

1627. July 21. M'DONALD *against* M'KENZIE.

No 251.

LITISCONTESTATION being made in a cause probable by witnesses, and *in termino probatorio*, the witnesses being at the bar, the defender chooses rather to refer the libel to the pursuer's oath than to admit the witnesses to depone, because they were Highland. THE LORDS ordain the pursuer to give his oath instead of all other probation; and because he was absent, the defender either to make the pursuer's expenses, to come and give his oath before the LORDS, or to yield to a commission to take his oath in his own bounds.

*Fol. Dic. v. 2. p. 200. Auchinleck, MS. p. 117.*

1628. March 13. HOME *against* HOME.

No 252.

IN an action pursued at the instance of a party, wherein litiscontestation was made, the party pursuer makes another assignee to the bond, whereupon the action was pursued, which assignee intends new action. It is *alleged* by the defender, That seeing litiscontestation was made in the first action pursued by the cedent upon this same bond, the assignee may not misken the first action, but must seek transferring of the act of litiscontestation, seeing it binds both parties as it were a contract. THE LORDS found that the assignee may pass from his first pursuit, and the defender may propone all his defences, which were competent to him in the first, except he show how he is prejudged.

*Fol. Dic. v. 2. p. 196. Auchinleck, MS. p. 117.*

1628. June 18. BLACKADDER *against* NICOLL EDWARD.

No 253.

A PARTY may compear and allege against the relevancy of a summons, and when the libel is found relevant he may pass from his compearance.

*Auchinleck, MS. p. 168.*

1629. January 19. LAWSON *against* SCRIMGEOUR and FRASER.

No 254.

IN a suspension, after interlocutor is pronounced, the pursuer may not take up his process, but must either consent that the letters be *simpliciter* suspended, or otherways insist to the discussing of the suspension.

*Auchinleck, MS. p. 169.*