

1624. February 12. E. MARR *against* LO. KILDRIMMIE.

No 124.  
Found in  
conformity  
with the  
above.

IN an action betwixt the Earl of Marr and Lo. Kildrimmie, for reduction and improbation of writs made to the Lo. Elphingston, of the Lordship of Kildrimmie, wherein an incident being used by the defender, and litis-contestation made therein, admitting the same to the Lo. Elphingston's probation; this incident was not further sustained, but the term circumduced; because, by the letters of diligence written by the clerk upon the act, no power was given to summon the King's Advocate, at whose instance the principal summons in the principal cause was raised, and who being pursuer therein, was found by the Lords to be a necessary party, who ought to have been warned to all the diets of the incident; and albeit the King's Advocate was summoned, and execute against by the indorsation of the diligence, and execution thereof; yet seeing the letters bore no warrant to summon him, the execution could not be lawful, as wanting a warrant, and was not sustained, but holden as if he had not been summoned.

Act. *Hope et Aiton.*

Alt. *Nicolson et Stuart.*

Clerk, *Scot.*

*Fol. Dic. v. 1. p. 142. Durie, p. 108.*

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## SECT. XXVIII.

### Citation in Process of Transumpt.

1552. July 20. TUTOR of PITCUR *against* LORD GRAY.

No 125.  
A transumpt  
was found not  
to instruct a  
pursuer's  
title, when  
the process of  
transumpt  
was raised  
*pendente lite  
principalis*, and  
the defender  
not called  
thereto.

ANENT the action pursewit by the Tutor of Pitcur *contra* Lord Gray, as assignee, constitute be certain of Dundee, in and to the action against the said L. for burning of certain tenements pertaining to them in heritage *respective*; for verification of some of the constituent's titles, there were produced certain transumpt of instruments of sasine, whilk the Lord Gray's procurator *alleged*, should make na faith against him, in respect he was not wairnt in special to hear the said transumpt, he having special interest, the same being done after the making of the said assignation and intending of the plea, whilk was thought relevant. Attour, it was excepted that the libel was inept, desiring allenary the L. Gray to be decerned to content and pay great sums of money to him, as assignee, for the damage and skaith sustained be the constituents for burning of ilk tenement *respective*; following of law and practique, he should be admitted

to have bigged the saids houses, and restored them as good as they were the time of the burning, or else to pay, considering that the walls being the principal part of the house, were standing undestroyed; notwithstanding the whilk allegiance, the libel was found relevant.

*Fol. Dic. v. I. p. 143. Maitland, MS. p. 13.*

No 125.

1612. *June 18.* DUNWIDDIE *against* The RELICT of MR JOHN JOHNSTON.

No 126.

IN transuming charters or sasines of lands, it is necessary to call the superiors of the said lands; and albeit the like custom have not been in transuming of sasines of lands holden of the King in time by-past, yet the like reason militates for his Majesty's interest; and the LORDS will proceed so in time coming.

*Fol. Dic. v. I. p. 143. Haddington, MS. No 2494.*

1623. *February 15.* HOP-PRINGLE *against* E. HOME.

No 127.

IN an action of reduction pursued at the instance of James Hop-Pringle, as heritor of certain lands, against the E. of Home; the title and interest of which pursuit was libelled, and founded upon this sasine, being pursued at his instance as heritable proprietor; THE LORDS sustained the pursuit, and the sasine produced to instruct the pursuer's title, albeit the same was a sasine which was transumed after the intending of the summons of reduction, and after the defender was summoned in the action; and albeit the defender *alleged*, that the title, whereupon the summons was founded, ought to precede the same; and that a sasine, which only had authority after the intending of the summons, by that subsequent transumpt thereof, could not instruct and be a title to a preceding intended cause; yet the LORDS repelled that exception, seeing the sasine itself was of a date long preceding the summons, albeit it was transumed thereafter: Likeas also the same was sustained, albeit the defender was not cited to the transuming, who, as was alleged by the defender's procurators, ought necessarily to have been summoned to the transuming, seeing he was cited in the principal cause before the transuming, and so could not be miskenned in the transuming, but should have been summoned thereto, which allegiance was repelled: And the Lords found no necessity to have summoned the E. of Home to the transuming of the sasine, albeit he was made defender before the transumpt by his preceding citation in the principal cause.

A transumpt of a sasine, obtained in a process raised during the dependence of another process, was, (in opposition to No 125. p. 2244.) found to instruct the pursuer's title in that prior process, without citing the defender, in the second process.

Act. *Aiton et Nicolson, jun.*

Alt. *Hope et Belshes.*

Clerk, *Scot.*

*Fol. Dic. v. I. p. 143. Durie, p. 47.*