

No 130. the executors; and because this defender was convened, both as heir and executor to the defunct, and the defender condescended not that there were other executors, therefore the process was sustained. And, because it was found by the Lords, that this action to prove a tenor was of a dangerous consequence, to make up obligations after the decease of the debtor, the cause of amission not being clearly qualified, which was found necessary to be well-known and qualified, and also proven in these cases to make up obligations; neither were the articles libelled found sufficient to produce this action, which were only conceived upon probation by witnesses; therefore the LORDS assoilzied from that action, in so far as it was of the nature of a cause to prove the tenor of a bond; but because the obligation desired to be proven was only of the sum of 100 pounds, therefore they suffered the pursuer to convert the pursuit, by this same summons, in an action to pay the debt against the defender; which decret and action, so converted, the LORDS found might be proven by witnesses, who saw the sum lent, and who knew that the defunct paid annualrent therefor; and found, that albeit the debt acclaimed extended to 100 pounds, yet seeing it exceeded not 100 pounds, that it might be proven by witnesses.

Act. Lawrie.

Alt. Mowat.

Clerk, Gibson.

Fol. Dic. v. 1. p. 143. Durie, p. 354.

1739. December 5.

MACLEOD against SINCLAIR.

No 131.

IN a ranking, one of the adjudications being objected to, for that an assignation, which was one of the grounds thereof, was not produced, the adjudger pursued a proving of the tenor thereof; in which the LORDS 'found no process, in respect the representative of the alleged cedent was not called, and refused to grant diligence for calling him, in respect that, in proving the tenor of an assignation, he was to be considered as the principal defender.'

Fol. Dic. v. 3. p. 123. Kilkerran, (PROCESS) No 1. p. 433.

SECT. XXX.

Citation in Burgh Elections.

1761. January 29.

CAPTAIN HALDANE, &c. against ADMIRAL HOLBURN, &c.

No 132.
In a reduction of the Michaelmas election of

IN the burgh of Inverkeithing, the election of magistrates and councillors at Michaelmas 1760 was controverted. Admiral Holburn and his party, having

the majority of votes, got into possession. But Captain Haldane and his party judging the majority of legal voters to be with them, brought a complaint before the Court of Session, accusing Admiral Holburn both of using force and also bribes; and, therefore, concluding the election of the defenders to be void, and that the election should be declared in favour of the plaintiffs. The defenders insisted upon a no process, as all parties having interest were not called. And to verify the objection, they condescended upon Captain Cunningham, who was not cited as a defender, though one of the councillors of the burgh. It was urged, That in all questions touching the rights of any burgh or community, or respecting their acts and deeds, the burgh or community must be in Court before the action can proceed; and that the regular way of bringing a burgh into Court, is by calling its legal representatives who are the magistrates and councillors.

It was answered, *imo*, That though, by the singular constitution of this burgh, a councillor once chosen continues for life without necessity of re-election, yet nothing bars a councillor to throw up his office, and that this may be done *rebus et factis*, as well as by declaration of will. But *ita est* that Captain Cunningham some time ago abandoned the town of Inverkeithing, and is now in the service of the States of Holland, as an officer in their army. *2do*, Where the incorporation of a burgh is made a party in any cause, it was yielded, that its whole representatives must be called. But the reduction of an election of magistrates or councillors by their competitors pretending to be the legal majority, is not a process in which the corporation must be considered as a party. The corporation has no interest in the one set more than in the other. The question turns entirely upon the rights of the competitors; and therefore, it is sufficient to call those magistrates or councillors whose election is objected to, among which number Captain Cunningham is not, therefore there is no necessity to call him.

‘ THE LORDS repelled the objection.’ See No. 25. p. 1882.

Sel. Dec. No 173. p. 236.

Citation *cum processu*. See QUOD AB INITIO VITIOSUM.

Places where citations must be used, and the formalities of them.

See EXECUTION.

Citation by summons, or by incident diligence. See PROCESS.

One who is pursuer with others in an action, where he rather ought to be defender, need not be called. His compearance and citation are supplied by his being a pursuer. See E. of Rothes against Tutors of Buccleugh.

Gilmour, No 9. p. 8. *voce* EXHIBITION.

No 132.

magistrates and councillors, there is no necessity to call parties, tho' councillors, who are not interested one way or other in the contested election.

CITATION.

native of Scotland, who had been several years abroad, having come to this country on a visit, and resided more than 40 days in it, was found to be lawfully summoned by a citation left for him at the lodging-house where he had chiefly staid, although he had quitted it, and was on his road to England, two or three days before the citation was given. *See* Calder against Wood, Fac. Col. No 55. p. 124. *voce* EXECUTION.

See APPENDIX.