

1750. *January 6.* MONTGOMERY *against* CREDITORS OF MAXWELL.

No 46.

A RANKING and sale having proceeded so far that the lands were put up to roup, the pursuer of the sale died. Another creditor petitioned for warrant to carry on the process. It was doubted, whether the representatives of the last pursuer should be called. THE LORDS found there was no necessity for doing so, as there could be no farther litigation.

Fol. Dic. v. 4. p. 147. Falconer.

* * * This case is No 118. p. 2240. *voce* CITATION.

1751. *June 21.* JOHN CUMING *against* GRANT of Glinbeg.

No 47.

JOHN CUMING, eldest son to Alexander Cuming, writer in Duthill, pursued William Grant of Glinbeg, for L. 1000 Scots, contained in a bond granted to the said Alexander and his heirs-male.

A summons, whereof the first diet was not 21 days from the execution, tho' the second was more than 27. was not sustained.

Objected, No process, in respect the first diet in the summons was not twenty-one days after the execution.

Answered, Whatever the necessity was formerly, when there were two executions, it seemed sufficient now, if the defender had twenty-seven days; and the second diet indulged him in this case with a longer time.

THE LORD ORDINARY, 13th June, "found no process."

THE LORDS refused a bill, and adhered.

Pet A. Pringle.

Fol. Dic. v. 4. p. 146. D. Falconer, v. 2. No 210. p. 252.

1752. *July.* LOCKHART *against* The MAGISTRATES OF LANERK.

No 48.

It was objected by the Magistrates and Town-council of Lanerk, to a summons of declarator of astringency pursued against them by John Lockhart of Lee, that the summons did not contain the names of the several persons that composed the Town-council, and only bore in general, the Bailies and Town-council.

The term of libelling and executing a summons against a magistracy and town-council.

This was by the Ordinary repelled, in respect it was not alleged, but that the name of every one of the Town-council was contained in the execution; and the defenders acquiesced.

A summons never bears the particular names of the Magistrates or Counselors, but in general, the Magistrates and Town-council; and though the stile in this case was the Bailies and Town-council, that was immaterial, as the general term *Town-council* comprehends the Magistrates. The case is the same

No 48. when the Officers of State are to be called; their names are never particularly expressed in the summons; and the practice is reasonable, for they may happen to be changed between the time of signeting and executing the summons.

Fol. Dic. v. 4. p. 148. Kilkerran, (PROCESS.) No 14. p. 439.

No 49. 1752. July 4. CLERKS, Petitioners.

JAMES and George Russels pursued James Clerk and his Sons before the Sheriff-depute of Stirlingshire for a battery; their libel concluded also, that the defenders should pay an assythment, and find caution of lawborrows. The Sheriff decerned in the lawborrows, and found expences due; but made no mention of assythment in his sentence. The Clerks suspended; the Lord Ordinary turned the decret into a libel; and then, besides adhering to the Sheriff's interlocutor, found assythment and damages due.

Pleaded in a reclaiming petition for Clerks; The Ordinary's interlocutor is not agreeable to form, and cannot subsist; for that a decret, which exceeds the demand of the pursuer, is intrinsically null; now, in this case, the charge of the pursuers was the decret of the inferior judge; nor did they ever demand more than that the letters should be found orderly proceeded.

THE LORDS were of opinion, That whenever a decret is turned into a libel, not only the decret of the inferior judge, but also the original libel, is understood to be before the Court; and therefore

“ They refused the petition.”

Petitioner, *Andrew Pringle.*

D. *Fol. Dic. v. 4. p. 148. Fac. Col. No 24. p. 44.*

No 50. 1754. December 11.

WILLIAM ROSS *against* GEORGE and JAMES MAXWELLS.

A defender dying during the dependence of a process before the Sheriff, his representatives living out of the kingdom, must be called by a transference before the Court of Session, and the other process advocated.

DURING the dependence of an action at the pursuer's instance, against Alexander Maxwell, before the Sheriff of Haddington, Alexander died. The pursuer called, by letters of supplement, George and James Maxwells, both resident in London, as Representatives of Alexander, to appear before the Sheriff; the Sheriff found they were not legally summoned. And the case being brought by advocacy, upon the head of iniquity, before the Court of Session, it was reported by Mr Thomas Hay of Huntington, Lord Probationer.

THE LORDS seemed to be of opinion, That, in cases of this kind, the proper form of proceeding was to have called the defenders by a transference to ap-