

testation, upon a discharge, without denying the intromission, he has acknowledged the libel, and the pursuer cannot be put to prove the same, without inverting the order, and making two litiscontestations in the same cause. The defender *answered*, That this being but an omission of the advocates or clerks, of a thing palpable, the Lords might repon the defender.

No 135.

THE LORDS adhered to the act of litiscontestation; but referred to some of their number, to move the parties to what was equitable; and it was thought, that if the defender would allege that he was not intromitter for these particulars, but that they were in the pursuer, or his other chamberlain's hands, and were instantly verified by his oath, it were receivable.

Stair, v. 1. p. 239.

1667. December 13. RIOCH against ———.

No 136.

AFTER litiscontestation upon an exception of payment, the defender, who was pursued as lawfully charged to enter heir, desired to be admitted to renounce; which was refused, because, by the proponing the defence, *gesserat se pro hered.*

Dirleton, No 119. p. 49.

1669. November 6. SCOR of Hartwood-mires against ———.

No 137.
Found in conformity with
Rioch against
——, *supra.*

SCOR of Hartwood-mires gave in a bill of suspension of a decret *in foro*, which the Ordinary reported to the Lords. The reason of suspension was, that he being convened, as representing his father, to pay the debt in question, for which his father was cautioner, he offered to prove payment, denying always the passive titles; and having proved the most part paid, by discharges granted to the principal debtor, he was decerned for the rest; and now offers to renounce to be heir to his father, conform to his protestation in the first act. It was *answered*, That the defence of payment does never suffer the proponer to deny the passive titles, or put the pursuer to a necessity to prove them, by the constant custom, founded upon good reason; because the proponing upon any positive right of the defunct's is a behaviour as heir, and in the act of litiscontestation, a term is only assigned to the defender to prove payment, and the protestation in effect is rejected, because there is no term therein assigned to the pursuer to prove the passive titles, in case the defender failed to prove payment, neither could there be any by our custom.

THE LORDS refused the suspension; and found, that the offer to prove payment liberated the pursuer from proving the passive titles.

Fol. Dic. v. 1. p. 187. Stair, v. 2. p. 649.