

No 76.

found, That the certification should be presently granted for all the particular evidents called for by the principal summons, and not contained in the incident. Thereafter, the pursuer *alleged*, That no process could be granted in the incident, because the necessary parties were not called, to wit, the said Mr John Johnston, and the advocate, who were pursuers in the principal cause; and in so far as they were indorsed upon, as summoned, the said Mr John offered to improve that execution. The pursuer of the incident *alleged*, That the improbation of the execution of his incident could not be received by way of exception, but behoved to be pursued by way of action. THE LORDS found, That because Mr John Johnston was pursuer of the principal cause, and delayed himself by proponing the improbation of the execution of the incident, that they would admit his exception of improbation as peremptory in the incident; wherein if he succeeded, the incident should be held as proved against him.

Haddington, MS. No 2074.

1611. February 20.

MURRAY against LADY ———.

No 77.

IN an action pursued by John Murray *contra* Lady ———, the LORDS admitted an exception against the production to stay the certification, viz. That the writs were in the pursuer's hands; and immediately thereafter, the LORDS found, That the defenders ought to propone their defences against the reasons of the summons, in respect the charter and sasine were produced, notwithstanding that the pursuer would not grant the production satisfied for the rest; and thereafter, an exception being found relevant against the reasons of the summons, the Lords assigned a day, both for proving the exception *contra productionem*, and for proving the exception against the reason.

Kerse, MS. fol. 204.

. Haddington reports the same case..

1611. Feb. 19.

JOHN MURRAY pursued the Lady Lamington, and the Laird her father, and the young Laird her eldest son, John Maxwell her second son, James Donaldson, Colquort, and divers others, for production of their infeftments, procuratories, and instruments of resignation, tacks of teinds, and other securities, to be reduced and improven. The defenders produced as incident for the procuratory and instrument of resignation against the Lord Hereis, heir to the alleged tutor of the said John Maxwell, and divers others. It was *alleged*, That the incident should not be sustained, because it was for the defender's own evidents. It was *answered*, That he being minor when his father died, and his writs coming in the Lord Herries's hand, who was his tutor, from whom he had not recovered them, he might justly use his incident

which he had raised in due time; notwithstanding whereof, the Lords would not grant him an incident, but gave present certification, provided, that if he produced before the 8th of March, it would be received, otherwise the certification should stand with his own consent. Thereafter, it was *alleged* for James Donaldson, son to Mr James, that he should have incident against his authors, who should not be permitted to collude in his prejudice. It was *answered*, That they were principally called, and therefore no incident should be granted against them. THE LORDS refused to admit the incident against them who were principally called.

February 20.—IN the before said action of reduction and improbation pursued by John Murray against the Lady Lamington, and her sons, and others, the defenders *alleged* against the certification of the improbation, that the writs called for were in the hands of John Murray, pursuer, which they referred to his oath of verity. The same was admitted to probation, and the 24th May assigned. Commission was given to Mr Adam Newtoun, Mr C. Murray, Mr R. Hamilton, and my Lord Secretary, or any two of them, to take his oath betwixt the first and tenth day of May, and to report betwixt and the 24th May. In the principal cause of reduction they excepted, that the pursuer could have no action, because he had ratified the defender's infeftments and rights, and bound himself never to quarrel nor impugn them. It was *answered*, the ratification was made by him, as factor and pensioner, and so could not take away the action competent now to him, as heritor; next, that he was only bound by that security to suffer them to bruik and possess by virtue of their rights and infeftments of the lands and tacks of their lands, and as he quarrelled their infeftment of the _____ and patronage of _____ which the King, by the annexation, had no power to give, especially no lawful demission being made. They *answered*, they needed no demission, because, as the Pope, by the canon law, might have conferred an ecclesiastical benefice or patronage *etiam laico vel alteri cui placuerit*, so may the King do in the reformation; and by act of Parliament, the King's gifts of patronages were lawful, if the titular's consent were obtained during his lifetime; and in this case, umquhile Edward Maxwell being titular, the acceptance of the infeftment given to himself imported his consent; which whole exceptions, the LORDS repelled; especially the ratification, which could not exclude improbation, because no ratification, how general soever, will be extended to comprehend falsehood, unless it be *per expressum mentionat*. In that case was disputed, and found by the LORDS, That albeit by act of annexation, the King be superior of lands and teinds where the lands are feued *cum decimis inclusis*, yet he has no right by the annexation to set an original feu *cum decimis inclusis*, albeit the feuer have had a feu thereof before the annexation, if the new feu depend not thereupon, because the new feu will be decerned null, without prejudice of the old feu, as accords of the law.

Haddington, MS. No 2156. & 2167.