

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 VAINÉ.

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

pursuer thereof condescended upon particular evidents which was yet permitted him to do.

No 170.

Spottiswood, (INCIDENT DILIGENCE.) p. 172.

1628. February 7. EARL OF MARR against His VASSALS.

IN the Earl of Marr's action against his Vassals, there were diverse incidents produced for the defenders; in respect whereof it was *alleged* by them, That no certification should be granted against them till their incidents were discussed. The pursuer *answered*, That his certification could not be stayed by the incidents, because he offered him to prove, that the writs called for in the incident were in the defender's own hands, by their own oaths, and this he proposed by way of reply in the principal cause, and not as compearing in the incident, which he refused to do, in respect it was not continued. The defenders *alleged*, It behoved to be reputed an exception in the incident, otherwise there would be two litiscontestations in one cause. THE LORDS sustained it as a reply in the principal cause; for they thought that in effect it was no more than as if the pursuer had sought the defender's oaths of calumny upon the having of these same writs in the incident.

No 171.

Where the writs ought to be in the hands of the party craving the diligence.

Fol. Dic. v. 2. p. 190. Spottiswood, (INCIDENT DILIGENCE.) p. 172.

* * Auchinleck reports this case :

1628. February 2.—AN incident cannot be granted to a defender against another defender especially called in that same process to prolong the same.

February 5.—BUT in actions of improbations, minors will have incidents against all persons alleged havens of these writs, and that without production of their rights.

IN improbations, heirs will not get incidents against the heirs of line *et contra*.

July 19.—IF an incident be raised at the instance of the father and son, one of them may pass from their incident, and yet the same may be sustained to the other.

December 3.—AN incident cannot be raised after a term is assigned to produce in an action of improbation.

1629. February 14.—IF a party pursued for improbation crave an incident, and the pursuer crave his oath to declare if he has in his own hands, the defender must first both depone and produce such writs as he confesses before the incident be granted for the rest, but a reasonable day is granted to the defenders to produce such as they confess.