

1624. January 27. EARL OF MARR against LORD ELPHINSTON.

IN the Earl of Marr's action against my Lord Elphinston, after the defender had produced his incident, *alleged* for the pursuer, in the principal cause, No process in the incident against the King's Advocate, because the executions bear him to be summoned where there was no warrant for the doing thereof, neither in the act nor letters, without which the diligence cannot be sustained. *Replied*, The diligence would be sufficient, albeit the advocate were not summoned, seeing he is a party compearing in the principal cause, but far more here where he has summoned him; and were it *alleged* done without a warrant, that is the clerk's fault, and not the party's. *Duplied*, That the advocate is a necessary party to be summoned in the incident (as was found between my Lord Buccleugh and Yester, No 123. p. 2242, *voce* CITATION,) and therefore should have done with a warrant. THE LORDS found the exception relevant, because no execution can subsist without a warrant, and the fault was as well in the defender's procurators (who should have seen the act and letters mended before the forthtaking thereof) as in the clerks.

Spottiswood, (SUMMONDS OF INCIDENT DILIGENCE.) p. 174.

No 165.

Execution of an incident without a warrant against the person cited cannot subsist.

1626. November 23. WATSON against LORD HOLYROODHOUSE.

IN the action pursued by James Watson against the Lord Holyroodhouse, the LORDS would not grant to the defender, at the second diligence for proving an exception, a term upon sixty days to summon witnesses forth of the realm, because, at the time of litiscontestation, and assigning a day to prove his exception, the defender did not protest for such diligence against witnesses, being forth of the realm; neither would they admit him to give his oath, that they were necessary witnesses, because he did it not at the beginning; neither would they give him a commission for examining the witnesses out of the realm, albeit he offered to bring back the report thereof before the ending of the diligences against the witnesses within the realm.

Fol. Dic. v. 2. p. 189. Spottiswood, (SUMMONS OF INC. DIL.) p. 174.

No 166.

1627. January 29. DUNBAR of Burghie against TENANTS.

IN an action of spuilzie at the instance of Robert Dunbar of Burghie against the Tenants of Carse, the LORDS sustained an incident diligence used at the defender's instance, for proving of an exception admitted to their probation, executed upon 60 days against the defenders called therein, who were out of the country; albeit at the term of litiscontestation he protested not for an incident.

No 167.

No 167. for 60 days, nor declared then that the parties were out of the country; notwithstanding whereof, the incident was sustained, seeing he had protested for an incident; but the LORDS ordained the users thereof to make faith, that they had just cause to use that incident against these persons called therein, and that they were necessary parties, without the which making faith, they would not sustain the incident against them. See No 172. 12076.

Act. *Sharp.*

Alt. ———.

Clerk, *Gibson.**Fol. Dic. v. 2. p. 189. Durie, p. 260.*

No 168. 1627. *June 21.* HAY against The LAIRD of VAINE.

IN a special declarator pursued by Mr Francis Hay against the Laird of Vaine, there being two allegiances admitted to the defender's probation, at the day assigned to him for that effect he produced an incident. The pursuer, in the principal cause, *alleged*, No incident for any evidents or discharges made to the defender's father, because he being the person who ought to succeed him, these writs should be presumed to be in his own hands. *Answered*, That he not being heir to his father could be accounted in effect but a stranger. THE LORDS, in respect of this reply, sustained the incident.

Spottiswood, (INCIDENT DILIGENCE.) p. 172.

No 169. 1627. *November 18.* GILBERT KIRKWOOD against JOHN INGLIS.

IN an incident raised against the havers of writs, it is not necessary that the makers and subscribers of the said writs be summoned.

*Auchinleck, MS. p. 100.**** Durie's report of this case is No 17. p. 3976, *voce* EXHIBITION.

No 170. 1627. *November 23.* CARRUTHERS against JOHNSTON.

IN an improbation pursued by John Carruthers of Rammerskails against Thomas Johnston, the defender raised an incident for recovering of the whole evidents called for generally, without condescending upon any in particular. *Alleged*, That the incident could not be sustained, because there was no particular writ called for, so that witnesses could not be received for proving thereof. *Answered*, That ought to be repelled, because he calleth for the whole writs contained in the summons of improbation, and he is as special in the incident as the summons. THE LORDS would not sustain the incident, unless the