*** This case having been appealed,

THE House of Lords, 15th April 1785, "ORDERED and ADJUDGED, That the interlocutors complained of be reversed, without prejudice to the points therein decided; and farther ORDERED, That the cause be remitted back to the Court of Session, with a direction to proceed thereupon according to justice.', It is believed the suit was afterwards compromised. No 450.

1784. *July* 21.

The EARL of HOPETON *against* The CREDITORS of the YORK-BUILDINGS COMPANY.

No 451.
Prescription not interrupted by informal diligence.

IN the ranking of the Creditors of the York-Buildings Company, a claim was entered, in the year 1779, by the Earl of Hopeton, in virtue of a contract which had been executed, in the year 1731, between his father, the late Earl, on the one part, and Colonel Horsey, as commissioner for the York-Buildings Company, on the other.

To this claim the Creditors of the Company objected the negative prescription of 40 years, the only document taken on it having been a horning executed in the year 1743, not against Colonel Horsey, but against the managers of the Company.

Pleaded for the Earl; Though Colonel Horsey was the nominal party, the contract bound the York-Buildings Company, and them only. The omission, therefore, to take a decreet of constitution against them, as the warrant of the horning which followed, being merely an inaccurncy in point of form, will, in a question of this sort, be altogether disregarded.

Answered; There is a solid distinction between the informal execution of regular diligence, which has been admitted as a sufficient intimation of the claimant's intention to prosecute, and the using of diligence intrinsically inept and void, to which no effect can be given; Erskine, b. 3. tit. 7. § 40.; Reid against Ker, No 440. p. 11273. Of the latter sort was the horning in question. To Colonel Horsey, the proper and only debtor in the obligation, it could afford no notice, because it was not executed against him; and it was equally ineffectual against the Company, who were no parties to the contract, on which alone it could proceed.

THE LORDS admitted the distinction, and found, "That the horning executed in the year 1743 against the Governor and Assistants to the Court of Direc-

No 451. tors of the York-Buildings Company, was an inept diligence, and did not interrupt the negative prescription."

Reporter, *Lord Monboddo.* For the Earl of Hopeton, Solicitor-General *Dundas.*
For the other Creditors, *Elphinston.* Clerk, *Colquhoun.*

C. *Fol. Dic. v. 4. p. 115. Fac. Col. No 172. p. 269.*

*** This case having been appealed:

The House of Lords, 21st March 1805, "Ordered and Adjudged, That the appeal be dismissed, and the interlocutors complained of affirmed."

1790. *March* 2. James Baillie *against* James Doig.

No 452.
A summons executed without subscribing witnesses, insufficient for interrupting the sexennial prescription of bills of exchange.

Doig sued Baillie in the Sheriff-court of Forfar for the contents of a bill of exchange dated in 1769. The summons was issued on 13th May 1778, and a citation was given on the following day, when the six years from 15th May 1772 had not elapsed.

But the execution of the summons was not witnessed in terms of the act 1686, c. 4.; and it appeared, that in ordinary actions of debt this was never done in that Court. The summons was afterwards called in Court on 16th June 1778, but no appearance was made for the defender.

On this footing matters stood for many years, when an action being brought by Baillie against Doig, the bill of exchange already mentioned was stated in the way of compensation as the document of a subsisting debt. The Sheriff-depute having pronounced a judgment in favour of Doig, Baillie, in a bill of advocation,

Pleaded; By act 1686, cap. 4. it is declared, that all citations shall be subscribed by witnesses, otherwise to be null and void. If this law is to be enforced where the party cited, by appearing in Court, seems to have been sufficiently put on his guard, it ought to be observed with all possible rigour, when, no appearance having been made, the legal presumption of want of due notification, arising from the omission of the requisite formalities, is confirmed. In those cases especially, where the question is, whether or not a statutory limitation has taken place, the temptation to a false execution being there greater than in any other, it would be highly inexpedient to depart from the general rule. Indeed, if we compare the enactment in 1686 with the preceding one in 1681, c. 5. requiring the subscription of witnesses in the execution of summonses for interrupting prescription of real rights, it seems hardly possible to dispute, that the same strictness with which the one statute has been followed ought to be observed with regard to the other. If so, the erroneous practice of a particular district ought not to be admitted to sanction a deviation from the established law.