeit, by general custom, fifteen persons are adhibited upon inquests in apprisings, yet an apprising was sustained where the inquest consisted only of thirteen, in respect law requires no greater number. And are not four witnesses mostly subscribing to every sasine? Yet the Lords have sustained sasines wherein there were but two or three witnesses, because two witnesses are sufficient in law to any instrument of one notary. The reason for three oyesses is not founded simply upon custom, but upon the law requiring publication at the market-cross, which long custom hath determined only as to the manner, by public reading of the letters after

three oyesses. The opinion of the learned lawyers cited for the pursuer, is not of that weight as to be a ground to decide contrary to the written law. Besides, Hope and Direlton speak only of the head burgh of the shire; and *provincia*, or *vicecomitatus*, are used by Craig as synonimous words for shire. But this point is fully cleared by the later authority of the Viscount of Stair, and Sir George Mackenzie, who hold it sufficient, that inhibitions be executed at the head burgh of the jurisdiction where the inhibited person dwells, and recorded either in the particular register where the lands lie, or in the general register. And in any decisions that seem to favour the defender, the point hath not been seriously or fully debated. For that betwixt Cleland and Falconer was made after the parties had transacted, and perhaps not without a particular view. And the *ratio decidendi* in the practick Watson *contra* Baird was, for that the inhibition was not at the head burgh of the regality where the party inhibited dwelt, and so doth not meet the present case. 2*dly*, It being clear in the act 1581, that the second production of the inhibition to the clerk of the shire where the lands lie, implies only, that it should be produced to him in order to registration, duly executed as it was produced to the first clerk, seeing there is no mention of any new publication or execution; and, therefore, the consequence drawn from the defender's constrained and unnatural gloss falls to the ground. That we are not to argue from registration to publication is clear, seeing inhibitions are often registered in the public register at Edinburgh, when the inhibited party lives in a remote jurisdiction; but it cannot be advanced, that in such a case publication at the market-cross of Edinburgh is necessary. 3*dly*, There is a great difference betwixt inhibition and apprising, the first being only a diligence to hinder parties to sell their heritage in prejudice of the inhibiter, without giving him any real right thereto; whereas apprising conveys the right of the heritage apprised; and therefore the denunciation should be upon the ground thereof, and published at the head burgh where it lies. So that it is justly sufficient to execute inhibitions at the market cross of the head burgh of the jurisdiction where the inhibited person dwells, without necessity to publish them also in all other districts where he hath lands; as denunciation upon a horning at the head burgh of the jurisdiction where the person denounced dwells, will make his liferent escheat fall, and carry right to his lands during his lifetime, wherever they lie.

No 71.

THE LORDS found, that an inhibition needs not to be executed at the head burgh of the regality where the inhibited person's lands lie; but that it is sufficient, after executing against him personally, or at his dwelling-place, to execute at the market-cross of the head burgh of the shire where he dwells, and register the same, either in the particular register of the jurisdiction where his lands lie, or in the general register.

Forbes, p. 399.