

No 26.

It was thought pretty evident, that he had averred a falsehood, in inserting the two that were in the execution, and that this was not so properly amending as making a new one.

*Kilkerran, (EXECUTION.) No 3. p. 170.*

1797. June 2.

HOG against MACLELLAN and LOWDEN.

No 27.

An error in the date of the execution of a charge of horning, although arising from mistake, cannot, in a competition of creditors, be corrected by parole evidence.

WALTER HOG, a creditor of James Dalrymple, executed a pointing of his effects, in which David Maclellan and William Lowden, also creditors of Dalrymple, were conjoined.

Walter Hog afterwards *objected* to Maclellan and Lowden's pointing, That the execution of the charge of horning, on which it proceeded, bore, that the common debtor had been charged on the 11th September 1794, while the horning itself was dated on the 29th of that month.

Maclellan and Lowden established, by the witnesses to the execution, that the charge had really been given on the 11th October, and that the date which the execution bore arose merely from the mistake of the messenger in writing it out. And he offered either to get the execution corrected by a marginal addition, by annexing to it a declaration of the real fact by the messenger and witnesses, or by producing a new execution.

Walter Hog opposed this ; and,

*Pleaded* ; No essential error in an execution can be corrected by parole testimony, Stair, b. 3. t. 3. § 3. ; Ersk. b. 2. t. 5. § 55. ; Stair, 11th July 1676, Stevenson, No 145. p. 3788. ; February 1684, Threapland, No 99. p. 3756. ; A. against B. *supra* ; Dictionary, *voce* EXECUTION. But the date of an execution is its most important part, as the preferences of creditors depend on it. Were messengers allowed to amend an error of so much consequence, it would give rise to a dangerous remissness in the exercise of their duty. An execution of charge is, besides, an *actus legitimus*, which is unalterable from the moment it takes place.

*Answered* ; As it is not alleged that the mistake arose from fraud, it can have no worse effect than if the execution bore no date at all. But the want of a date is not declared a nullity in an execution by statute, and at common law the defect may be supplied by extrinsic evidence, February 1730, Arrot against Garden, *voce* PROOF, except where the execution is in itself part of the diligence as in inhibitions ; or where it has been put on record, after which the lieges are entitled to judge of it as it stands.

Although the execution of diligence as an *actus legitimus* may be unalterable, the indorsation of the messenger is not so. It is merely a deed of evidence, certifying that the ceremony of the execution was regularly performed, and as it is in general written out, so may it also be amended after the ceremony is over.

The question came before the Court by an advocacion by Mr Hog, of a judgment of the Stewart of Kirkcudbright, who had found that the 'error in the date of the execution in question may be amended by the messenger and witnesses.'

No 27.

THE LORD ORDINARY having taken the cause to report, the COURT, by a great majority, found, 'That the error in the date of the execution in question cannot be rectified so as to entitle David Maclellan and William Lowden to be conjoined in the poinding with Walter Hog; but found, that the present action having been brought within four months of the date of the poinding, they are entitled to a proportional part of the goods poinded, or value thereof, after deduction of 10 *per cent.* and the expence of the poinding.'

Lord Ordinary, *Armadale.* For Hog, *D. Catcart.* Alt. *G. J. Bell.* Clerk, *Sinclair.*  
*R. D.* *Fac. Col. No 32. p. 74.*

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 DIVISION II.

## Litigious by Arrestment.

1620. June 24. AIIKEN against ANDERSON.

No 28.

THE LORDS found that an arrestment made upon goods, could not hinder the lieges to buy in public market.

*Fol. Dic. v. 1. p. 554. Kerse, MS p. 235.*

1623. December 10. DOUGLASS and Others against BELSHES.

No 29.

IN an action betwixt Douglas and others against Belshes, wherein diverse creditors contending with the assignee, made by the donatar, to the escheat of him who was their common debtor, the creditors were preferred to the donatar's assignee, albeit the donatar's assignee was also a creditor; because the creditors proponed an alleigeance of simulation, offering to prove that the gift of escheat and declarator were taken upon the rebels own moyen and expenses, &c. and so the assignation being of an escheat null for the cause of the simulation, cannot prejudice the creditors, who before the assignation had affected the goods controverted, with arrestments at their instances, at which time of the arrestments making, there was no assignation; and so the cause ought to be respected, as it was at the time of the arrestment, which being then disputed betwixt them and the donatar, the simulation would have been found relevant, and albeit sinsyne, the assignee being a creditor, had received as

A subsequent assignation by a donatar of escheat, found not to prejudice prior arrestments by creditors of the common debtor.