

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.

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

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

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

they might have alleged some reasons why the legacy should not have been paid, as *quod debita excedunt bona*, or some other lawful defence, which makes them necessary parties to have been called; so that the process, without their citation or concurrence, could not be sustained.

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funct. They
might allege
reasons why
the legacy
ought not
to be paid.

Act. Nairn.

Alt. Haliburton.

Fol. Dic. v. 1. p. 134. Durie, p. 288.

1627. December 17. LD. CARNOUSIE *against* LD. TECHMURIE.

A COMPRISER of a reversion, redeeming lands from a wadsetter, need not call the reverser or his heirs.

No 37.

Fol. Dic. v. 1. p. 134.

* * * See The particulars, No 12. p. 2181.

1639. January 31. DUNDAS *against* HIS GOODSIRE'S EXECUTORS.

GEORGE DUNDAS, Oye to the Goodman of Newliston, pursues the Executors of his umquhile Goodsir, for payment of 500 merks, left him in legacy by his Goodsir, by a codicile made after his testament, bearing this legacy; and the defender quarrelling this alleged codicile, as not sufficient to give him right to the legacy, in respect there was a perfected principal testament bearing no such legacy; and this note made thereafter, is but a testificate made and subscribed by Mr John Boog, minister of the parish, wherein the defunct died, which is neither subscribed by the testator, who could write, nor by the minister in his name, and at his command; but is only given out under the form of a notary's instrument, and so wants all formal solemnities requisite to acts testamentary, to which the law only privileges ministers to be notaries; attour, the process cannot be sustained, except all the legatars in the principal testament were called thereto; these allegiances were repelled, and the codicile sustained, being in substance and matter found good in itself; and no necessity was found to call the the rest of the legatars. See WRIT.

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One legatee
need not call
other lega-
tees.

Fol. Dic. v. 1. p. 134. Durie, p. 873.

1663. January 16. The EARL of ROXBURGH *against* KINNEIR, MINISTER.

MR ANDREW KINNEIR, minister at Calderclear, in *anno* 1650, obtains a decret of locality against his parishioners, and namely against the Earl of Roxburgh, for his lands of Auchniounselhill and Millburnhead, which are burden-

No 39.
Citing of
tenants is not
sufficient,
where the
master is