

null, because it is offered to be proven it was signed by the messenger and witnesses blank, and so transmitted to Edinburgh, and filled up here by the agent; which was a most false and abusive practice, seeing the witnesses are now, by act of Parliament, adhibited not only to the messenger's subscription, but to the verity of the act, and all its solemnities, which is a clear pre-engaging them, and *proditio testimonii*, being made to subscribe before it is filled up, and so to attest what was not truly done. *Answered*, There is no practice more ordinary, in regard messengers frame their executions so informally, that their ignorance did cast a great many processes, for preventing whereof this was invented; and, that it might not be altered to any other use, the messenger uses to write a note on the back of the said blank execution, containing directions how to fill it up. *Replied*, The quotation here calls it a diligence, and not a summons, and is not subscribed by the messenger. *Duplied*, If ever Mayen executed a diligence against this defender he is content his summons be cast; likeas a summons is a diligence, and these are not always subscribed.—THE LORDS were all clear that it was *prava consuetudo*, and of ill consequence, yet thought the preparative might be as dangerous on the other hand; for it had been generally done, *et error communis facit jus quoad præteritum*, otherwise the half of the decreets and processes of Scotland shall be annulled, they proceeding on such citations; therefore they rejected the nullity, but prejudice of his improving the execution, as accords: But resolved, by an act of sederunt, to discharge the like practice of messengers and witnesses subscribing blank executions in time coming, and to cause publish and proclaim it.

*Fol. Dic. v. 1. p. 271. Fountainball, v. 2. p. 78.*

1704. June 28.

SINCLAIR against SINCLAIR.

IN the competition betwixt Sinclair of Barak and Southdun, mentioned 21st current, No 5. p. 234.; Barak objects against the execution of Southdun's adjudication, that it was null, because they were signed blank by the messenger and witnesses in Caithness, and sent blank to Edinburgh, where they were filled up with a legal and formal execution, by Southdun's writers and agents, seeing the witnesses could not know what was to be filled up in the blank, neither did they see it since the upfilling, so that they were only witnesses to the verity of the messenger's subscription, whereas the true design of adhibiting is to attest the contents and solemnities of the execution. *Answered*, *Imo*, They would abide at the verity of the execution, if Barak offered to improve it as false, which was all that law could oblige them to do. *2do*, Whatever inconvenience might be in messengers signing a blank paper, wherein afterwards an execution is filled up, because of the ignorance and informality of most messengers to frame them without such help, yet it has been a frequent practice these many years bygone, both north and south, and other remote places from Edin-

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No 141.

senger and witnesses, blank, and afterwards filled up by the pursuer's agent. The Lords sustained it, but made an act of sederunt prohibiting such practice in time coming.

No 142.

A messenger and witnesses having signed a blank paper, and transmitted it to the pursuer's agent, along with a note under his hand, containing some of the essentials of the execution, and the agent having written the execution, it was sustained, unless the defender would prove that the solemnities were not used.

No 142. burgh; so that the casting of these executions would introduce a great confusion and disorder, and annul many diligences; and as *error communis facit jus pro præterito*, so it may be obviated by an act of sederunt discharging such practices for the future, according to the doctrine of the commentators, *ad l. 3. D. de off. prætor.*—THE LORDS, in this case, found the messenger had sent amongst with the blank execution a short note or minute under his hand, containing some few of the essentials of an execution, and therefore sustained it, unless Barak would, by the witnesses insert, disprove that the solemnities of six knocks, and leaving a copy, &c. were not used; and as *ex malis moribus bonæ oriuntur leges*, so, for preventing such a pernicious practice *pro futuro*, they made an act of sederunt, discharging such blank executions in all time coming, under the pain of nullity, and depriving the messenger; and ordained it to be published, printed, and intimated to the Lord Lyon and messengers.

*Fol. Dic. v. 1. p. 271. Fountainball, v. 2. p. 234.*

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S E C T. XII.

Executions bearing in general to have been lawfully gone about.

No 143.

Execution of an inhibition not bearing that a copy was delivered, but only "that the debtor was inhibited personally apprehended," was found null.

1671. July 28. SIR JOHN KEITH *against* SIR GEORGE JOHNSTON.

THE estate of Caskieben being apprised by Dr Guil, Sir George Johnston the apparent heir, acquired right to the apprising in the person of Phillorth, who by a missive letter, acknowledged the trust; upon which letter, Sir George raised action against Phillorth to count for his intromission, and denude himself, and upon the dependence, raised inhibition; yet Phillorth sold the estate to Sir John Keith, who, to clear himself of the inhibition, raised a declarator that the inhibition was null, and that his estate was free of any burden thereof, because it wanted this essential solemnity, that the execution against Phillorth did not bear a copy to be delivered; and that the executions being so registrate, he being a purchaser for a just price, and seeing no valid inhibition upon record, he ought not to be burdened therewith. The defender *alleged* absolvitor; because, *1st*, The delivering of a copy was no essential solemnity, neither does any law or statute ordain the same; much less any law declaring executions void for want thereof; and albeit it be the common stile, yet every thing in the stile is not necessary; for if the messenger should have read the letters, and shown them to the party, he could not say, but that he was both certjorate and