No 121.
writs of the lands comprised, nor them to be copied to him, without calling the debtor to the pursuit.

lands, nor such real rights, himself not being really infeft; but that he might call for production of contracts and bonds, the same being comprised: And also found, that a compriser could not seek production of any writs of lands comprised, nor the same to be copied to him, except the party from whom he comprised had been called to that pursuit. *See* TITLE TO PURSUE.

Act. *Stuart.* Alt. *Nicolson.* Clerk, *Scot.*
Fol. Dic. v. 1. *p.* 142. *Durie, p.* 289.

1636. *March* 17. REID *against* MR HARY GIBSON.

No 122.
A relict of a debtor was pursued to exhibit and deliver a bond. She voluntarily exhibited it; but the Lords found no process, till the defunct's representatives should be cited.

UMQUHILE John Reid, by bond being obliged to Hugh Reid minor, son to George Reid of Daldilling, in 3000 merks, the said Hugh, and his father as administrator, pursue the relict of the said umquhile John Reid, maker of the bond, and her second husband, for exhibition and delivery thereof to him; wherein the Lords found no process ought to be granted (albeit the said relict and her spouse exhibited voluntarily the bond, being in her hands ever since the death of her husband, maker thereof) while some person were summoned to represent the defunct debtor, alleged maker of the same; seeing it was never libelled in the summons, that ever the bond was the pursuer's evident, or ever was delivered to him, but produced now after his decease by his relict, it being amongst her husband's writs the time of his decease; and this was so found, being proponed by Mr Hary Gibson, who was creditor to umquhile ——— the debtor, and his brother, and the daughter, only bairn of the debtor's brother, and so who is that only person, who was apparent heir to the debtor, and who thereby was found to have interest to propone the same.

Act. ——. Alt. *Nicolson et Stuart.* Clerk, *Hay.*
Fol. Dic. v. 1. *p.* 142. *Durie, p.* 805.

SECT. XXVII.

Citation in Incident Diligences.

1624. *February* 10.
KING'S ADVOCATE and Lo. YESTER *against* Lo. BUCCLEUGH.

No 123.
In the case of a party's craving an incident

IN an action of improbation pursued at the King's Advocate's instance, and the Lo. Yester, against the Lo. Buccleugh, an incident being used at the Lo.

Buccleugh's instance, for proving of an exception admitted to his probation against the improbation; the LORDS found, that the incident could not be sustained, because the Advocate, at whose instance the principal cause of improbation was pursued, was not summoned in the incident; seeing they found that no incident could be granted in any case, except where all the pursuers in the principal cause, wherein incidents are to be used, ought *specifice* to be summoned in these incidents; and this was found; albeit it was *alleged* for the party user of the incident, that where the principal parties pursuers are warned *apud acta* in the principal process, by the act of litis-contestation, in that case they needed no other citation in the incident, they being warned by the act for the term assigned to the defender, for proving of his exception, and for proving whereof now the incident is used; and also, that it was *alleged*, that seeing the direct and principal party was summoned by the incident, the same ought not to be rejected for not summoning of the King's Advocate, who was not a principal party, and who could neither tine nor win thereby, but who was only party for his interest, *ratione officii*; which allegiances were repelled.

No 123.
for recovering of writs called for to be improven, the Lords found that the Lord Advocate, as being a necessary party, behoved to be summoned, because he being a party in the principal summons, could not be left out in the incident.

Act. *Nicolson* et *Stuart*. Alt. *Hope* et *Scot*. Clerk, *Hay*.
Fol. Dic. v. 1. *p.* 142. *Durie, p.* 108.

*** Spottiswood reports the same case:

IN an incident raised by the Earl of Buccleugh for recovering of certain writs, sought to be improven by my Lord Yester, it was *alleged*, 1*mo*, No incident for such and such writs; for which it was alleged by the pursuer of the incident in the production, that no certification should be granted, because he offered him to prove, by witnesses, that they were in the pursuer's own hands; because he having an ordinary way of probation for proving the having of them, could not take him to an extraordinary also.—THE LORDS found that one might very well use both the manner of probation by writ and witnesses, and that they were not incompatible, as the probation by oath is indeed with either of them. Next it was *alleged*, That the incident in whole could not be sustained, because the Advocate was not summoned, who was a necessary party; for he being a party in the principal summons, could not be left out in the incident. *Answered*, That it was sufficient in an incident to warn the parties havers only, and that the Advocate had no interest therein whereby he should be summoned; at the farthest that it was sufficient to warn him *apud acta*. Nevertheless the LORDS found the allegeance relevant, and refused the incident.

Spottiswood, p. 172.