

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 principali*, 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 practise, he should be admitted