

No 18. to be observed, seeing the most part of executions do not bear parties designations; and albeit it were observed, this execution ought to be sustained, seeing it bears Andrew Thomson within designed to be summoned, and he being designed in the summons, it is sufficient.—THE LORDS allowed the messenger to mend the execution, and to insert the defender's designation, as he was within designed.

*Sir P. Home, MS. v. 1. No 499.*

\* \* \* This case is also reported by Harcarse :

*November 1683.*—A SUMMONS being quarrelled as null, for that the execution bore only, that the within designed Andrew Thomson was cited; and so the defender was not designed as well as named in the execution;

*Answered,* This was never in observance, and *communis error facit jus; 2do,* The execution is now helped at the bar.

THE LORDS sustained the summons and execution as helped.

*Harcarse, (SUMMONS.) No 908. p. 255.*

1703. *November 20.* SMART *against* CHAPLAIN.

No 19.  
Witnesses had been adduced before the Lyon Court. It was found, in advocacion, that their examination was null, not having been signed by the Judge until after they had been judicially produced in the advocacion.

ARCHIBALD HISLOP being debtor to Archibald Smart in Fisher-row in 420 merks by bond, Rebert Chaplain, messenger in Dalkeith, is employed to take him with caption, who after he had apprehended, and kept him in custody for a day, suffered him by connivance to escape; whereupon Archibald pursues him and his cautioner, before the Lyon Court, for payment of the debt; where sundry witnesses were examined, for proving the libel, viz. his being employed, and his negligence in letting him escape, after he had taken him; and the messenger having proponed this defence, that Smart had promised, if he took the rebel of new, and incarcerate him again, he would pass from his subsidiary action, and that he had accordingly taken him, the Lyon found the said allegiance relevant, and probable by witnesses; whereupon there is an advocacion raised of the pursuit; and at discussing, they *insisted* on these reasons, *1mo,* That the depositions were not signed by the Lyon, as judge, till they were judicially produced before the Lords, and quarrelled on that nullity, and then only signed; *2do,* It was not the Lyon who took them, but his depute, and so ought to have been signed by him, and not by the Lyon; *3tio,* It was contrary to all law, to admit a promise to be proved by witnesses. *Answered,* to the *first,* It was a very good practice, that the judge should subscribe the testimonies as well as the witnesses, but there was no specific time limited, precisely to do it in, but the omission can be supplied any time before advising; to the *second,* *Non refert* whether the principal judge or his depute sign them; and as to the *third,* It was of the nature of a paction or a bargain, which may certainly be proved by witnesses. THE LORDS found the examination of the witness-

ses null and informal, and not probative, till they were led of new before the Lords, upon getting up their former depositions ; and likewise found this paction of the nature of a promise, and so not probable by witnesses, but only *scripto vel juramento*. See PROOF.

No 19.

*Fol. Dic. v. 1. p. 553. Fountainhall, v. 2. p. 191.*

1709. January 4.

MAVOR *against* STEWART.

IN a case betwixt Mark Mavor and Stewart, it being *alleged* the decret was null, because it bore not personally apprehended ; and it being *answered*, That the sheriff-mair offered to depone, that it was done personally ; *replied*, Executions are not to be made up in that manner, but must be in writ ; and messengers only depone on the verity of their executions in cases of treason, and serving of brieves. THE LORDS repelled the nullity, in regard the officer gave an execution bearing personally apprehended, and offered to abide at the truth of it.

No 20.

*Fol. Dic. v. 1. p. 552. Fountainhall, v. 2. p. 478.*

1709. February 26.

WILLIAM JUNKISON, Tenant in Newtongrange *against* the LADY ARDVORLICK.

IN the cause at the instance of William Junkison, against the Lady Ardvorlick, the execution of a wakening of the process being quarrelled as null, for that the defender's house was not designed ; and William Junkison having afterwards produced another more formal copy of the execution, wherein the dwelling-house was expressly designed ; the Lady *alleged* that the execution first produced and given out in the process being null, the messenger could not supply the defect thereof, either by a new execution, or by amending the old one.

THE LORDS repelled the objection, and sustained the new execution, in respect Junkison offered to abide by the same ; albeit such mending of an execution of horning, whereof the conclusion is penal, inferring the confiscation of one's whole effects, would not be allowed.

No 21.  
Execution of a summons being objected to, because the defender's dwelling-house was not designed, the pursuer was allowed to produce another more formal execution.

*Forbes, p. 329.*