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.
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.

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 allegeance 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-

No 163.

ed, theippriser not being called, the party from whom the land was comprised would willingly suffer the evidents to be decerned to make no faith by collusion betwixt him and the pursuer of the improbation in prejudice of the compriser. It was *answered*, That if it were refused to give process against the owner of the evidents, he might forge them, and suffer the lands to be comprised from him, and when he and the compriser should be called for improbation, the forger should not compear, and the compriser should produce and abide by them; in which case, if the falset were well conveyed, he might chance to be assoilzied; and if the writs were improved, the forger should be in no peril, because he neither produced the writs, nor abode by them; and the compriser who produced them, and abode by them, should get free, because it was delictum alien. cujus ille habebat probabilem ignorantiam. Notwithstanding whereof, the Lords found Glendoning's allegeance relevant to stay the certification of the summons for his author's evidents of his comprised lands.

Fol. Dic. v. 2. p. 190. Haddington, MS. No 2425.

1622. *February* 6. Grier *against* Maxwell.

No 164.
In a process of abstracted multures, incident diligence refused to recover writs executed by the defender's author, because presumed to be in the defender's own hands.

Gilbert Grier, heritor of the mill of Glenisland, and thirled multures thereof, pursues Homer Maxwell, heritor of the lands of Speedoch, which were astricted to the said mill, for abstracting of the thirled multures thereof; against which the defender *alleged*, That he was infeft in the said lands, *cum molendinis et multuris*, by John ———, his author, likeas, his said author was likewise infeft in the same lands *cum molendinis et multuris* before the pursuer's right. This exception being admitted to the defender's probation, he used incident against certain persons, for having of his said author's evidents, which incident the Lords would not sustain, for the writs made to his author, because it was presumed, that the same behoved to be in the defender's own hands, he having acquired his right from that same author, who is probably presumed to have delivered all the evidents made to him of these lands, the time when the excipient acquired the right thereof from him; and therefore, the incident for his author's writs was refused, likeas the same incident was refused against certain persons convened therein, who were out of the country, seeing they were not summoned upon threescore days, albeit the user of the incident alleged, that he behoved to summon them necessarily to that day which was assigned by the act of litiscontestation, and could not chuse another day, so that it was not his default, seeing there was not a term of sixty days assigned by the act, and it behoved that the day of compearance in the act, and in the incident, should convene together, which was repelled by the Lords, and the incident refused.

Act. *Lautie*. Alt. *Cunningham*. Clerk, *Gibson*.

Fol. Dic. v. 2. p. 190. Durie, p. 14.