

No 163. ed, the compriser not being called, the party from whom the land was comprised would willingly suffer the evidents to be decerned to make no faith by collusion betwixt him and the pursuer of the improbation in prejudice of the compriser. It was answered, That if it were refused to give process against the owner of the evidents, he might forge them, and suffer the lands to be comprised from him, and when he and the compriser should be called for improbation, the forger should not compear, and the compriser should produce and abide by them; in which case, if the falset were well conveyed, he might chance to be assoilzied; and if the writs were improved, the forger should be in no peril, because he neither produced the writs, nor abode by them; and the compriser who produced them, and abode by them, should get free, because it was delictum alien. cujus ille habebat probabilem ignorantiam. Notwithstanding whereof, the LORDS found Glendoning's allegiance relevant to stay the certification of the summons for his author's evidents of his comprised lands.

Fol. Dic. v. 2. p. 190. Haddington, MS. No 2425.

1622. February 6.

GRIER against MAXWELL.

No 164.

In a process of abstracted multures, incident diligence refused to recover writs executed by the defender's author, because presumed to be in the defender's own hands.

GILBERT GRIER, heritor of the mill of Glenisland, and thirled multures thereof, pursues Homer Maxwell, heritor of the lands of Speedoch, which were ascribed to the said mill, for abstracting of the thirled multures thereof; against which the defender alleged, That he was infest in the said lands, *cum molendinis et multuris*, by John ———, his author, likeas, his said author was likewise infest in the same lands *cum molendinis et multuris* before the pursuer's right. This exception being admitted to the defender's probation, he used incident against certain persons, for having of his said author's evidents, which incident the LORDS would not sustain, for the writs made to his author, because it was presumed, that the same behoved to be in the defender's own hands, he having acquired his right from that same author, who is probably presumed to have delivered all the evidents made to him of these lands, the time when the excipient acquired the right thereof from him; and therefore, the incident for his author's writs was refused, likeas the same incident was refused against certain persons convened therein, who were out of the country, seeing they were not summoned upon threescore days, albeit the user of the incident alleged, that he behoved to summon them necessarily to that day which was assigned by the act of litiscontestation, and could not chuse another day, so that it was not his default, seeing there was not a term of sixty days assigned by the act, and it behoved that the day of compearance in the act, and in the incident, should convene together, which was repelled by the LORDS, and the incident refused.

Act. Lantie.

Alt. Cunningham.

Clerk, Gibson.

Fol. Dic. v. 2. p. 190. Durie, p. 14.