

except there had been a term assigned. Ego et nonnulli 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.

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 admitted to probation, the said Knows, in the meantime, raises a new summons supra eadem re inter easdem partes et eodem modo agendi variatis nonnullis 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 contestatam, 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.

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.

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