No 380.

1711. *January* 17. WATSON *against* BROWN.

A PURSUER extracted an act of litiscontestation, in a process upon the passive titles, for proving diverse facts whereby *gæstio pro hærede* might be instructed. Some witnesses were examined. He returned to the libel, and offered to prove other passive titles besides behaviour. This was alleged to be contrary to form, yet the LORDS found, That the extracted act of litiscontestation did not bar the pursuer from returning to the other branches of his libel, and insisting therein.

Fol. Dic. v. 2. p. 207. Fountainhall. Forbes.

*** This case is No 88. p. 9744. *voce* PASSIVE TITLE.

1711. *November* 16. SANDILANDS *against* BURNET.

No 381.
Where a defence is stated but not insisted in.

SANDILANDS of Cotton having an infeftment of annualrent for 2500 merks forth of the lands of Frosterhill, and pursuing a poinding of the ground, Sir Thomas Burnet of Leys, and Andrew Ritchie, his assignee, compear, and crave preference on two rights, one derived from the town of Aberdeen, and the other, an adjudication against Burnet of Clarkseat, the former heritor. Against the first, Cotton *objected*, Though it was preferable, yet it was satisfied by the Town's intromissions and Ritchie's. And as to the second, he fell clearly to be preferred, because his right was twelve years prior to the said adjudication. And for proving their intromission, there was an extract produced from the town count books of the treasurer of Aberdeen, which, joined with Ritchie's possession, did more than extinguish that infeftment. Which probation being advised by the LORDS, they found it paid that right, and L. 237 more. Leys reclaiming by bill, represented, that his author's oath could not prejudge him a singular successor for an onerous cause; and that the abbreviate out of the Town's books was neither authentic nor probative against him. 3*tio*, That any intromissions he had could never extinguish his right from the town, because he had another title in his person, viz. his adjudication, to which he ascribed his possession. *Answered* for Cotton, He opponed the probation, and that he could never ascribe his intromission to the adjudication, both because the Town's right being both the *jus nobilius et antiquius*, and first in his person, he could never alter or invert his title by which he entered, but behoved to continue to bruik it ay till that was paid. And this bill being remitted to Lord Blairhall, where Leys insisted on his adjudication, and ascribed his possession thereto, my Lord repelled his allegeance and preferred Cotton; who having extracted his decreet, Leys procured a suspension of it, and at discussing insisted on this reason, that it was null, in so far as his reclaiming bill, containing se-

veral different points, being remitted to Blairhall, and he having only discussed one of his rights, viz. his adjudication, and his other title on the Town of Aberdeen's right not being determined, but the interlocutor stopped by the bill, no total decreet could go out till that were insisted in, and so the decreet was wrongously extracted and null: And if parties or clerks be permitted to hough and circumvene one another this way, no firm decreet can be expected: So that it is yet entire for him to be heard in the Town of Aberdeen's right, which is yet standing out unpaid, the probation no ways concluding against him. *Answered*, The two great bulwarks protecting and supporting decreets *in foro* are proponed and repelled, and competent and omitted: And if there was a case in Scotland where competent and omitted took place, it is here; for if a defender had ten reasons in his bill, and at hearing insist only on one or two of them, and they be repelled, and he neglect to resume the rest, and the decreet go out against him, it is a most firm decreet, for law presumes he had passed from them as of no weight and moment. For in all causes defenders have the managing of their own defences, and may propone them as they incline to insist, so that neither judge nor pursuer can force them to open their mouth farther than they please; and therefore Sir Thomas Burnet laying the stress of his cause on his adjudication, and that being repelled, he suffering the decreet to be fairly extracted, (which was not till six days after it had been read in the minute-book) whom had he to blame but himself, that he did not apply to be heard on his other grounds before extracting? And it were a new doctrine, that if a party reclaim against an interlocutor upon different points, and at hearing insist only upon one of them, and that be repelled, that no decreet can follow, because there were other points in the bill which he did not think fit to repeat. For at this rate, a decreet *in foro* could never be got, till a law invented some certification to force a defender to propone all, whether he will or not; then the Ordinary, or the whole Lords, behoved to read over his whole bill and fish out what he has omitted, and mind him of his neglect, which would be a very rare employment for judges, and mispend their time, who are only to judge *secundum allegata et probata*; and either parties' omissions must be charged on themselves, and none other: And such a practice would be a golden age for debtors, who never needed to pay; for he may omit some of his allegeances, and bring them of new by way of suspension and reduction, which would entail an endless seminary of pleas, and encourage defenders beyond whatever was known to be allowed in any civilized country in the world. And the truth is, though he were reponed, his allegeances omitted, about the Town of Aberdeen's right yet subsisting, were neither relevant nor true. THE LORDS found the reasons of his bill not being repeated were competent and omitted, and so not receivable now. If any thing had been alleged against the extracting of the decreet, that it was precipitant and unwarrantable, the Lords would have noticed it, but nothing of that was pretended here: Yet, in regard he offered to instruct that Sandiland's right was satisfied and paid, the LORDS

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No 381. thought payment could never come too late, therefore they allowed him to be heard thereupon before the Ordinary, though some moved he should raise a separate process for it. But the Lords took it in summarily upon his suspension of the decreet *in foro*. There is another case occurs sometimes, and is mistaken by the lawyers and parties; and it is this; there is a bill given in representing sundry points, and in the petitory parts they sum up their demands into several heads, and crave a distinct categoric answer to each of them: The Lords take notice only of what they judge material, and adapt their interlocutor thereto, without giving a specific answer to the rest; and when the decreet is afterwards extracted, this has been contended to be a nullity, as if the Lords overlooked and forgot these particulars: But this has not been sustained as a nullity, for what gets no special answer is supposed to be rejected and refused, as deserving no special consideration or notice.

Fol. Dic. v. 2. p. 208. Fountainhall, v. 2. p. 672.

1715. *July* 19. Dame Barbara Jaffery *against* Scot of Brothertoun.

No 382.
Two brothers being decerned conjunctly and severally in a decree, as representing their predecessor, the Lords repelled this reason of suspension, that they could only be liable *pro rata*, as competent and omitted.

The deceased Sir John Falconer of Balmakelly having a fishing upon the water of North Esk, belonging to his lands of Galraw, and John Scot of Comistoun having the cruives a little below the said fishing, they entered into a mutual contract, by which Sir John obliges himself not to quarrel any irregularities about the said cruives, by which his fishing was prejudged; and Comistoun bound him, his heirs, &c. to pay to Sir John, his heirs, &c. L. 24 Scots yearly, with a provision, that in case by a legal sentence at the instance of any person, the said cruives should be altered, and Comistoun necessitated to observe the distance of the hecks, height, and breadth of the dam-dyke, Saturday's Slop, &c. that then he should be free as to all terms thereafter, till the obtainer of the decreet shall discharge the same, intimation being always made to Sir John of the said action before litiscontestation. The Lady Galraw, as being infeft in the lands and fishing, *insisted* against Brothertoun, and Colonel Scot his brother, as representing Comistoun their uncle upon the passive titles, and at length recovered decreet against them for the L. 24 Scots, as the agreed tack-duty betwixt Sir John and their uncle: And they suspended upon several reasons, and among others these two, viz, 1*mo*, That they being decerned in general to make payment of the sum, it behoved to divide betwixt them *pro rata*, as if they had been bound conjunctly in one bond: And adduced two decisions observed by Durie, the one the last of February 1626, where the Lords found, "That two persons pursued upon the passive titles, the one as heir, and the other as executor, were only liable each for his own share, in respect it was not libelled that ilk one of them should be liable *:" and another case, the 16th of November 1626, betwixt two vitious intromitters †. 2*do*, Comistoun's contract with Sir John Falconer was *ad diem*, viz. until a decreet was

* ——— against Douglas, *voce* Solidum et pro rata.

† Chalmers against Marshall. Ibidem.