

No 38c. 1711. *January 17.* WATSON *against* BROWN.

A PURSUER extracted an act of litiscontestation, in a process upon the passive titles, for proving diverse facts whereby *gastio pro hærede* might be instructed. Some witnesses were examined. He returned to the libel, and offered to prove other passive titles besides behaviour. This was alleged to be contrary to form, yet the LORDS found, That the extracted act of litiscontestation did not bar the pursuer from returning to the other branches of his libel, and insisting therein.

Fol. Dic. v. 2. p. 207. Fountainhall. Forbes.

* * This case is No 88. p. 9744. *voce* PASSIVE TITLE.

1711. *November 16.* SANDILANDS *against* BURNET.

No 381.
Where a defence is stated but not insisted in.

SANDILANDS of Cotton having an infeftment of annualrent for 2500 merks forth of the lands of Frosterhill, and pursuing a pointing of the ground, Sir Thomas Burnet of Leys, and Andrew Ritchie, his assignee, compear, and crave preference on two rights, one derived from the town of Aberdeen, and the other, an adjudication against Burnet of Clarkseat, the former heritor. Against the first, Cotton *objected*, Though it was preferable, yet it was satisfied by the Town's intromissions and Ritchie's. And as to the second, he fell clearly to be preferred, because his right was twelve years prior to the said adjudication. And for proving their intromission, there was an extract produced from the town count books of the treasurer of Aberdeen, which, joined with Ritchie's possession, did more than extinguish that infeftment. Which probation being advised by the LORDS, they found it paid that right, and L. 237 more. Leys reclaiming by bill, represented, that his author's oath could not prejudice him a singular successor for an onerous cause; and that the abbreviate out of the Town's books was neither authentic nor probative against him. *3tio*, That any intromissions he had could never extinguish his right from the town, because he had another title in his person, viz. his adjudication, to which he ascribed his possession. *Answered* for Cotton, He opposed the probation, and that he could never ascribe his intromission to the adjudication, both because the Town's right being both the *jus nobilius et antiquius*, and first in his person, he could never alter or invert his title by which he entered, but behoved to continue to bruik it ay till that was paid. And this bill being remitted to Lord Blairhall, where Leys insisted on his adjudication, and ascribed his possession thereto, my Lord repelled his allegiance and preferred Cotton; who having extracted his decreet, Leys procured a suspension of it, and at discussing insisted on this reason, that it was null, in so far as his reclaiming bill, containing se-