

No. 120. cancelled ; the Lords repelled the objection, and found it no nullity, the witness being chosen by mutual consent.

Fountainhall.

This case is no No. 37. p. 8433. *voce* LOCUS PœNITENTIÆ.

1710. *July 5.* The LORD GRAY *against* SIR WILLIAM HOPE.

No. 121.

Inhibition sustained, although the names and designations of the witnesses were added upon the margin of the execution, and signed by the messenger, and the writ bore not, that the witnesses were also witnesses to the marginal note.

In the reduction *ex capite inhibitionis*, at the instance of the Lord Gray against Sir William Hope, the defender objected, That the pursuer's inhibition was null, in respect the witnesses in the execution are not designed in the body of the writ, conform to act 5. Parl. 3. Ch. 2. 1681, but both their names and designations adjected in a marginal note ; which, though signed by the messenger, cannot be reputed as in the body of the writ, unless attested by the subscription of witnesses, or that the writ bear, that the witnesses therein were also witnesses to the marginal note ; seeing *eadem est ratio totius, et partis*, one part of the same writ cannot be more privileged than another, but all of it must be verified by the same solemnities ; and therefore, as the body of the writ would be null, if wanting the subscription of witnesses, the margin is null for that defect.

Alleged for the pursuer : In the stile of law, the body of a writ comprehends all except the subscription and solemnities. Was ever a margin refused at the registers to be taken into the body of the book ? Are not the designation of witnesses even in probative writs frequently added upon the margin, and reckoned a fulfilling of the act 179. Parl. 13. James VI. ; *nec temere sunt mutandæ quæ semper habuere certam interpretationem*, L. 23. D. De legibus ; *2do*, There is a difference between witnesses to the subscription of parties, and witnesses to the acts of notaries and messengers ; the former being witnesses to the parties' subscription only and not obliged to know the tenure of the writ, or that the facts therein mentioned are performed accordingly ; whereas the latter are witnesses to facts required in law to be done by the messenger, which properly speaking are the execution. The act of Parliament 1681 requires indeed subscribing witnesses in instruments of notaries, and executions of messengers, and that these witnesses be designed in the body of the writ, but requires not such instruments or executions to have all the solemnities of probative writs, as the writer's designation, and the witnesses to the subscription of the messenger or notary : For were it necessary for witnesses to attest the verity of the messenger's subscription, executions would be docketed as probative writs, *viz.* That the messenger, for the more versification, had subscribed the said execution before such witnesses ; whereas the docket of a messenger's execution runs thus, " And for the more versification of this my execution, I and the said witnesses have subscribed these presents." Which difference betwixt probative writs and executions, is owned by the statute

1681, in so far as it expressly appoints, That witnesses to the former know the party, and see him subscribe, or give warrant to a notary, or see him touch the pen, or hear him acknowledge his subscription, and doth not require any such thing from witnesses in executions; yea, it bears, That no execution shall be sufficient to infer interruption of prescription in real rights, unless the same be done before subscribing witnesses who were present at the doing thereof.

No. 121.

Answered for the defender: The act of Parliament makes no difference in this point betwixt executions and other writs; for the words, "Unless the same be done before witnesses present at the doing," comprehended the whole execution as reduced into writ, and signed by the messenger, without whose subscription it is not a complete execution; and as stamping was formerly necessary for verifying the messenger's subscription, and dispensed with by the act 1686, in respect subscribing witnesses were afterwards to be adhibited; so the subscriptions of the witnesses must attest and confirm the verity of the messenger's subscription.

Replied for the pursuer: Stamping executions was abrogated, because found vexatious and ensnaring solemnity of no use; and the act of Parliament doth not mention it to have been taken away in consideration of the subscribing of the witnesses; *2do*, There is no instance, or which is the same thing in law, it is very rare to see witnesses in executions designed also witnesses to the margins, far less to such margins as are no part of the fact they are required to witness, viz. their own designation.

The Lords repelled the objection against the execution of the pursuer's inhibition.

Forbes, p. 418.

* * * Fountainhall's report of this case is No. 106. p. 3760. *voce* EXECUTION.

1711. *January 24.*

JOHN MOIR and JAMES MORISON, Merchants in Stirling, against JOHN DON, late Bailie, and JEAN DON, Relict of ALEXANDER SIMPSON, Merchant there.

In the reduction of John and Jean Don's confirmation as executors creditors to Alexander Simpson, at the instance of John Moir and James Morison, who were also confirmed executors *qua* creditors, the Lords found, That the edict upon which John and Jean Dons were confirmed was null, for want of subscribing witnesses, in respect the act 4. Parl. 1686 ordains all citations before any Judges which formerly used to be in writ, to be subscribed by the executor thereof, and the witnesses, otherwise to be null; albeit it was alleged for the defenders, That the said statute, chiefly calculated to introduce the necessity of subscribing witnesses, in place of the former custom of stamping, doth only relate to personal, and not to edictal citations by the officers of inferior courts, who used not to stamp their executions; serving edicts at the church door being kept up more for form's

No. 122.

The execution of an edict served by a Commissary officer, in order to confirm an executor, found null for want of subscribing witnesses.