

On the 24th January 1771, "the Lords found that the notification given in April 1770, was sufficient to make the defender remove at Martinmas 1770, and *Beltane* 1771; and, in respect that Martinmas 1770 is past, ordained her instantly to remove from the arable land, and at *Beltane* from the houses and grass;" altering Lord Pitfour's interlocutor.

Act. A. Lockhart. *Alt.* G. Ferguson.

1771. *January 24.* JOHN LAWRIE *against* MARY WADDLE.

TITLE TO PURSUE.

Objection to the Title of a Pursuer of a ranking and sale, removed by the concurrence of the party having interest.

[*Fac. Col. V.* 202; *Dictionary*, 16,130.]

HAILES. Had there been a discharge of the obligation to retrocess, it is admitted that there would have remained no objection. What is the difference between discharging this obligation and authorising the trustee to proceed, as if there had never been any such obligation?

COALSTON. I am surprised to see a petition of this kind given in. The whole intention of the litigation is to occasion delay.

On the 24th January 1771, "the Lords sustained the title to pursue, and found the petitioner liable in the expenses of the answers to the pursuer;" adhering to Lord Kaimes's interlocutor.

Act. D. Dalrymple. *Alt.* A. Wight.

1771. *January 25.* ALEXANDER GILLIES *against* ADAM MURRAY.

PROOF—EXECUTION.

Parole Evidence incompetent to rectify a mistake in the record of Judicial proceedings.
Executions of Inhibitions must bear three oyezses and public reading.

[*Fac. Coll. V.* 207. *Dict.* 3,795.]

PITFOUR. Mistakes are incident to mankind. *Here* there is nothing more than a mistake in writing *five* instead of *three* in the execution. As to the three

oyezes, when execution was the whole of the intimation. A great exactness was required : not so now, when, to execution, there is superadded registration.

JUSTICE-CLERK. There is no objection to the *execution* of the inhibition. The only objection is as to the *date*. The error of the date may be proved.

PRESIDENT. The Court is going very far to rectify errors in legal acts by the means of parole evidence. The clerk of the bills does not examine the executions : he takes that upon the faith of the writer who presents the bill. Here, then, we are to trust every thing to the writer, and, of consequence, to the party himself.

COALSTON. This cause is not to be determined upon principles of equity. Creditors must stand or fall by the priority and propriety of diligence. In order to support the inhibition, the execution must be produced. An inhibition on the 3d of July cannot be supported by an execution of summons on the 5th of July. The execution cannot be supplied by witnesses : no more can the dependance. Besides, the clerk of the bills cannot swear that this summons was the summons shown to him : The *oyez* (or hear all) is the publication, and the want of it is the want of publication.

HAILES. The pursuer pleads, that, to require critical accuracy in the *minutiae* of legal acts, is to throw snares in the way of suitors. I do not think so. We live in an age where there is so much carelessness and inattention, that, if we relax from the rigour of form, every thing will go into inextricable confusion. If the pursuer has suffered by the error of the person he employed, let him seek his damages as he best can. I am also for sustaining the second objection, not because the execution does not bear three *oyezes*, but because it does not bear *lawful publication* : and this is just what was the opinion of the Court in 1681, as observed by Lord Stair. *Lawful publication* may imply *three oyez*es ; but we cannot presume lawful publication where no mention is made of *publication* at all.

MONBODDO. As all our judicial proceedings must be in writing, evidence by witnesses cannot be received to rectify errors in them.

KAIMES. Here there seems a contest of reality against law : but, when an inhibition is *ex facie* regular, will it not stand till it be reduced ?

On the 25th January 1771, the Lords “sustained the objection, that the execution of the inhibition appears to be prior in date to the execution of the summons ; and also the objection that the execution of inhibition does not bear *three oyez*es.”

Diss. as to the first objection, Pitfour, Auchinleck. As to the second, Pitfour, Auchinleck, Elliock.

Act. H. Dundas. *Alt.* G. Buchan, Hepburn.

Reporter, Barjarg.