1627. *January* 10. L. THORNTON and Dr STRACHAN *against* KEITH.

No 246.
Even after an extracted act of litiscontestation, upon the defence of payment, which the defender failed to prove, he was allowed to object against the foundation of the debt..

IN an action pursued by the L. of Thornton and Dr Strachan against Robert Keith, burgess of Aberdeen, for payment of a legacy left by a defunct to the defunct's legatar, which the defunct ordained to be paid by her executors, at the time of the marriage of the said legatar, and in the mean time that the sum left in legacy should be employed upon profit to the use of the said legatar; these pursuers being made assignees by the legatar to the said legacy, pursue this defender as executor to the testatrix, for payment of the principal sum left in legacy, and of the annualrent thereof continually since, as well before the time of the legatar's marriage as since the time of the marriage; and the defender compearing and proponing an exception of payment of the legacy to the cedent before the assignation; which being admitted to probation, and he having succumbed in proving thereof; thereafter the defender, when the exception was found not proved, and the decreet was to be pronounced conform to the desire of the summons, he *alleged*, That the LORDS ought not to pronounce a decreet for any years' profit since the marriage, seeing the legacy, which was the ground of the pursuit, astricted the executor only to pay profit to the legatar, to the time of the marriage, when the principal sum should have been paid, so that after the marriage there was no action competent for any profits thereafter: The pursuer *answered*, That this was not competent now to be proponed, after the proponing and admitting of a peremptory exception, wherein the defender succumbing, there rested no more but sentence conform to the summons; which could not now be quarrelled upon irrelevancy, or how far the same should be extended after succumbing, as said is, but ought to have been proponed before litiscontestation: The defender *answered*, That this was competent to be considered at all times by the Judge, albeit the party had omitted the same, for the LORDS, *ex officio nobili*, ought to decern nothing but that which is relevant and reasonable, albeit the party should omit the same, quia quæ desunt partibus et advocatis, Judex debet supplere. The pursuer *Answered*, That this supplement of the Judge is not now to be received, being the party's fault, *et non juris*, wherein the Judge of the law may supply. THE LORDS found, that notwithstanding of the defender's succumbing to prove the exception proponed, and omission to propone this allegeance, that they, as Judges, *ex officio nobili*, might in this same state of the process, after the defender had failed in probation, yet consider how far the debt should extend as to the profits, for that was incumbent to the Judge, to see that their sentence should proceed upon reasonable and relevant grounds; and therefore seeing the testament was the only ground of the pursuit, which appointed profit to be paid to the time of the marriage, and that the pursuit was not moved upon that ground, viz. that the profit was sicklike due sinsyne *ob moram*, for not payment of the principal sum at that time; therefore the LORDS found, That de-

creet should only be given for the profit to the time of the legatar's marriage, there being no profit sought, as said is, upon any other ground *ob moram*, in not paying thereof then; and this was found might and ought so to be done by the Judge, albeit it was not proponed by the party, and albeit of the failzie to prove *ut supra*. No 246.

Fol. Dic. v. 2. *p.* 199. *Durie, p.* 254.

*** It must be kept in view, with regard to the pursuer, he is not barred by litiscontestation from making new allegeances, and insisting upon new *media concludendi;* for if a decree does not exclude him, far less an act of litiscontestation.

1627. *March* 16. WALTER HAY *against* MARK KER. No 247.

WALTER HAY pursued Mark Ker for ejecting him and his tenants out of the lands of Catcume, albeit the action was prescribed by the act of Parliament 1579. *Answered*, That he restricted his summons to intrusion, and to the ordinary profits. The defender *contended*, That he could not turn his libel of ejection into intrusion, seeing that he was *tutus* from his ejection *præscriptione trium annorum*, and so was not obliged to answer to any new made up libel, until he were of new summoned: Yet the LORDS sustained the reply, as they had done not fourteen days before betwixt James Mowat and Mr Thomas Davidson, who was convened by James for ejecting him out of the Procurator-Fiscalship of Aberdeen, to whom was permitted likewise to turn over his libel into intrusion.

Fol. Dic. v. 2. *p.* 198. *Spottiswood*, (EJECTION.) *p.* 92.

*** Durie's report of this case is No 265. p. 11069. *voce* PRESCRIPTION.

1627. *June* 8. CRAWFORD *against* CUNNINGHAME. No 248.

IN an action betwixt Crawford and Cunninghame, where Cunninghame was convened as heir to his predecessor, who was cautioner for the Laird of Lesnories for payment of L. 400, which the defender's predecessors were obliged to pay, as said is; in the which action, an exception being admitted to the defender's probation, and a term assigned to prove the same, and the act being called by the pursuer, who sought protestation thereon, the defenders desired to be heard to propone another peremptor, whereupon he was ready to make faith, that it was *noviter veniens ad notitiam* since the term of the act; and the pursuer contesting, that it ought not to be granted to him, in respect of his compearance in the act and the state of the process, and that the same had depended almost two years; the LORDS found, seeing this was desired to be proponed by the defender at the first term of the act, that the said exception might be proponed and received; but first they took consideration of the de-