

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.

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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

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

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sake, than because it is necessary to certiorate those interested; *2do*, Whatever be in the statute, inferior commissaries generally have not been in use to cause adhibit subscribing witnesses to the execution of their edicts, and error communis facit jus, L. 3. D. De officio Prætoris, at least, for salving the interest of private parties bona fide perfected according to use;—in respect it was answered for the pursuers, *1st*, The act 1686 is general as to all citations, without distinction of personal and edictal, and the latter do rather than the former require the subscription of witnesses, because no person being to receive a copy, the officer hath the more power and trust; *2do*, The Lords do not in their decisions regard the customs of inferior courts, when derogatory to statute, July 15, 1708, *Houstoun* against the Lord Ross, No. 25. p. 3107.; June 10, 1709, *Moir* against Jack, No. 31. p. 5197. Nor can the maxim, *Communis error facit jus*, which is understood of a whole people or country labouring under some common mistake, be applied to this case; since, whatever be the practice in Stirling, the Commissaries of Edinburgh observe the act of Parliament in the execution of their edicts.

June 13, 1711, The defenders craved, That whatever rule the Lords might please to establish in time coming, they would sustain deeds passed that have been perfected according to the common use and apprehension, as was done February 15, 1681, No. 116. p. 3768.; and in the case of Sir Thomas Young against Calderwood of Pittedie, No. 22. p. 3105. and in that betwixt Russel and Miller, No. 217. p. 7497.

Answered for the pursuers: The error of an inferior court-officer, can never be of more force than the express act of an inferior court, which cannot derogate from public law, L. 3. § 5. D. De supulchro violato. The practiques cited for the defenders cannot be applied to this case, for in the year 1681, the Lords did not sustain a custom contrary to law, but did regulate in time coming the stile of executions, which in times past had varied. In Sir Thomas Young's case, they were unwilling to annul instruments of resignation given according to the custom for a considerable time past, though the old symbol was neglected, because these symbols are not founded upon express statutes, but established by custom, and so may go in desuetude by not observance; and in the practise betwixt Russel and Miller, the Lords who made the act of Sederunt 1696 did derogate from it, by granting a dispensation in other terms; but no Judge can derogate from an express act of Parliament.

The Lords adhered to their former interlocutor.

Forbes, p. 486.

Fountainhall also reports this case:

John Don merchant in Stirling, having confirmed himself executor creditor to one Alexander Stevenson there, John Moir, another of his creditors, observing sundry defects and nullities in the first confirmation, procures himself decerned executor, raises a reduction of the first edict before the Commissaries of Edinburgh, and prevails therein. Don to bring the affair before the Lords, intents a reduc-

tion of that decret reductive, and the whole being tabled there, it was objected against Don's edict and execution before the Commissary of Stirling, that it was null on sundry grounds after mentioned. Don suspecting the event, produces at next calling a split new execution, formal in every point, wherein all the defects of the former were supplied; but Moir offering to improve it as false, and having consigned £40, and Don having shunned to abide at the verity thereof, it was declared null, and improved for not abiding by it. Whereupon Don recurred to his first execution, and they repeated their nullities against it, viz. that it was signed by the Commissary-depute, and not by the clerk; whereas these offices were quite distinct in their own nature, and not to be confounded; *2do*, The edict bore to be executed betwixt the first and second bell, which is the quietest time, there being few or none then in the church; whereas it should be at the dissolving of the congregation; *3tio*, It does not bear it was proclaimed at the market-cross of Stirling, but only at the market; and there be more market places there besides the cross, such as for shoes, fish, corn, meal, flesh; *4to*, It had neither witnesses insert, nor subscribing, contrary to the 4th act 1686, requiring all messengers' executions and other writs to be done before witnesses subscribing; *5to*, The Commissariot register-book, where this is recorded, is interlined, vitiated, and scored, and the clerk should be fined and censured for keeping such incorrect books. Answered, That, in absence of the clerk, the depute frequently signs the warrants; and for the certioration, it may be any time of the Sabbath when the people are gathering; and its proclamation at the market, omitting the word "Cross," is but a pure mistake, and can never amount to a nullity. And as to the want of witnesses, it was offered to be proved, that, by the custom of that Commissariot, witnesses never had subscribed executions of edicts; and whatever the Lords might order *pro futuro*, yet to find it a nullity for bygones, will cast all the confirmations in that Commissariot, whereupon adjudications and other diligences have followed, and so may be very dangerous in the consequence. The Lords fixed on that nullity, that the execution wanted witnesses; and having tried the custom used by the Commissaries of Edinburgh, and finding that they constantly adhibited witnesses to all their executions of edicts, they found Don's confirmation null, and so reduced his testament, and preferred Moir. And it was remembered, that on the 10th of June 1709, in the case of Jack's creditors, No. 31. p. 5197. they found, that the custom of inferior courts, contrary to law and practice, was no sufficient plea nor excuse; and the *verba solemnia* required by law in writs ought to be in sacred and inviolable observation, and not left to the knavery or ignorance of messengers.

Fountainhall, v. 1. p. 631.