

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 wakened. THE LORDS would not cast the incident; but if the defender therein, to delay himself, would allege it ought to be wakened, 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

No 180.  
having of the  
writs by wit-  
nesses.

Which incident the LORDS sustained, and would not restrict the terms of probation in the incident to horning against witnesses, and caption; but allowed four terms, and ordained the same to be shorter.

*Stair, v. 1. p. 327.*

1667. July 3.

Mr ROGER HOGG, and other Creditors of Wauchton, *against* COUNTESS of HUME.

No 181.  
Incident not  
sustained at  
the instance  
of any but  
those whose  
names as pur-  
suers were  
filled up in  
the bill.

IN an incident pursued by the Creditors of Wauchton against the Countess of Hume, it was *alleged* for the Countess, that the incident as to several of the creditors could not be sustained, and likewise could not be sustained against several of the havers, because, as to these, the incident was without warrant, their names not being contained in the bill at the Signet. It was *answered*, The bill contained several names, and a blank for others, which is a sufficient warrant for the raisers of the incident to insert whom they please. It was *replied*, That incidents being odious, strict form should be observed in relation to them, so that a new pursuer cannot be supplied by the blank, who did not supplicate by the bill; and *alleged* a decision the last Session, where it was so found in an incident at the instance of the Feuars of Goldinghame against the Lord Justice-Clerk.

THE LORDS sustained not the incident as to any of the pursuers thereof whose names were not in the bill; but sustained the same against any of the havers, albeit their names were not contained in the bill, it being ordinary to get summons upon bills, upon such persons named, and others wherein the persons names insert, are always sustained; but it is not so in the pursuers; and yet this would hardly have been sustained in another case than an incident, which is unfavourable.

*Stair, v. 1. p. 468.*

1676. July 5.

MUIR *against* M'AULAY.

No 182.  
A diligence  
against wit-  
nesses sus-  
tained, tho'  
not taken out  
till the term  
of probation  
was past.

JOHN MUIR having pursued M'Aulay for a bargain of victual, a term was assigned to him to prove the bargain; whereupon he adduced witnesses. The defender *alleged*, That the diligence was null, being extracted, and dated after the elapsing of the term.

THE LORDS found, That the term being assigned with continuation of days, a diligence taken out at any time before the term was circumduced is sufficient.

*Fol. Dic. v. 2. p. 191. Stair, v. 2. p. 439.*