

1611. *June 12.*      *SETON against SETON.*

No 162.

HE who forms an exception upon offers really and in due time made by him, and instruments taken by him thereupon to eschew a clause irritant of a tack or infeftment, will not get an incident diligence for recovery of these instruments from the notary, because they are his own evidents, and could have been extracted by him in due time, unless he make faith; that he has just cause to use the incident, and shew probable causes of his want of the instruments.

*Fol. Dic. v. 2. p. 190. Haddington, MS. No 2206.*

1612. *March 4.*      *LOCHINVAR against DRUMLANRIG.*

No 163.

IN the improbation pursued by Lochinvar and John Murray against Drumlanrig and others, the LORDS found, that they would not grant incident diligence to Drumlanrig for any evidents called for by him which were made to his father or his goodfather, or to himself; because the law presumed them to be in his own hand. They would not sustain his allegiance that the pursuer could have no certification for the evidents made by young Drumlanrig, as Provost of Kinclouden, to the Laird his father, because the maker would ratify them, because that could not stay the production or certification for not production; but if they were produced, the ratification of the maker might exclude the pursuer from improbation of such as were produced; but no man can ratify the thing that is not, and they must be presumed not to be so long as they are not produced. The defenders *alleged*, That a number of the writs called for were in the pursuer's hands, at least in the hands of James Douglas of ———, their author, and therefore, no certification could be granted for these. The exception was found relevant for such as were affirmed to be in the defender's hands, but was repelled for such as were affirmed to be in James Douglas's hands; for as the defender could have no incident for his own evidents, so could he have no exception admitted to him, alleging them to be in the hands of any, unless it were the pursuers, who could not have action for the evidents being in their own hands. It was *excepted* by Glendoning, admitted for his interest for certain lands comprised by him from George Herries of Tarrachtie, That no certification could be granted for any evidents pertaining to Tarrachtie, because Glendoning having comprised these lands from Tarrachtie, and thereupon having obtained himself infeft therein, held of the superior *in anno 1609*, no certification could be granted against Tarrachtie for not production of his infeftments, Glendoning not being called; because, if it should be permitted, that after lands were comprised, it should be lawful to any man to pursue an improbation of the evidents of the parties from whom the lands were compris-

Incident will not be granted in an improbation to the defender for his own evidents, nor will an exception be admitted to him, alleging them to be in the hands of any, unless it be in the pursuer's hands.