

No 139.
 officer neither
 take the sails
 nor rudder
 from the ship,
 nor leave a
 copy of the
 arrestment
 affixed to the
 ship.

themselves, upon an arrestment direct, and executed by warrant of the precept of an inferior judge, viz. the admiral-depute; and the said arrestment so executed was sustained, albeit it was quarrelled as unlawfully executed, not bearing, to be stamp, and not bearing, that the officer took the sails from the bark, and the rudder from her, all which are necessary formalities in arresting of any ships, and omitted, albeit the warrant of the precept directed the same. *Item*, No copy delivered to the party, nor left or affixed upon the ship; which objections were repelled, seeing the pursuer offered to prove, that the officer intimated to the debtor's own son, that he had arrested the ship immediately after the doing thereof; and which intimation, so made, the LORDS found probable by witnesses, and the officer, and that it was not necessary to prove it by writ, or by oath of party.

Act. ———.

Alt. *Mowat*.

Fol. Dic. v. 1. p. 269. Durie, p. 842.

No 140.

1694. July 19.

M'KEAN, &c. against ———.

HALTON reported the case of M'Kean, &c. about a decret of the Sheriff of Ayr, which was quarrelled on this nullity, that he was not cited, and that there was no execution in writ; and the decret itself bore, that the sheriff-officer only verified his verbal execution in face of court. THE LORDS turned the decret into a libel; for though of old, when writing was not so frequent, verbal citations were allowed, (as they are to this day in Baron-courts), yet now, since almost every body are taught to read and write, and that the late acts of Parl. 1681 and 1693 require subscribing witnesses to executions of messengers, such verbal citations cannot be sustained.

Fol. Dic. v. 1. p. 271. Fountainball, v. 1. p. 634.

S E C T. XI.

Execution returned Blank to the Party.

No 141.
 An execution
 was signed
 by the mes-

1700. January 9.

ABERNETHY against OGILVIE.

ARBRUCHEL reported Abernethy of Mayen against Ogilvie of Badintowl, for payment of a debt contained in his father's bond. *Alleged*, The execution is

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-

VOL. IX.

21 Q

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.