

THE LORDS refused to admit of the second instrument, after the judicial offer of the first, and refused to supply or sustain the same in a case so penal, and therefore preferred the creditors to the donatar. See REDEMPTION.

No 16.

Fol. Dic. v. 1. p. 953. Stair, v. 2. p. 492.

*** See Dirleton and Gosford's report of this case, No 19. p. 3630.
voce ESCHEAT.

1679. December 11. COUNTESS OF CASSILLIS *against* EARL OF ROXBURGH.

No 17.

AN execution, bearing a copy delivered to the party's wife, was not sustained, unless it were added, that it was delivered to her in the party's dwelling house.

Fol. Dic. v. 1. p. 552. Stair.

*** This case is No 19. p. 3695. voce EXECUTION.

*** Fountainhall likewise mentions it :

AN execution sustained, though it wanted six several knocks, and the fixing a copy, because it bears a copy was delivered to the Earl's own servant in his house. See act 75th, Parl. 6th, James V.

Fountainhall, MS.

1683. November 10. MAXWELL and HOME *against* THOMSON.

No 18.

AN execution being quarrelled on the act of Parliament 1672, for not designing specially the defender, it was *alleged*, That act meant principally of citations to be used as interruptions, &c. THE LORDS, on Pitmedden's report, allowed the pursuer to mend his execution, and that being done, sustained it.

Fol. Dic. v. 1. p. 552. Fountainhall, v. 1. p. 242.

*** Sir P. Home reports this case :

ADAM MAXWELL and George Home, merchants, having pursued Andrew Thomson, skipper, for payment of a debt, *alleged* for the defender, That by the 6th act, § 3d, Parl. 2d, Charles II. it is provided, that all executions of summonses 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 summons, otherwise the execution shall not be sustained; so that, seeing the executions of this summons bear only Andrew Thomson, within designed, to be summoned, without designing him in the execution, it is null.—*Answered*, That the foresaid clause in the act of Parliament has not been in use

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 advocation, that their examination was null, not having been signed by the Judge until after they had been judicially produced in the advocation.

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 advocation 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-