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who was then at Hamilton; which the LORDS found did not import a legal citation of the Lady, who ought to have been cited by giving a copy to herself personally, or leaving a copy at their dwelling-house, in the terms of the act of Parliament; albeit it was *alleged* for the pursuer, That delivering a copy to the husband, who was curator in law to his Lady, was equivalent to the giving a copy to herself, and a better certioration than if a copy had been left with any servant in the house; for the LORDS were of opinion, that a copy given to any curator in name of the minor, is null.

Fol. Dic. v. 1. *p.* 265. *Forbes, p.* 337.

1710. *June* 23. LORD GRAY *against* SIR WILLIAM HOPE.

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An execution of an inhibition bore, that the messenger affixed a copy to the market cross, but wanted these words, "I left a copy." The Lords refused to reduce the execution on this account, unless the pursuer would allege that the copy was fraudulently taken down.

IN the reduction *ex capite inhibitionis* (between these parties), the LORDS repelled the nullity that it was not executed at the Canongate, the head burgh of the regality where the lands lay. Sir William now objects a second nullity, viz. That by the 5th act of Parliament 1681, all executions of inhibitions must design the witnesses in the body of the writ, or instrument, otherwise the same are void, null, and make no faith; but so it is, the witnesses are not named or designed in the body of this execution, but in a marginal note adjected by the messenger himself. It is true, the law does not reprobate all such marginal adjections, but it requires that the writ bear the witnesses were adhibited not only to the body of the writ, but likewise to the marginal note, which is not expressed in this execution, and so it is evidently null; otherwise messengers might adject these marginal notes *ex post facto*, which the witnesses neither saw nor knew of, which would entirely evacuate the design of the act of Parliament, which is farther confirmed by the 175th act 1593, and 4th act 1686. *Answered*, This nullity is more weak, trifling, and frivolous than the former, neither supported by the words, meaning, nor reason of the law, which was introduced to correct a corrupt custom that witnesses insert proved without subscribing; therefore, to rectify this, the act ordains the witnesses to subscribe, which is fully obeyed in this execution; and the body of the writ is not in contradiction to the inserting of marginal notes, but that it be within the context of the writ, and not in a condescendence apart; so that the margins, in legal sense, are as much in the body of the writ as any part thereof; and to do otherwise, were to unsecure the lieges, the most part of executions being offered to the register with marginal notes, and never refused; and that the writ should bear, they are witnesses to the marginal note, as well as to the body of the writ, that may indeed hold in probative consensual writs, such as bonds, contracts, discharges, &c. but was never required in messengers' executions, where the witnesses are only called to attest the fact done by the messenger, that they heard

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and saw what he has insert in his execution, but noways to his subscription; whereas, in probative writs, the witnesses may be ignorant of the contents of the writ, and are only to attest the parties' subscription. The vote being stated, sustain the nullity or repel, there were two *non liquets*, and five sustained and five repelled; so it came to the President's vote, who repelled the nullity. Some thought, however it might be for bygones, yet it were fit to regulate it by an act of sederunt for the future, that witnesses in executions should be both for the marginal notes and the body, and wanting that solemnity should in time coming be null. It is observable, that the solemnities of writs came in gradually by progress *ex malis moribus*, of old. In ignorant times, when writing was rare, the parties' seal was sufficient without his subscription, and then the messenger's stamp to executions served for his subscription; and it was by way of signet, containing the initial letters of his name; and then by the 32d act 1469, they were ordained to be stamped before witnesses. Then, by act 117th 1540, evidents are to be subscribed by the parties, or notaries, besides sealing, which made messengers also to sign their executions. Thereafter, act 80th 1579, required witnesses to be insert in the obligations; and act 179th 1593, added the writer's name, all to afford means of improbation against forged writs. And, as the last finishing hand, the 5th act 1681, required the designation of the witnesses in the body of the writ, which gradation shews how necessary our statutes have thought these formalities to be. *See* WRIT.

1710. *July* 25.—BESIDES the two former nullities proponed against the execution of Lord Gray's inhibition, and repelled *supra*, Sir William now insists on other two; 1*st*, That the execution did not bear that the messenger left a copy on the market cross, but only affixed it, which is a necessary solemnity for ascertaining the lieges. *Answered*, There is neither law nor custom appointing a copy to be left, and the battering it on the market cross is sufficient, and implies it was left, unless that Sir William prove that the messenger, witnesses, or party came *ex incontinenti*, and tore it down, for then it would be *ex dolo*; and to shew this objection has no foundation in our law, there be only two acts of Parliament which speak of this matter, act 75th 1540, and act 85th 1587, which only speak of affixing copies, but not a syllable of leaving them, though the first includes the second, it being impossible to conceive, by the nicest and most abstract notion and idea of the mind, a thing to be affixed on a certain place, and yet not to be left in that place. And as to the certiorating the lieges, it is well known that it is not the affixing, nor three oyesses, that put the lieges *in mala fide*, but the registration of it only; and it is mere trifling to argue otherways. *Replied*, That this solemnity is indispensably necessary, is put beyond doubt by a decision, 12th February 1670, Napier *contra* Gordon, No 95. p. 3755., where an inhibition was found null, because it did not bear a copy left; and Stair, Lib. 3. Tit. CONFISCATIONS, thinks naked affixing not sufficient; and the constant stile was always, 'I have affixed and left;' and as

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leaving alone would not be sufficient, so neither should affixing be. The Lords, by a plurality, did not find the want of the words 'I left a copy' to be a nullity, unless Sir William found it was fraudulently taken down. The second nullity objected was, That by the 5th act 1681, the witnesses are appointed to subscribe the executions; and though this was signed by two witnesses, yet the execution did not bear that the witnesses had signed it; which is as necessary and essential a formality as when the messenger's executions were required to be stamped with the two initial letters of his name, engraven on the end of his wand of peace, the execution behoved to say *per expressum* 'my stamp is 'affixed;' and when these words were omitted, the Lords found the execution null, as Hope observes, Tit. Horning, Home *contra* Pringle, 22d November 1610, No 127. p. 3777.; and the like is observed by Durie, 22d July 1626, Stewart *contra* Ahaay, No 155. p. 3803. And the stile since the act of Parliament 1686, abolishing and taking away the use of stamping with their signet, has always been, 'and for the more verification of this my execution, I 'and the saids witnesses have subscribed the same,' which this execution wants. *Answered*, This is more frivolous than any of the former objections; for all that the acts of Parliament require, is, that the witnesses sign the execution with the messenger, but no law bids the messenger mention it in the body of the execution; yea the Lords have gone farther, even to sustain an inhibition wanting the three oyesses, as sufficiently supplied by these words, 'that the 'letters were carefully published and read,' which included and presumed *omnia fuisse solemniter acta*, 21st June 1681, Lundy *contra* Trotter, *voce* Proof. And this execution of the Lord Gray's being so recently after the acts, viz. in 1687, the stile was not then fixed and brought to consistency, as it is since that time; and therefore can never be regulated by subsequent practice. The Lords likewise repelled the nullity, and sustained the execution. [This case was appealed.] *See* Appendix.

Fol. Dic. v. 1. p. 265. Fountainhall, v. 2. p. 579. & 591.

*** Forbes reports the same case:

In the reduction *ex capite inhibitionis* at the instance of the Lord Gray against Sir William Hope, mentioned July 5th, *voce* Writ, the defender *objected* farther against the execution of the inhibition, That it was null, because, 1*mo*, It bears only, 'That the messenger affixed a copy at the market cross,' and not that he affixed and left a copy there, which is the ordinary stile of executions; leaving a copy being as necessary a solemnity in an execution at the market cross against the lieges, as either three oyesses, open proclamation, and public reading, which are not so much noticed, or delivery of a copy to one personally apprehended, or six audible knocks in an execution at one's dwelling-house, Napier *contra* Gordon of Grange, No 95. p. 3755. Stair,

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Instit. Tit. CONFISCATION, § 4.; because what is affixed is not necessarily left, it being ordinary for messengers to cause tear off immediately what they affix. *2dly*, The execution is null, for bearing only, 'And for the more verification I have subscribed the same,' whereas it should have borne, 'That I and the said witnesses have subscribed,' seeing, as before the act of Parliament 1686, an execution was null that did not bear to have been stamped when *de facto* the stamp was affixed, M'Kenzie's Observ. on the act 75th Parl. 6. Ja. V. July 22. 1626, Stewart *contra* Achany, No 155. p. 3803. So this execution, now when stamping is no longer necessary, is null, for that it mentions not that the witnesses, as well as the messenger, did subscribe. For nothing is presumed to be done save what the officer testifies that he has done, and is so ascertained as law requires.

Answered for the pursuer; No law requires expressly to leave, but only to affix a copy upon the cross. Besides, affixing implies leaving, which is less; seeing whatever is affixed is understood to be left, but *e contra* copies may be left that are not affixed. Tearing off the copy *ex incontinenti* by the messenger or his assistants, being an unwarrantable practice, is not to be presumed; for, *nemo præsumitur malus*, and *omnia præsumuntur solemniter acta*, unless the defender prove the contrary. Albeit some executions bear, that copies were affixed and left, that is but tautological stile, the last being implied in the first. Nor can the practick betwixt Napier and Gordon advance the defender's purpose, seeing the execution did not bear that a copy was either affixed or left, which is to be presumed from the inhibiter's not founding any argument upon the sufficiency of affixing a copy to support his diligence. Again, where solemnities are not introduced by statute, but only by custom, executions implying the same have been sustained, June 21. 1681, Lundie *contra* Trotter, *voce* PROOF. *2dly*, The objection against the execution, that, though witnesses sign it, it doth not bear them to have subscribed, is of no moment; for the act 1681, that first introduced the necessity of subscribing witnesses, requires only that the deeds mentioned in the executions be done before witnesses subscribing, and not that the executions bear these to have subscribed, which is but a piece of late stile, used sometimes since the act 1681, or rather since the statute 1686. Besides, there was more reason to annul an execution for not bearing that it was stamped, although *de facto* the messenger's stamp was affixed, than to annul executions subscribed by witnesses, because they do not bear that witnesses subscribed; seeing a messenger might put to his stamp *ex post facto*, and it could not appear from the register that executions were stamped, unless they mention affixing the stamp; whereas witnesses subscriptions to executions are recorded, though executions bear not that the witnesses subscribed.

THE LORDS repelled both the defender's objections, and sustained the execution.

Forbes, p. 428.