

No 133.

1662. *July 3.* RENTOUN of LAMBERTOUN *against* EARL of LEVIN.

LAMBERTOUN having intented an improbation of lands, *alleged*, Subscribed by his father in favour of the umquhile Countess of Levin, and her daughters, and others; and having proceeded to the indirect manner, articles of probation and improbation were given in writ *hinc inde*, and a full dispute thereupon, and all such witnesses examined as either party craved; the LORDS, having perused and read the whole process, did, upon the defender's desire, allow them to be heard *viva voce*; and both parties compearing, the pursuer referred the dispute to the Lords, without saying any further; and the defenders having related the case, and debated, in general, anent the taking away of writs, by presumptions and conjectures, and having entered to repeat all that was in the written dispute, and to answer every allegiance,

THE LORDS declared, That it was not their meaning that the dispute should be repeated, but the material and weighty points which the defender thought of most importance, to have been resumed, and urged shortly; referring to the rest the Lords.

Therefore, they ordained the defenders to order their allegiances, as they might, for all they had to say, betwixt ten and twelve the next day, without any further, unless the pursuer answered.

Stair, v. I. p. 120.

1663. *January 24.* BAIN *against* Laird of STREICHAN.

No 134.
After litiscon-
testation, al-
legiances in-
stantly veri-
fied are re-
ceivable.

THE Laird of Streichan being pursued by Bain, proponed a reason of compensation, and produced a writ for instructing thereof, being called at the advising of the cause,

THE LORDS suffered him to reform the allegiance, seeing he instructed it instantly by another writ than was formerly produced.

Stair, v. I. p. 162.

1664. *December 13.* Lord ROLLO *against* His CHAMBERLAIN.

No 135.
Found as
above.

THE Lord Rollo having pursued his chamberlain for intromissions, conform to a particular account libelled, the defender have compeared, offered to prove he was discharged; which was found relevant; and now producing the same, it proves but for a part; whereupon the pursuer craved sentence for the rest. It was *alleged* for the defender, That there was nothing produced to instruct the intromission. The pursuer *answered*, That the defender having made litiscon-

testation, upon a discharge, without denying the intromission, he has acknowledged the libel, and the pursuer cannot be put to prove the same, without inverting the order, and making two litiscontestations in the same cause. The defender *answered*, That this being but an omission of the advocates or clerks, of a thing palpable, the Lords might repon the defender.

No 135.

THE LORDS adhered to the act of litiscontestation; but referred to some of their number, to move the parties to what was equitable; and it was thought, that if the defender would allege that he was not intromitter for these particulars, but that they were in the pursuer, or his other chamberlain's hands, and were instantly verified by his oath, it were receivable.

Stair, v. 1. p. 239.

1667. December 13. RIOCH against ———.

No 136.

AFTER litiscontestation upon an exception of payment, the defender, who was pursued as lawfully charged to enter heir, desired to be admitted to renounce; which was refused, because, by the proponing the defence, *gesserat se pro hered.*

Dirleton, No 119. p. 49.

1669. November 6. SCOR of Hartwood-mires against ———.

No 137.
Found in conformity with
Rioch against
——, *supra.*

SCOR of Hartwood-mires gave in a bill of suspension of a decret *in foro*, which the Ordinary reported to the Lords. The reason of suspension was, that he being convened, as representing his father, to pay the debt in question, for which his father was cautioner, he offered to prove payment, denying always the passive titles; and having proved the most part paid, by discharges granted to the principal debtor, he was decerned for the rest; and now offers to renounce to be heir to his father, conform to his protestation in the first act. It was *answered*, That the defence of payment does never suffer the proponer to deny the passive titles, or put the pursuer to a necessity to prove them, by the constant custom, founded upon good reason; because the proponing upon any positive right of the defunct's is a behaviour as heir, and in the act of litiscontestation, a term is only assigned to the defender to prove payment, and the protestation in effect is rejected, because there is no term therein assigned to the pursuer to prove the passive titles, in case the defender failed to prove payment, neither could there be any by our custom.

THE LORDS refused the suspension; and found, that the offer to prove payment liberated the pursuer from proving the passive titles.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 649.