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.

No 452.

Besides, it is somewhat doubtful how far the execution of a summons in the most regular manner, is sufficient for keeping alive a claim, otherwise falling under the sexennial limitation introduced by the statute of 1772, which requires, 'that diligence shall be raised, or action commenced, within the six 'years;' by which last it must have been meant, that besides the execution of the summons, some farther proceedings should, within the six years, be held by the Judge before whom the action is brought. Bankton, b. 2. tit. 12. § 56.

Answered; The object of the statutory limitations being to prevent those claims which might have been obviated if they had been intimated at an earlier period, it seems to follow, that where such intimation has been actually, though perhaps somewhat informally made, no objection should be listened to. This idea is confirmed by many decisions, and it seems peculiarly applicable to such a case as this, where notice was given according to the established usage of the Court in which the action was commenced. The opinion of our lawyers with regard to the enactment of 1681, which was meant for securing the uninterrupted commerce of landed property, cannot here be of any weight.

The argument founded on the words of the statute in 1772, is evidently erroneous. By the execution of the summons within the six years, the defender being warned of the danger which might arise from not preserving the necessary documents, the purpose of the law seems to be fully complied with. It has been uniformly held too, that an action is commenced as soon as the summons is executed. Stair, b. 4. tit. 3. § 20.; Bankton, b. 2. tit. 3. § 14.; Erskine, b. 2. tit. 11. § 3.; b. 3. tit. 6. § 3.; 25th November 1665, White, No 44. p. 10646.; 6th July 1671, Macrae, No 13. p. 8338.; 9th January 1700, Abernethy, No 141. p. 3784.; 30th July 1761, Cameron, Div. 17. *h. t.* See the Title LITIGIOUS.

The Lord Ordinary sustained the claim arising from the bill of exchange. And after advising a reclaiming petition for James Baillie, with answers for James Doig,

THE LORDS adhered to the judgment of the Lord Ordinary.

But a reclaiming petitition having been preferred, which was followed with answers,

THE LORDS altered the former interlocutors, and found, that the execution of the summons at the instance of James Doig not having been authenticated by the subscription of witnesses, was not sufficient for interrupting the sexennial prescription of bills of exchange.

Lord Ordinary, *Stonefield.* Act. *Robertson Scott.* Alt. *Gillies.* Clerk, *Home.*

C. *Fol. Dic. v. 4. p. 114. Fac. Col. No 123. p. 238.*