

No 176. That the pursuer of the incident can have no farther diligence; but the most that can be granted to the defender in the principal cause, is to have the pursuer's oath upon the verity of the exception. THE LORDS ordained the parties called in the incident to give their oath upon the having of the writs, if they were at the Bar, but no otherways.

*Auchinleck, MS. p. 172.*

\* \* \* Durie reports this case

IN a reduction, wherein an exception being admitted to the defender's probation, to be proved by writ, or oath of party, and incident being used against certain persons called as havers; which being denied by the defenders therein, in the second term of probation assigned to summon the witnesses for proving thereof, no diligence being used against the witnesses; and the pursuer of the principal cause desiring therefore the term to be circumduced, seeing no diligence was used nor produced to satisfy the term; and the party user of the incident alleging, that he might refer the having of the writs contained in the incident to the oaths of the defenders therein, albeit he had no diligence; and the other party contending, that that ought not to be granted, but only he ought to refer the verity of the principal exception to the pursuer's oath of verity, seeing his process ought not to be delayed, whatever others should declare upon the incident, except the writs, whereby the defender might prove his exception, were produced; the LORDS found, That albeit there was no diligence done upon the incident at the second term, yet seeing the defenders called in the incident were present, that the party user of the incident might refer the same, and the having of the writs therein contained, to their oaths, after whose depositions, seeing they were present, the pursuer might urge his process to be put to such further point, as he might, in law, by the course and order thereof; and the Lords would consider what their declarations should work for or against any of the parties.

Act. *Burnet.*

Alt. *Nicolson & Scot.*

Clerk, *Gibson.*

*Durie, p. 640.*

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1633. *January 23.* Sir JAMES DOUGLAS *against* PATRICK OLIPHANT.

No 177.

IN an improbation pursued by Sir James Douglas against Patrick Oliphant, there being an incident produced, *alleged*, It could not be sustained, because it had been raised above two years before, and nothing done upon it, but had slept ever since, unwakened. *Answered*, There needed no wakening, because it being a part of the principal summons, when they were wakened, so was it; and the raiser of the incident could not make any use of the same, before the pursuer in the principal cause insisted. *Replied*, That might seem to have

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