

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, *Scot.**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.*

* * * Auchinleck reports the same case :

No 5.

SUMMONS of diligence execute against persons out of the country, at the market-cross of Edinburgh, pier and shore of Leith, upon 60 days, not sustained, because the summons bore no warrant; but the LORDS gave the party a long day to conclude his diligence.

Auchinleck, MS. p. 220.

1666. June 29. DOUGAL M'PHERSON against Sir RORY M'LAUD.

No 6.

DOUGAL M'PHERSON pursues Sir Rory M'Laud for payment of a sum upon his promise, and the summons bears a warrant to cite him at the market-cross nearest the place of his residence, being in the Isles; whereupon the pursuer craved him to be holden as confest. The defender *alleged*, That he was not personally apprehended, and so could not be holden as confest; and, that this citation at the market-cross was *periculo petentis*, and not to be sustained in the time of peace, when there was no trouble in the country.

A warrant to cite at the nearest market cross, where there is no *tutus accessus* to the party, must be granted by the Lords *in præsentia* upon a special bill.

THE LORDS found that warrants for such citations ought not to be granted by common bills of course, but only by the Lords, upon special bills *in præsentia*, but seeing the defender compeared, they allowed his procurator a long time to produce him.

Fol. Dic. v. I. p. 258. Stair, v. I. p. 383.

1672. June 21. FERGISSON against ———.

No 7.

THE LORDS found, That a party being within the country, the time of the citation upon the first summons, and some time thereafter; and, going out of the country before the second summons, could not be cited at the pier and shore of Leith upon the second summons, without a warrant in the said summons to that effect.

Fol. Dic. v. I. p. 259. Dirleton, No 170. p. 69.

1677. July 18. MONTEITH against MURRAY.

No 8.

GEORGE MONTEITH being creditor to Hector M'Kenzie, arrested in the hands of Thomas Dewar skipper, the said Hector's share of the ship called the Golden Crown, and profits thereof, which ship was disposed to the said skipper, and he

An execution at the market cross of Edinburgh and