

1583. *February.*

One may pass from an exception or reply admitted to his probation, if there be no term assigned for proving thereof; because found that there is no litiscontestation, unless a term be assigned. *Communis tamen est Doctorum opinio, quod exceptione peremptoria proposita, quæ tollit libellum et condemnationem litis, semper sit litiscontestatio.*

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1583. *February.* KER of MERSINGTON *against* KER of SHAW.

KER of Mersington having obtained a decret of non-entry of the lands of Dalcosie, with the tower and fortalice thereof, pursued Ker of Shaw for delivery of the house to him upon six days' warning. Excepted, That the pursuer had no action for delivery of the house by that order; but it behoved him to make warning, or apprise the lands, and obtain sasine first, and then seek the delivery of the house. Replied, That he, being donatar to the gift of non-entry, and having obtained decret thereupon, had as good right to pursue by virtue thereof, as if he had obtained the gift of a ward. The order was found good, and that the house should be delivered without any warning, by the chancellor's vote.

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1583. *June.* EUPHAME MACKALZEAN and PATRICK MOSCROPT *against* WILLIAM NAPIER of WRIGHTS-HOUSES.

EUPHAME Mackalzean, as nearest and lawful heir to Mr Thomas her father, and Patrick Moscroft, her husband, for his interest, pursued William Napier of Wrights-houses for the bygone annual-rents of 1000 merks laid upon his land by her father, whereof he received infestment and sasine, to be holden blench of William, as superior. Alleged, She could not have the annual-rents for the space of three years, during which the said infestment of annual-rent was in non-entry, and so belonged to the defender, as superior. Replied, He could not retain those three years' annual-rents in his own hands by reason of non-entry; because he was bound to warrant the pursuer's infestment of annual-rent from all wards, non-entries, &c.—*et sic quem de evictione, &c.* Duplied, In so far as he was bound to warrant it from non-entries, that behoved to be understood of such as came by him, or by his deed and occasion; but this non-entry came by the pursuer's self, *et ob negligentiam hæredis, jus suum minime prosequentis*; for she might have sought the superior to have entered her, and used the ordinary remedy for the same. Triplied, That, albeit the fault proceeded not from him, yet there was no reason that he, having received another's silver, should retain the profit thereof in his own hands, *et sic locupletaretur cum alterius jactura*; for it was not alike in infestments and alienations of annual-rents received by a