

THE LORDS preferred Mr Innes, in respect the last iustament was not produced till after the first was registered, and an interlocutor in the action founded upon it.

No 23.

*Fol. Dic. v. 1. p. 553. Forbes, p. 674.*

1744. July 7. CHRISTIAN BEG against THOMAS RIG of Morton.

THE pursuer having brought a process against the defender, the summons was called in the Outer-house the 9th June 1743, and given out on the 12th, with an execution subscribed by a messenger, but not by any witnesses; and, upon the 20th, was returned with defences written upon the back of the execution, objecting the nullity thereof, as wanting witnesses, in terms of the act 1686, which declares such executions void and null, and are not suppliable *ex post facto*, by the act 1681. This process was enrolled the 30th June, upon the said return; and being called before the Ordinary, and the same defence insisted on, the pursuer produced a new execution, signed both by a messenger and witnesses, with an instrument of protest, four days after the return, offering the process to be given out a second time, with the new execution, which was refused to be taken out, in regard signed defences were made to the first outgiving.

Upon this debate the LORD ORDINARY repelled the defences, and the LORDS adhered.

*C. Home, No 271. p. 441.*

No 24.  
If an execution is objected to as null, it can be supplied by producing another after the process is called, given out, and defences returned.

1748. July 15. A. against B.

ON a verbal report, it was by the LORDS given as a general rule, that a messenger may be allowed to amend his execution, where nothing inconsistent with what the execution produced bears is proposed to be added; but that he could not be allowed to give a new execution bearing any thing inconsistent with the former produced.

*Kilkerran; (EXECUTION.) No 1. p. 169.*

No 25.

1752. February 28. A. against B.

THIS day an Ordinary verbally reported this point, whether where an execution of removing bore two witnesses to the executing at the church-door, the messenger could be allowed, after imprecation was proponed, to amend his execution, by adding other two witnesses to his execution.

THE LORDS were of opinion he could not.

No 26.

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It was thought pretty evident, that he had averred a falsehood, in inserting the two that were in the execution, and that this was not so properly amending as making a new one.

*Kilkerran, (EXECUTION.) No 3. p. 170.*

1797. June 2.

HOG against MACLELLAN and LOWDEN.

No 27.

An error in the date of the execution of a charge of horning, although arising from mistake, cannot, in a competition of creditors, be corrected by parole evidence.

WALTER HOG, a creditor of James Dalrymple, executed a pointing of his effects, in which David Maclellan and William Lowden, also creditors of Dalrymple, were conjoined.

Walter Hog afterwards *objected* to Maclellan and Lowden's pointing, That the execution of the charge of horning, on which it proceeded, bore, that the common debtor had been charged on the 11th September 1794, while the horning itself was dated on the 29th of that month.

Maclellan and Lowden established, by the witnesses to the execution, that the charge had really been given on the 11th October, and that the date which the execution bore arose merely from the mistake of the messenger in writing it out. And he offered either to get the execution corrected by a marginal addition, by annexing to it a declaration of the real fact by the messenger and witnesses, or by producing a new execution.

Walter Hog opposed this ; and,

*Pleaded* ; No essential error in an execution can be corrected by parole testimony, Stair, b. 3. t. 3. § 3. ; Ersk. b. 2. t. 5. § 55. ; Stair, 11th July 1676, Stevenson, No 145. p. 3788. ; February 1684, Threapland, No 99. p. 3756. ; A. against B. *supra* ; Dictionary, *voce* EXECUTION. But the date of an execution is its most important part, as the preferences of creditors depend on it. Were messengers allowed to amend an error of so much consequence, it would give rise to a dangerous remissness in the exercise of their duty. An execution of charge is, besides, an *actus legitimus*, which is unalterable from the moment it takes place.

*Answered* ; As it is not alleged that the mistake arose from fraud, it can have no worse effect than if the execution bore no date at all. But the want of a date is not declared a nullity in an execution by statute, and at common law the defect may be supplied by extrinsic evidence, February 1730, Arrot against Garden, *voce* PROOF, except where the execution is in itself part of the diligence as in inhibitions ; or where it has been put on record, after which the lieges are entitled to judge of it as it stands.

Although the execution of diligence as an *actus legitimus* may be unalterable, the indorsation of the messenger is not so. It is merely a deed of evidence, certifying that the ceremony of the execution was regularly performed, and as it is in general written out, so may it also be amended after the ceremony is over.