

1710. *January 19.* ROBERT STRAITON *against* ALISON ROBERTSON.

No 22.

IN a competition betwixt Robert Straiton and Alison Robertson, for an acre of temple-lands in Swanston, she, January 18th 1704, having produced and founded preference on a disposition granted to her by Barbara Reid, signed by two notaries for the granter, who could not write, and subscribed by three witnesses only, albeit four were inserted; the LORDS found, that the said disposition, though now subscribed by the fourth witness, is null; for that the writ being once judicially produced with such a defect, that could not *ex intervallo*, so long after subscribing by the notaries, be supplied.

Fol. Dic. v. 1. p. 553. Forbes. p. 387.

1713. *February 28.*

Mr ALEXANDER DUNCAN of Lundie *against* WILLIAM INNES Writer to the Signet.

No 23.

A posterior assignation was preferred, because the first, which had been informal, was rectified after the other had been produced in process.

IN a competition for a sum due by John Scrimzeour of Kirkton betwixt the Laird of Lundie, as having right thereto by assignation from Kilmahew the creditor, and William Innes, who, after intimation of Lundie's assignation, obtained another assignation from Kilmahew to the same money; at calling of the cause before the Lord Polwarth Ordinary, William Innes having objected against the intimation of Lundie's assignation that it was null, as wanting subscribing witnesses in the terms of the act of Parliament 1681; and the objection being sustained, Lundie procured from the notary a new instrument of intimation of the same date with the former duly signed by him and the witnesses designed in the first intimation, who were willing to depone upon the verity of the intimation.

Alleged for Mr Innes; Lundie's first instrument of intimation having been registered and judicially produced, and an interlocutor past thereupon, there was a *jus quasitum* thereby to Mr Innes, which could not be taken away by the notary's giving a new more formal instrument. The fact of intimating and taking instrument before witnesses, is not the essential solemnity, but the instrument itself duly signed by a notary and witnesses, and nobody ought to take an instrument from a notary till it is signed, *de recenti*, for fixing the facts of solemnity in the memory of the witnesses. Again, it were as reasonable to allow the intimation and solemnities to be proved judicially by witnesses, as to allow the defect of the instrument in question to be supplied by any new deed of the notary and witnesses.

Answered for Lundie; Albeit the first intimation was registered through inadvertency, that could not alter the case, seeing law required it not to be registered; and it was inserted in the extract only because indorsed on the assignation.

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.

No 25.

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

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.

No 26.

THE LORDS were of opinion he could not.