

some ground, being alleged against the pursuer in the principal cause; but he proposed it for them that were called as havers in the incident, who were not obliged to answer, except the incident had been awakened. THE LORDS would not cast the incident; but if the defender therein, to delay himself, would allege it ought to be awakened, they would suffer the pursuer to do the same.

No 177.

*Spottiswood, p. 174.*

1633. November 22. WALTER WISHE against JAMES KING.

No 178.

In an incident diligence against witnesses out of the country, after the terms, upon 60 days, the principal party urged the conclusion of the incident, seeing the whole terms were outrun. It was alleged by the pursuer of the incident, That he was certainly informed, that some of the witnesses were returned to the country, and therefore ought to have caption against them, according to the ordinary form of process. The other party contended, That caption was not necessary against persons out of the country; and except the user of the incident would give his oath that they were returned, they could give no caption. THE LORDS gave him 20 days to use caption, in case they were returned already, or should return within that space.

*Auchinleck, MS. p. 175.*

1635. February 15. Earl of KINGHORN against STRANG.

No 179.

AFTER an incident is used for proving an exception, and the whole terms thereof outrun, the LORDS grant no further term, but hold the cause concluded, and give a short day to the parties to see the process in the Clerk's hands, that if the defender be to produce, he may do it in that space, at which day the Lords will advise the process.

*Auchinleck, MS. p. 174.*

1665. December 15. MONTEITH against Mr JOHN ANDERSON.

No 180.

In a reduction at the instance of Monteith against Anderson, a reason of payment being found relevant, Mr John produced an incident, at the first term, and a diligence against witnesses, for proving the having of the writs, at the second term.

In an incident, four terms were allowed for proving the