

S E C T. VIII.

Citation in Process upon Delinquencies.

1554. August 3. The QUEEN against LD. CAPRINGTON.

ANENT the summons pursewit at the instance of the Q. g. against the Ld of C. and others of inqueist, it was *allegit* be the said Ld, that they might not proceed against him, the rest of the inqueist not being lawfully summoned, because the action was convict ; whilk alledgeance was repelled, and process ordained against the said Laird.

Fol. Dic. v. I. p. 134. Maitland, MS. p. III.

No 31.

Process may go on against any one of an inquest for error, without calling the rest.

1573. July. LD. RUTHVEN against ST COLM.

AN inquest may be pursued for error, though some of them be absent.

Fol. Dic. v. I. p. 134. Erskine, MS.

* * * See This case, *voce* PROCESS.

No 32.

1621. November 22. SCLAITER against ROSS.

ANDREW SCLAITER having charged Richard Ross, Bailie of Burntisland, by letters of caption, to take John Murray, who was denounced rebel at the said Andrew his instance, for not payment of certain sums ; upon the Bailie's disobedience, the Bailie is pursued for payment of the sum ; where the Lords found that there was no necessity to summon the party principal debtor to this pursuit, for his interest, nor that there was any necessity of a second charge against the Bailie, before that pursuit could be intented, seeing the rebel was instantly at the time of the first charge presented and shown to the Bailie. But the LORDS sustained the pursuit, notwithstanding of both these allegeances.

Act. *M'Gill.* Alt. *Lawtie.* Clerk, *Gibson.*

Fol. Dic. v. I. p. 134. Durie, p. 3.

No 33.

A Magistrate being charged to take a rebel, and disobeying ; in an action against himself for the sum, found unnecessary to cite the rebel.

1629. June 25. ROSS against BAILIES of INVERNESS.

THE Bailies being pursued for not taking the rebel denounced, they being charged by the creditor by letters of caption to that effect ; and the Bailies *alleging*, That no process ought to be granted against them, seeing the rebel was not summoned to the pursuit, who might allege payment, or propone some other

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No 34.

Found in conformity with the above. The rebel had been before decerned against.

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