

against them at that time, nor summoned he them at the first term, albeit he summoned others, who were then out of the country, against whom he then protested for an incident upon 60 days, at which time he made no mention of these, who were thereafter summoned after the second term.

No 174.

Act. Gibson.

Alt. Baird.

Clerk, Gibson.

Fol. Dic. v. 2. p. 190. Durie, p. 485.

*** Auchinleck reports this case :

At the last term of the incident, it is desired that the pursuer thereof may have letters to summon witnesses, upon 60 days, because it was *alleged*, that he was a necessary witness; to which it was *answered*, that seeing he did not condescend, at the first term, upon this witness, when he protested for lawful diligence, upon 60 days, against such as were out of the country, it was no reason the same should be granted now, at the last term. THE LORDS would not grant the desire of the pursuer of the incident.

Auchinleck, MS. p. 101.

1632. January 28. Laird of CADDELL against Lord LOVATT.

No 175.

AFTER the whole terms of an incident are run out, the user of the incident may not, for obtaining farther delay, refer the having of the writs to the party's oaths contained in the incident, and to the effect obtain a new day to summon them to give their oaths; which the Lords refused.

Auchinleck, MS. p. 101.

1632. July 4. BURNET against Lord BUCCLEUGH and SCOTT.

No 176.

IN an action of production pursued by John Burnet, fiar of Barns against my Lord Buccleugh and Laurence Scott, there being sundry exceptions proponed to be proved *scripto vel juramento partis*, they, for proving thereof, raised an incident, and the same being sustained, there was a day assigned for proving the incident; at which day, diligence is produced against the witnesses, and another day assigned for using farther diligence; at which second day, diligence being produced, the said John Burnet pursuer in the principal cause craves the term to be circumduced. To which it was *answered*, No circumduction can be granted, because they are now content to refer the having of the writs contained in the incident to the parties called in the incident, as alleged havers of these writs, their oaths of verity. It is *replied* by John Burnet,

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.

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