

**\*\*** Fountainhall reports this case :

No 278.

THE LORDS in a case betwixt Walwood and Walwood, declared, by an act where a pursuer is to prove his libel, or reply, *prout de jure*, and when the term is circumducing against him for not proving thereof, and then he offers to refer it to the defender's oath, that they would not oblige the defender to swear thereon, unless he were present within the town of Edinburgh, because if he was absent, it made two litiscontations in one cause. It may be doubted, if the same should be where the defender so refers his allegiances to the pursuer's oath, who is ever presumed to be present and ready to insist, whereas the defender, by the Emperor Justinian's laws is called *ὁ φευγων* (*fugiens*). I think both of them ought to elect their manner of probation at the time of the act. What if a party refer any allegiance or exception to the oath of the other party, whether pursuer or defender, and when he comes to depone, he resiles, and offers to prove by witnesses; that makes two litiscontestations, and yet is permitted; only I think the party's expenses should be paid to him by the resiler.

*Fountainhall, v. 1. p. 5.*

1680. *January 23.* PATON *against* STIRLING of Ardoch.

No 279.

THE LORDS found he might adduce writ to prove an article of a rental, if the witnesses he had led, had proved nothing of it, but otherwise, he might not, if they had proved in part.

*Fol. Dic. v. 2. p. 201. Fountainhall, MS.*

1685. *December 22.* LORD PITMEDDEN *against* REID of Bara.

No 280.

THE case of Lord Pitmedden, and Reid of Bara, is reported by Lord Carse, viz. If the backbond given by my Lord Winton, which declared he had taken the gift of the ward and marriage of Seton of Pitmedden, to the behoof of the apparent heir, with this express condition, providing he followed his advice, was null; because the heir, Pitmedden's elder brother, contravened the quality, in putting out Winton's Chamberlain, uplifting the rents himself, and chusing other curators; and when he was major, in selling his lands very cheap to this Reid of Bara's father, who was his Writer and Procurator in Aberdeen? The intent of this declarator is, that the backbond being put out of the way as forfeited and contravened, the lands which Pitmedden's brother sold to Bara, may be burdened with a proportional part of the ward and avail of the marriage, as being *onus reale et debitum fundi*, only to this effect, that this liquida-

Where a cause had been remitted by the Lords to some of their number, to settle between the parties, the pursuer was found at liberty to pass from the instance *simpliciter*.

No 280.

tion may make up a competent price of these lands he acquired so cheaply and fraudulently from his brother. *Alleged*, The backbond declaring Winton's gift to be for the apparent heir's behoof, Winton could adject no quality in his own favour, the right of those casualties being the heir's. *2do*, It is not conceived *irritanter et resolutive*. *Answered to the first*, Winton having given this backbond *ex gratia*, he might clog his donation with what qualities he pleased. *2do*, It being *in eodem corpore* with the declaration of trust, you cannot *pro parte approbare et reprobare*, but you have already used and accepted it. To the *second*, Though it be not under an irritant clause, yet it is implied in the nature of a writ, that if you fail, I shall be free.

This being reported, some of the LORDS inclined to ordain trial to be taken, before answer of the contraventions; but it was recommended to some of their number, to try what was the real worth of the lands, and what Bara paid for them, and to report, or else to endeavour to settle them. And the LORDS, to whom it was referred, having determined Pitmedden to get L. 150 Sterling, and to give a discharge and ratification of Bara's rights, he refused to ratify, in respect he had more to claim. Whereupon Bara gave in a bill, craving the cause may be advised. Pitmedden declared he passed from the pursuit. *Answered*, He cannot do it now by the act of sederunt, it lying at a report, and being a common process. *Replied*, He was content to pass from this instance *simpliciter*, and the tear the summons, &c. And that Lord Boyne was suffered to lift his process against Arthur Forbes of Balveny; and Yester his process against Lauderdale. THE LORDS allowed Pitmedden to pass from his process.

*Fol. Dic. v. 2. p. 196. Fountainhall, v. 1 p. 387.*

No 281.

1686. *January 26.* Mr JAMES HORN against JAMES STRACHAN.

DRUMCAIRNE reported the debate betwixt Mr James Horn and James Strachan, anent the horse infected with the *mord de chien*, and returned back again *secundum edictum œdilitium actione redhibitoria*. THE LORDS turned Horn's decret into a libel, in respect of this informality, that having referred his libel to the defender's oath, he had also led witnesses thereon; though it was *alleged*, That the witnesses were first adduced, and in so far as they did not prove, the libel was referred to the defender's oath; which the LORDS found irregular, these two probations being contrary and incompatible *super eodem subjecto*, and pursuers behoved to rest content with one of them. At last, the LORDS ordained the depositions to be transmitted here.

*Fol. Dic. v. 2. p. 201. Fountainhall, v. 1. p. 406.*