

p. 3681, except that that was found in the execution of an inhibition, which tending to make a posterior heritable alienation to be null and to fall, required a more strict warrant and process, after the nature of the warrant, as it is craved by the party's self, and is a greater contempt of the Judge, than a citation upon a summons, which is but the beginning of a process, and thereafter hath a progress of a judicial procedure, whereas inhibition is more odious and strict.

No 3.

Act. *Belcher.*Alt. *Nicolson.*Clerk, *Gibson.**Fol. Dic. v. I. p. 258. Durie, p. 338.*

* * Auchinleck reports the same case.

Letters raised to summon a party upon sixty days, by reason he is out of the country, the summons is executed against the party personally apprehended. The execution is quarrelled as wanting a warrant. The LORDS sustain the execution.

*Auchinleck, MS. p. 218.*1628. *March 19.*LAMB *against* BLACKBURN.

In a reduction James Lamb against Blackburn, for reducing of an inhibition, by reason that the command and charge of the letters bore, 'to prohibit the party at the market-cross of Edinburgh, pier and shore of Leith, and other places needful,' because the party was out of the country, for these are the very words of the letters, and this party was only prohibited at his dwelling-place, for the which there was no warrant; and the defender *alleging*, that seeing the inhibition was executed against the party at his dwelling-place, and that the letters bore as said is, to prohibit him at all other places needful, he doing the same at the party's dwelling-place, it behoved to be found sufficient; likeas the same was executed at the market-cross, and pier of Leith, against all the lieges *in genere*, and the party being one of the King's lieges, behoved to be found comprehended within that execution, and so the warrant of the letters was obeyed. This allegiance was repelled, and the reason sustained, for the letters gave no warrant to prohibit the party at his dwelling-place, for that was not craved therein, and the execution against the lieges at the market-cross and pier of Leith, could not extend to the party, because thereby the lieges were prohibited to receive alienations from the party to be prohibited to annailzie, who was not thereby prohibited to make alienation to the lieges, which ought specially to have been done against him. And the defender thereafter *alleging*, that in another action pursued betwixt Mr John Archibald and this same pur-

No 4.

Found in conformity with
No 2. p. 3681.

No 4. suer, an exception being proponed upon the same inhibition, and the inhibition as it now is, being used for proving thereof against this pursuer, the same was found to prove the exception against him then compearing, so that this objection being then competent to have been proponed, which now is used for a reason of reduction, and being then omitted, and not proponed, which might have been as well received there, by way of objection, as here in a reduction, the same consisting *in jure*, and being proven *instante* by inspection of the writ, therefore he *alleged*, that the pursuer cannot be heard to reduce upon this reason. This allegiance was found relevant; and because this was not proponed in that process by way of objection, being *in jure*, and then competent to have been received and discussed there; THE LORDS therefore found, that the pursuer could not be heard to reduce thereupon, albeit the pursuer replied, that he omitted to propone the same in that process, by way of objection, because he thought that it could not be received against the inhibition standing, and therefore of purpose reserved it to pursue reduction thereon, which was not respected, seeing he omitted to propone it, and protested not that he might be heard to reduce thereupon. See PROCESS.

Act. *Aiton & Lawrie.*Alt. *Hope.*Clerk, *Scott.**Fol. Dic. v. I. p. 258. Durie, p. 364.*

* * The same case is reported by Kerse, Division 4., Section 1. *b. t.*

1629. February 28.

MUIR *against* HIS TENANTS.

No 5:
An incident used by a defender against a party called as haver, upon 60 days citation as being out of the country, was not sustained, because the letters bore no warrant to summon him as out of the country.

AN incident used by a defender against a party called as haver, upon 60 days citation as being out of the country; was not sustained, because the letters bore no warrant to summon the party as out of the realm upon 60 days, neither did the user thereof protest when litiscontestation was made for incident after that manner; but because the procurators for the raiser of the incident offered to make faith that he was not informed, or knew at that time that the parties were out of the country then, therefore albeit incident was refused, yet a long day was assigned to the party user thereof; to deduce all his probation upon the exceptions, for which the incident was used, during the which time he might use his incident against the parties called therein, and prosecute his probation against them, and that he should conclude all against the day foresaid, at which time they would conclude the cause and advise the same.

Act. *Cunninghame.*Alt. *Millar.*Clerk, *Scott.**Fol. Dic. v. I. p. 258. Durie, p. 431.*

* * The like done, 19th March 1629, L. Newark *contra* Maxwell.

Act. *Belsher.*Clerk, *Gibson.**Durie, ibid.*