

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 litiscontestation 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 litiscontestation.

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

against them at that time, nor summoned he them at the first term, albeit he summoned others, who were then out of the country, against whom he then protested for an incident upon 60 days, at which time he made no mention of these, who were thereafter summoned after the second term.

No 174.

Act. Gibson.

Alt. Baird.

Clerk, Gibson.

Fol. Dic. v. 2. p. 190. Durie, p. 485.

*** Auchinleck reports this case :

At the last term of the incident, it is desired that the pursuer thereof may have letters to summon witnesses, upon 60 days, because it was *alleged*, that he was a necessary witness; to which it was *answered*, that seeing he did not condescend, at the first term, upon this witness, when he protested for lawful diligence, upon 60 days, against such as were out of the country, it was no reason the same should be granted now, at the last term. THE LORDS would not grant the desire of the pursuer of the incident.

Auchinleck, MS. p. 101.

1632. January 28. Laird of CADDELL against Lord LOVATT.

No 175.

AFTER the whole terms of an incident are run out, the user of the incident may not, for obtaining farther delay, refer the having of the writs to the party's oaths contained in the incident, and to the effect obtain a new day to summon them to give their oaths; which the Lords refused.

Auchinleck, MS. p. 101.

1632. July 4. BURNET against Lord BUCCLEUGH and SCOTT.

No 176.

IN an action of production pursued by John Burnet, fiar of Barns against my Lord Buccleugh and Laurence Scott, there being sundry exceptions proponed to be proved *scripto vel juramento partis*, they, for proving thereof, raised an incident, and the same being sustained, there was a day assigned for proving the incident; at which day, diligence is produced against the witnesses, and another day assigned for using farther diligence; at which second day, diligence being produced, the said John Burnet pursuer in the principal cause craves the term to be circumduced. To which it was *answered*, No circumduction can be granted, because they are now content to refer the having of the writs contained in the incident to the parties called in the incident, as alleged havers of these writs, their oaths of verity. It is *replied* by John Burnet,