

****** 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 φευγών* (*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*.