

No 3.
The designation given to a witness, by the messenger, in a denunciation, will be presumed to be the true one.

1631. *March 29.* MURRAY of Halmyre *against* LORD YESTER.

IN an improbation of a horning, whereupon the Lord Yester had taken the Laird of Drummelzier's escheat and liferent, the heritable right of the said lands was disposed by Drummelzier to the said improver; and the improver, at the term, producing one of the witnesses inserted in the horning, named Archibald Tweedie in Drummelzier; and the Lord Yester, *alleging*, that that person was not the right witness, but that he designed another witness of the same name, dwelling at the same time, in the same place, who was now dead; and the improver contending, that the witness produced by him should be examined, seeing the officer, executor of the horning, was yet living, who was not presently in the country, to design his own witness, and who only properly might design the witness, and who, if he should compare, and declare, that the witness produced was not his witness, then he was content, that the deposition of this person now produced, should not be respected, but holden as not taken: THE LORDS found, That this person produced by the improver, should not be examined, nor his deposition taken, seeing they found, that the user of the horning had the place of designing the witness, where the officer compared not to design them, albeit the horning was not executed at the Lord Yester's instance, but at the instance of another creditor; but they found, that if the officer should compare, and design another person to be witness, then this designed by the defender, at any time before the conclusion of the cause, *eo casu* they would receive his designation. And if he should design this to be the witness produced by the pursuer, and that this witness should happen then to be deceased, he should be holden as an improver, seeing the defender upon his own peril opposed the examination of this witness, and designed another dead witness, which peril the LORDS declared to be as said is, that he should be holden as an improver.

Act. Nicolson.

Alt. Stuart.

Clerk, Gibson.

Durie, p. 587.

No 4.

1686. *January.* ROBERT WEMYSS *against* JAMES GOODSIRE.

A messenger, executor of a pointing, having first given an execution to the creditor for L. 220, and then an execution to the debtor for L. 252, the LORDS adhered to the first execution, and ordained the messenger to be punished.

Harcarse, (MESSENGER.) No 687. p. 194.