

No 34. lawful defence, which might liberate the magistrate, as in actions to make arrested goods furthcoming, where the principal party debtor is ever summoned; this allegiance was repelled, and no necessity found to summon the rebel in this or the like pursuit, where the magistrate is convened *ex sua culpa*, the rebel being decerned of before; and this pursuit being moved against the Bailie for his disobedience, wherein the principal debtor had no interest; whereas in actions to make arrested goods furthcoming, the principal party is necessary to be called, because it tends directly to constitute one first to be his debtor, and next that debtor to pay again that debt to the creditor pursuer, whereby he is a necessary party, from whom in effect payment is sought, and his gear desired to be taken from him. And upon the last of June it was found, That the Bailie not being powerful to take the rebel at the time of the charge, the Bailie being then single, and the rebel well accompanied, and escaping thereafter, before the Bailie got assistance, that the Bailie ought not to be answerable.

Act. *Gibson.*Alt. *Mowat.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 134. Durie, p. 448.*

S E C T IX.

Citation in Process at the Instance of a Legatee.—At the instance of an Assignee.—In Process of Locality.—Of Pension.—Of Declarator of Extinction or Payment.

No 35. 1627. *January 20.* ALEXANDER WEMYSS *against* ROBERT HAMILTON.

IN the action pursued by Alexander Wemyss against Robert Hamilton, the Duke of Lennox's Chamberlain, for his pension of 600 merks, granted to him by umquhile Lodowick Duke of Lennox, it was found, That he needed not summon the Duke for the time, nor any to represent him; notwithstanding that his Chamberlains were summoned to answer him his pension.

Fol. Dic. v. 1. p. 135. Spottiswood, p. 227.

No 36.

A special legatee cannot convene a debtor, without calling the executors of the de-

1627. *March 10.* FORRESTER *against* CLERK.

IN an action betwixt Forrester and Clerk, for payment of a legacy of a sum specially adebted by the defunct's debtor, designed in the legacy, the LORDS found, That albeit the legacy was specified and designed certainly owing by such a special debtor, yet that the legatar could not convene the debtor therefor, except the executors of the defunct had been also convened in that pursuit; for