DIVISION VII.

Clauses implying or importing particular legal steps of execution.

1626. *July* 22. STUART *against* ACHANAY.

No 155.
An execution of charge, which bore that the messenger delivered a copy to the party, was sustained, as implying personal execution.

IN a declarator betwixt Stuart and Achanay, the horning whereupon declarator was sought was alleged to be null, because the charge bore not 'that the 'party was either charged personally, or at his dwelling-place;' and whereas the charge bears, 'that the messenger delivered a copy to the party charged,' that ought not to sustain the charge, seeing the same could not be found lawfully executed, except the messenger had expressly set down in his execution, 'that he charged him personally apprehended,' no more than an execution could be found lawful, where the charge bears not, 'that the messenger had 'affixed his stamp thereto,' albeit the stampt was affixed thereto. This allegeance was repelled, and the horning found sufficient, bearing, 'that a copy was 'delivered to the party,' which could not have been, but by a charge given to him personally apprehended.

Act. ——. Alt. *Belshes.* Clerk, *Scot.*

Fol. Dic. v. 1. *p.* 270. *Durie, p.* 224.

1681. *February* 22.

JOHN EWING Merchant in London, *against* MR JAMES ROCHEAD of INVERLEITH.

No 156.

THE LORDS found an inhibition served against Mr Thomas Burnet, Mr James's author, null, because the publication bore not a copy left at the pier and shore of Leith, (Thomas then biding in Holland,) though it bore these words, a copy left at the market cross of Edinburgh, before these witnesses, at the market cross and pier and shore of Leith respective, conform to the tenor of the letters, which the LORDS found not to be equivalent.

Fol. Dic. v. 1. *p.* 270. *Fountainhall, MS.*

*** Stair reports the same case:

JOHN EWING, merchant in London, having arrested in the hands of Mr James Rochead all sums due to Mr Andrew Burnet, for satisfying of sums due by

No 156. Burnet to him, pursues Rochead to make furthcoming; who having deponed that he was only debtor to Burnet for the price of Inverleith, and that he had paid most of the price for satisfying the real burdens on Inverleith by infeftments and inhibitions, and that what remained he had paid after the loosing of the arrestment, the pursuer *objected* against a sum paid to one Howieson upon an inhibition, That it was no real burden, the inhibition being null, as being executed at the market cross of Edinburgh, and pier and shore of Leith, and yet bears not a copy left and affixed at the pier of Leith; and the Lords have found in the case of Caskieben and others, No 143. p. 3786. 'That deliverance or 'affixing of a copy is an essential solemnity in executions,' the want thereof annuls them; 2*do*, Payment, after the loosing of an arrestment, is not relevant, if voluntary, without process; 3*tio*, The loosing was upon finding a cautioner, who is neither known nor solvent, for which Mr Andrew Burnet, who attested the cautioner, is liable.

The Lords found the inhibition null, not bearing a copy affixed at the pier of Leith, but at the cross of Edinburgh; and found the voluntary payment, after the loosing of the arrestment, valid as to Rochead; but found Burnet, the attester of the insufficient cautioner, liable for the sums paid by Rochead after the arrestment was loosed.

Stair, v. 2. *p.* 864.

1683. *November.* Matthew Baillie *against* Mr Alexander Dunbar.

No 157.

Found, that the execution of a denunciation bearing three oyesses, did import open proclamation and public reading.

Fol. Dic. v. 1. *p.* 270. *Harcarse,* (Messenger.) *No* 686. *p.* 194.

1694. *February* 14. Morrison, &c. *against* Dempster, &c.

No 158.
An execution of inhibition was sustained, though it wanted three oyesses, it bearing public reading and *open proclamation*, which last imported three oyesses.

Rankieler reported David Morison, Sir Alexander Bruce of Broomhall, and the other creditors of Darsie, *contra* Sir John Dempster of Pitlever, and Patrick Steel, for reducing Mr Hary Blyth's inhibition on that estate, and his decreet of reduction obtained on that inhibition in 1675.——The Lords found in such reductions there was no necessity of citing authors, nor of calling the party inhibited and his heirs, but only him, who, contrary to the prohibition of the said inhibition, had received a right from the inhibited person; and so there was no need of calling Spottiswood's heirs in that process. Next, they found that no creditor compearing in that process of reduction pursued by Dr Blyth, *ex capite inhibitionis,* could be admitted now to quarrel and impugn the said inhibition, being there competent and omitted; but that a creditor or two, giving