No 82. saying 'witness to the affixing,' can never wrong the execution, which had been good without it: more than it could be quarrelled as null for not bearing, 'That they were witnesses to the open and public reading and crying of the 'oyesses,' which are likewise said to be done in the execution.

The Lords repelled the nullities, and sustained the execution.

Fol. Dic. v. 1. p. 263. Forbes, p. 697.

1750. *November* 29. Jean Donaldson *against* Donaldson.

No 83.
It is only where the parties are so connected in the action, that it cannot proceed in the absence of any one of them, that the execution must contain the names of all the defenders.

Thomas Donaldson now of Kinnardy, and others, being called by the said Jean in the exhibition of a tailzie of the estate of Kinnardy, said to have been made by William the elder brother of the said Thomas, the Ordinary sustained the no-process objected for Kinnardy, that the execution against him did not contain the names of the other defenders.

The pursuer reclaimed; and the Ordinary, upon hearing the opinion of his brethren, being satisfied that the objection ought to have been repelled, the petition was remitted to the Ordinary.

The act 1672 requires, that the execution should contain the names and designations of all the defenders; and where parties, pursuers or defenders, are so connected that the process cannot proceed if any one of them are wanting, as for example, in reductions of elections in burghs, it has been found a nullity in the execution, that any of the parties' names were omitted to be expressed in it: But that in every case, where more parties are called in one summons, the execution should be void for not bearing the names and designations of all the parties, has no foundation in the statute, in practice, or the reason of the thing, which in no case can be more apparent than in that of a common exhibition. Nay, the said construction put upon the statute in the reduction of an election may even be thought to have gone far enough, as the intent of the statute seems to have been no other than to require that the names of pursuers and defenders should be exprest in executions, and not related generally, as they used formerly to bear only 'the persons within written;' which might be thought sufficiently answered by two different executions, one containing one part of the defenders, and another containing another part of them, each expressing their names and designations.

Kilkerran, (Execution.) *No* 2. *p.* 169.

1755. *February* 20.

Sir William Dunbar, and Others, *against* John M'Leod younger of M'Leod, and Others.

No 84.
Where an execution is written on the back of

A double election of Magistrates and Councillors in the burgh of Forres, occasioned a process at the instance of the one set, headed by Sir William Dunbar

No 84.
the summons, it is not necessary to design the defenders.

as Provost, against the other set, headed by M'Leod younger, for declaring their own election and voiding the other. The following no process was moved, That the execution of the summons against Sir Ludovick Grant one of the defenders is void; because though it recites the names of all the pursuers, none of the defenders are specially mentioned, except Sir Ludovick Grant himself, and the said John M'Leod. With regard to the other defenders, there is nothing but a general description in these words: 'And the other persons within 'named and designed.' And that this was a total objection the act 6th Parl. 1672 was appealed to, ordaining, 'That all executions of summons shall bear 'expressly the names and designations of the parties, pursuers and defenders, 'and that it shall not be sufficient that the same do relate generally to the sum-'mons, otherwise the execution shall not be sustained.'

It was *answered*, That the statute is not applicable to the present case, where the execution is written upon the back of the summons; and upon that account cannot refer to any other defenders but those named in the summons. This will be evident from considering the inductive cause of the statute, as vouched by Sir George M'Kenzie in his observations upon it. Executions originally were indorsed upon the summons, which produced the following curt stile, 'That the messenger cited the parties within expressed.' It became usual afterwards to write the execution on a paper apart, without altering this curt stile, which was not only a blunder, but in some cases furnished an opportunity to fraud, by applying to a summons, that never was executed, an execution of a deserted summons. This artifice had been carried so far as even to interrupt the negative prescription of 40 years. To prevent this abuse the above mentioned clause in the statute 1672 was calculated. It is true, the words are general, comprehending all executions without exception. But then the words ought to be limited to the purpose and intendment of the statute, which was never meant to comprehend the present case. For it is evident, that an execution written upon the back of the summons, must relate to that summons and to none other.

'THE LORDS repelled the objection.'

One should imagine that it did not require an act of Parliament to correct the abuse above mentioned. An execution upon the back of a summons, bearing a citation of the parties within expressed, is not at all ambiguous. It contains the same certainty as if every one of the defenders were mentioned *nominatim* in the execution. But such an execution on a paper apart has no certainty. It may apply to any summons whatever, and affords no evidence of a citation of the defenders contained in the summons to which the pursuer is pleased to apply it. Upon this account such an execution ought not to be regarded by a court of justice; and had it been disregarded, the above clause in the statute would have been unnecessary.

Sel. Dec. No 84. *p.* 111.