1663. *February* 10. CRAWFORD *against* DEBTORS of THOMAS INGLIS.

No 156.

THOMAS CRAWFORD, as executor-creditor to umquhile Robert Inglis, pursues some of his debtors. It was *alleged*, No process; because Thomas, as factor for Robert Inglis, had pursued the same party, for the same cause, before the Commissaries of Edinburgh, wherein litiscontestation was made; and so now it cannot be pursued elsewhere, but the process ought to be transferred and insisted in. The pursuer *answered*, That he pursued then as factor, but now as executor-creditor, who did not consider what diligence defuncts did; but might insist therein, or not; 2*dly*, This being a dilator, is not instantly verified.

THE LORDS found the defence relevant, but would not find it competent, unless instantly verified; and because it behoved to be instructed by an act extracted.

Fol. Dic. v. 2. *p.* 188. *Stair, v.* 1. *p.* 176.

1672. *February* 6. MURRAY *against* MURRAY.

No 157.

A DEED conveying lands in Ireland being challenged in a reduction and improbation as forged, the defence was, *res judicata*, the defender having been assoilzied in a like process intented against him by the pursuer before the Irish judges. *Answered*, This is a dilatory defence, which must be instantly instructed. *Replied*, The defender is willing to propone it as a peremptory, so as, if he succumbs, he shall have no terms to produce. THE LORDS, notwithstanding, refused to sustain the *res judicata in initio litis*, to bar production, unless instantly instructed, but reserved the same till after production.

Fol. Dic. v. 2. *p.* 188. *Stair.*

*** This case is No 18. p. 4799, *voce* FORUM COMPETENS.

No 158.

1676. *February* 24. KELLO *against* KINNEIR.

ALISON KELLO having pursued Alexander Kinneir for reduction of several rights of his fathers, he *alleged*, *Minor non tenetur placitare super hæreditate paterna*. It was *answered*, That this defence was but dilatory, and ought to be instantly verified.

THE LORDS repelled the allegeance, and found that a term ought to be granted to prove the defence.

Fol. Dic. v. 2. *p.* 189. *Stair, v.* 1. *p.* 422.

*** Dirleton reports this case

No 158.

IN a pursuit against a minor, it was *alleged*, *Quod non tenetur placitare*, because minor; whereupon there did arise two questions, viz. *1mo*, Whether the said exception, being a dilator, ought to be verified *instanter?* As to which, it was found by the LORDS, That minority being in fact, could not be verified *instanter*. *2do*, It being *replied*, That the defender was major, which was offered to be proved; and a conjunct probation being desired by the defender; it was nevertheless found by the LORDS, That the allegeance of minority being elided by the said reply of majority, which only was admitted, the pursuer ought to be allowed to prove his reply, without conjunct probation to the contrary. *In præsentia.*

Act. *Sir David Falconer.* Alt. ——. Clerk, *Hamilton.*

Dirleton, No 349. *p.* 166.

1693. *December* 6.

Messrs JAMES and JOHN KEITHS, *against* Mr ROBERT BURNET, Minister.

No 159.
A defence in a reduction, that a charge to enter heir had been given to a wrong person, being proponed only *dilatorie*, was not received unless pleaded *peremptorie totius instantiæ.*

IT was a reduction at their instance as adjudgers of some lands, calling for a voluntary right acquired thereon by Burnet; who *alleged*, he would not take a term in the reduction, because the pursuer's adjudication was null, being on a charge to enter heir to a wrong person, seeing they offered to prove there was a nearer heir then living at the time of the charge, and who went off the country, and is presumed to be yet alive, unless they offer to prove, that he is dead; *vita præsumitur nisi mors probetur*. *Answered*; This ought not to stop your taking a term to produce, and you may insist on your reduction, as accords. THE LORDS found it not receivable *hoc loco*, being only proponed *dilatorie*, else all the consummate diligences of Scotland should meet with that objection, you have charged the wrong heir, I offer to prove there was a nearer then on life, but if they would propone it *peremptorie totius instantiæ*, then the LORDS would consider it.

December 13.—IN the cause of Keith and Burnet, mentioned 6th December current, the LORDS, on a bill given in by Burnet, allowed this to be tried, whether he had renounced his wadset to Sir Peter Fraser of Doors, the reverser, and if he had ceded to him the possession, and delivered up to him all the writs; for if the wadset was extinguished, and he out of possession, the LORDS thought it hard that he should be obliged to take terms to produce the rights in an improbation, which might be cancelled, and though he would get a diligence against Doors to exhibit them, yet it seemed more reasonable the action should