

S E C T. IV.

Who liable to Exhibit.

No 16.

1620. February 1. E. of MURRAY against _____.

IN an action of exhibition of evidents, the LORDS fand this exception relevant, that before the charge, it being a common evident, it was delivered to one of the colleagues.

Fol. Dic. v. 1. p. 282. Kerse, MS. fol. 185.

No 17.

1627. November 17. INGLIS against KIRKWOOD.

When a haver of writs is called by an incident diligence, it is necessary to prove that he had the writs since intending the cause; and, if it is only alleged, that he had them before, it must be proven that he fraudulently put them away.

IN a special declarator of the Laird of Ochiltree's escheat, pursued by John Inglis, the donatar's assignee, against Gilbert Kirkwood, an incident being used for proving of an exception, founded upon a back-bond granted by the donatar or his assignee in favours of the rebel; the LORDS found, that the maker of the back-bond needed not to be summoned in this incident, as is otherwise necessary, that the maker of writs be summoned in other ordinary actions, pursued against havers of writs for delivery of these writs; but, in this instance it was not found necessary, that the maker of writs should be summoned, when any writs were called for to be produced by the havers of the samin to this effect only, viz. to prove any part of a cause, and not for delivery of the same to the party who craved production by the incident; neither was it found necessary to the user of the incident to libel therein, or to prove that the writs called for were delivered to the party, in whose favours they were made as his own evidents, and so, without qualifying of that point or citation of the makers, the incident was sustained: And when any third person is called as haver, the LORDS find, that *eo casu*, there is either a necessity to libel, at least to prove, that he had the writs since he was summoned in the cause, or else that he had fraudulently put them away before the intending of the cause, and that it was not sufficient to prove that such third persons had the writs before the intending of the cause only, except it be also proven, that they committed fraud in putting of them away; which fraud, the LORDS found (being only generally conceived, and not specially qualified) might only be proven by the oath of the third person, who was convened as haver.

Act. Hope & Nicolson.

Alt. Stuart & Gibson.

Clerk, Gibson.

Fol. Dic. v. 1. p. 282. Durie, p. 313.