No 232.

alleged, the Laird of Glenbervie took in hand to prove, by the notary and witnesses contained in the instrument of offering and intimation, that the gift of marriage was sufficiently intimated to him, and read, at least offered to be read, although that such words *per expressum* were not contained in the said instrument of intimation; which being admitted to Glenbervie's probation, he summoned the notary, the witnesses, and the party, to give oath *de calumnia*, and at the day of compearance, he would have referred the same to his oath of verity, so that he would give *juramentum veritatis* in that cause. Udney refused, because the pursuer had taken in hand to prove his allegeance by the notary and witnesses contained in the instrument foresaid, and produced them to this effect to farther proving thereof; which allegeance of the Laird of Udney was found relevant by the LORDS, and he ought not to give *juramentum veritatis*, in respect produced, as said is.

Fol. Dic. v. 2. p. 200. Colvil, MS. p. 250.

No 233.

1575. *February* 15. LAIRD of BARGENY *against* ——.

THE Laird of Bargeny pursued —— for spoliation of certain goods. The defender proponed a good peremptory exception; and because no day was assigned or taken to prove the said exception, the pursuer would have passed from that instance, but the defender alleged he should have absolvitor, he proving the peremptory; which allegeance of the defender, the LORDS found relevant, and repelled the pursuer's allegeance; and decerned, that from the time litiscontestation was made, that is, when the defender proponed a peremptory exception, and the same referred to his probation by interlocutor, that the pursuer might not renounce the instance, nor gang frae the summons as is libelled, albeit the defender had taken no time to prove his exception, but absolvitor should be given therefrom, the defender proving the exception, or else the pursuer should pass from the whole cause.

Fol. Dic. v. 2. p. 196. Colvil, MS. p. 252.

1583. *February*. LUNDIE *against* GRAY.

No 234.

IN an action pursued by the Lady Lundie against Helen Gray, after that there was a reply proponed and admitted, taking away an exception, the pursuer would have gone from the reply. It was *answered*, That litiscontestation was made in repelling the exception, and admitting the reply. It was *answered*, That there could be no litiscontestation made in repelling of the exception, and admitting of the reply, except there had been a term assigned. THE LORDS found, by interlocutor, That there could not be litiscontestation,

except there had been a term assigned. Ego et nonulli alii in contraria fuerunt opinione, quod exceptione peremptoria proposita quæ contra libellum et condemnationem litis, semper fit litiscontestatio; et hæc est communis Doct. opinio, prout Bald. in L. unica C. ibidem.

No 234.

Fol. Dic. v. 2. p. 197. *Colvil, MS. p.* 387.

1583. *March.* KNOWS *against* IRVINE.

No 235.
Found that a pursuer may pass from his libel before a term be assigned for proving, and he may pass from the instance, and raise another libel, upon paying the defender's expenses.

IN the action betwixt George Knows and Mr Richard Irvine, for the deliverance of a reversion, the said Knows having raised summons for deliverance of the reversion, and the matter being disputed in presence of the Lords, all exceptions and duplies being admited to probation, the said Knows, in the meantime, raises a new summons supra eadem re inter easdem partes et eodem modo agendi variatis nonullis circumstantiis; which summons being called, it was *answered*, That there could be no process in the libel, because the pursuer having pursued the defender before supra eadem re et eodem modo agendi, there was an exception with a duply admitted to the defender's probation, and for proving the same, he had raised the act; and the same being exhibited in presence of the Lords, desired a term to be assigned, and so, until there be a term first assigned to the defender for proving his exception and reply, the pursuer, in novo libello super eadem re et eodem modo agendi intentato, et inter easdem partes, ought to have no process. To which it was *answered*, That true it was, there was the libel and reply proponed by the pursuer, and now the pursuer was content, ante statutum et assignatum terminum, to pass from his libel and reply, and to renounce the instance. It was *alleged* by the other party, That he might not renounce the instance in prejudice of his defence, the exception and reply, which were admitted to his probation, and to drive parties to such expenses, and then to go back at the will and pleasure of the party that was pursuer, hoc esset contra bonos mores vexare reos litibus. The matter being reported before the Lords, some were of opinion, that post litem contestatem, and the admission of the exception and duply, res non fuit integra, and the defender ought to be heard; others were of the opinion, that as was practised supra mense Feb. eodem anno, inter Gray et Heron, (No 234.) that litiscontestation is not till a term be assigned, et unicunque licet jure per se introducto renunciare, ut notat Bald. L. Jubemus, C. De judiciis, quod quis potest renunciare testibus, et instrumentis, et omnibus allegationibus tam facti quam juris pro se allegatis. THE LORDS found by interlocutor, that the party might pass from the instance ante statutum terminum, yet he ought to refund the expenses to the defender at the sight and discretion of the Lords; licet bona pars, &c.

Fol. Dic. v. 2. p. 196. *Colvil, MS. p.* 392.