

ing after the cause was reasoned, the LORDS found no necessity to summon any person to represent the executor, or to transfer the process, but that it might be sustained against the cautioner, without citation of the executor, whom the LORDS found no necessary party, he being discust, as said is. And it being *alleged*, That the whole goods of the testament were exhausted, by a sentence obtained at another creditor's instance against the executors, who had made payment thereof, which absorbed the whole goods thereby confirmed, and that before this pursuer's sentence, it was *replied*, That the payment cannot be sustained in prejudice of this pursuer, who had cited the executor before the making of payment; so that the executor could not, after his citation, be found in *bona fide*, to have paid all to one creditor, but he ought to have suspended upon double distress, that the pursuer, as a creditor, might come in *pro rata* for his debt; seeing he was, by the citation executed before making of payment, certiorate that he was a creditor, and so ought not to have voluntarily done any thing, or to pay to his prejudice. The excipient *duplied*, That the pursuer had past from that citation in process, so that he cannot be reputed to have done fraudulently in paying the other creditor.—THE LORDS sustained the exception of payment, and found, that a citation preceding, which was past from, was no impediment to stay the payment; and that it was no such certioration to the executor, which might astrict him to know the pursuer to be a creditor, the said citation being past from, which passing from, rendered the parties and process in that same estate, as if he had not been summoned at his instance.

Act. —.

Alt. *Belsbes.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 134. Durie, p. 87.*

S E C T. VII.

Citation in Process against a Woman *vestita viro.*

1622: July 18.

CALDWELL against CALDWELL.

IN an action of ejection pursued by Caldwell, which was libelled to have been committed by Caldwell defender, being a woman, and whom the defender alleged to have been clad with a husband at that time, when the pursuer, by his summons, affirms that she committed the ejection, which was now pursued against her after the decease of her husband; and therefore *alleged*, That no process ought to be granted against her, while the heirs or executors, or some person to represent her umquhile husband were called in that process; seeing if the ac-

No 28.

died during the dependence. No necessity to call his representatives, as it was unnecessary to call himself.

No 29.

A woman, while married, made a person be ejected. Being pursued for this in her widow-hood, process was sustained against her, without cit-

No 29.
ing the heirs
or executors
of her de-
ceased hus-
band. *Noxa
caput sequitur.*

tion had been pursued against the defender while her husband lived, he behoved to have been called ; sicklike now being pursued against her after his death, some to represent him ought to be called. THE LORDS repelled the allegiance, and sustained the process against the woman who was libelled to have committed the fact ; and found no necessity to summon the heirs or executors of the defunct's husband, seeing the fact was only pursued against the woman's self, as committer, *et noxa caput sequitur.*

Act. —.

For the Defender, *Miller.*

Clerk, —.

Fol. Dic. v. 1. p. 134. Durie, p. 30.

1627. June 29.

BAILIE against ROBERTSON.

No 30.
Found, no
process, a-
gainst a wo-
man who was
married after
executing
the principal
summons,
because her
husband was
not called for
his interest
in the se-
cond sum-
mons of con-
tinuation.

IN an action betwixt Margaret Bailie and Janet Robertson, the LORDS found no process against the defender, because she was clad with a husband, and he not summoned ; which allegiance was sustained, albeit she was married since the executing of the principal summons, because she was married before the execution of the second summons of continuation ; so that her husband should have been summoned to compear by the said citation ; and albeit the act and letters could not have been directed against him, seeing he was not in the principal summons ; yet the pursuer, by supplication to the Lords, might have obtained warrant to summon him, by virtue whereof he might have been summoned for his interest, likeas the pursuer might raise a new continuation, and give in a supplication to summon the husband for his interest, as said is.

Clerk, *Hay.*

Fol. Dic. v. 1. p. 134. Durie, p. 309.

* * * See HUSBAND and WIFE.

* * * When this Work had proceeded thus far, 20th August 1802, the last date of any case published in the Fac. Col. was July 1798. Cases subsequent to that date, relative to the subjects of this Volume, will be found in the Appendix.

The Title CITATION is continued in Vol. 6th.