

pursuer thereof condescended upon particular evidents which was yet permitted him to do.

No 170.

Spottiswood, (INCIDENT DILIGENCE.) p. 172.

1628. February 7. EARL OF MARR against His VASSALS.

IN the Earl of Marr's action against his Vassals, there were diverse incidents produced for the defenders; in respect whereof it was *alleged* by them, That no certification should be granted against them till their incidents were discussed. The pursuer *answered*, That his certification could not be stayed by the incidents, because he offered him to prove, that the writs called for in the incident were in the defender's own hands, by their own oaths, and this he proposed by way of reply in the principal cause, and not as compearing in the incident, which he refused to do, in respect it was not continued. The defenders *alleged*, It behoved to be reputed an exception in the incident, otherwise there would be two litiscontestations in one cause. THE LORDS sustained it as a reply in the principal cause; for they thought that in effect it was no more than as if the pursuer had sought the defender's oaths of calumny upon the having of these same writs in the incident.

No 171.

Where the writs ought to be in the hands of the party craving the diligence.

Fol. Dic. v. 2. p. 190. Spottiswood, (INCIDENT DILIGENCE.) p. 172.

* * Auchinleck reports this case :

1628. February 2.—AN incident cannot be granted to a defender against another defender especially called in that same process to prolong the same.

February 5.—BUT in actions of improbations, minors will have incidents against all persons alleged havens of these writs, and that without production of their rights.

IN improbations, heirs will not get incidents against the heirs of line *et contra*.

July 19.—IF an incident be raised at the instance of the father and son, one of them may pass from their incident, and yet the same may be sustained to the other.

December 3.—AN incident cannot be raised after a term is assigned to produce in an action of improbation.

1629. February 14.—IF a party pursued for improbation crave an incident, and the pursuer crave his oath to declare if he has in his own hands, the defender must first both depone and produce such writs as he confesses before the incident be granted for the rest, but a reasonable day is granted to the defenders to produce such as they confess.

No 171.

1630. *July 24.*—IN an improbation, the custom is, after the second term assigned for production and past, to grant certification, with provision, that the writs produced before such a day as they will appoint, shall be received; but sometimes the LORDS, after the second term, will give a third, upon considerations moving them.

1632. *June 26.*—IN the improbation pursued by the Earl of Marr against his Vassals, it was *alleged* for Pitsligo, That one of the two heirs portioners of line being dead, no certification could be granted against him. THE LORDS found, That the improbation should only cease for the defunct, and proceed against the other heir for the half pertaining to her.

Auchinleck, MS. p. 99. & 100.

No 172.

1629. *February 28.*MUIR *against* HIS TENANTS.

IN a like case with Dunbar against Tenants, No 167. p. 12073, the LORDS refused such an incident; but upon offer to make faith that the party at liti-contestation knew not that the persons were out of the country, a long day was assigned to the party user to lead all his probations of the exceptions, for which the incident was used, during which time he might execute his incident against all parties called therein.

Fol. Dic. v. 2. p. 189. Durie.

* * * This case is No 5. p. 3684. *voce* EXECUTOR.

No 173.

1629. *July 29.* MASTER OF STORMONT *against* DUNCAN MENZIES.

AN incident raised to prove an exception cannot be executed to another day than is contained in the act of liti-contestation.

Auchinleck, MS. p. 100.

No 174.

1630. *January 26.* Ross *against* _____.

AN indident diligence, for proving of an exception, being received and admitted to probation, and, in the second term, the pursuer thereof having cited witnesses, out of the country, upon 60 days, and offering to make faith that they were necessary witnesses to him, and craving further diligence against them, for the like space, because they were still out of the country, the LORDS refused to grant further diligence against them, upon 60 days, because they were out of the country before the first term when the incident was admitted, but the pursuer thereof then did not condescend nor protest for an incident