

leageance found relevant, and admitted to either, litiscontestation should be understood to be made as to that allegiance. 2. And likewise as to that effect, that the parties are concluded; and cannot be heard thereafter to propone any other allegiance. 3. The terms being run as to allegiance not discussed, they are concluded as to the probation of it; as if the relevancy had been discussed by a formal act of litiscontestation: whereas it is remitted to be considered after probation: seeing often *ex facto oritur jus*; and, upon consideration of the circumstances after probation, the Lords have more clearness to determine relevancy.

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1674. June 12. FREEHOLDERS of LINLITHGOW *against* The COMMISSIONERS to the PARLIAMENT.

IN a suspension, at the instance of the Freeholders of Linlithgowshire, against their Commissioners to the Parliament;—

The Lords found, That if the prorogations and recesses of Parliament be for a considerable time, so that the Commissioners do or may go home, the Commissioners should not have their fees or charges during the same. 2. That if the prorogation be for a short time, and the Commissioners, having their residence at a little distance, in Edinburgh, or Linlithgowshire, do or may go home, they ought not to have fees during that time. 3. If there be Articles sitting during that time, and they do not go home, though they be not upon the Articles, they should have their fees; because they are concerned to know and inform themselves, what is in agitation in the articles.

Newbyth, *Reporter*. Monro, *Clerk*.

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1675. January 5. PITTARRO *against* The EARL of NORTHESK.

THE Earl of Northesk, having taken an assignation to a bond, granted by the deceased Laird of Craig and Earl of Dundee to Margaret Carnagie and her children for 1000 merks; and having comprised thereupon Craig's estate; he did, after the comprising, give a bond to the said Margaret Carnagie and her children, that, in case he should recover payment, he should make payment to them of the foresaid sum.

Sir David Carnegie of Pittarro, being debtor to the said Earl in the sum of 2000 merks, SUSPENDED upon that reason;—That the said Margaret and her children had assigned to him the said back-bond, granted by Northesk; and, that the said Earl had disposed the right of the said apprising to the Lord Hatton; and therefore became liable to pay the said sum to the suspender's cedent; and the suspender may, and does compensate upon the said bond, *pro tanto*.

It was ANSWERED by the charger; That the comprising did neither belong to the suspender's cedent, nor was to their behoof; the said bond, granted by the Laird of Craig, being assigned *ab initio*, without any back-bond; and the com-

prising being deduced before Northesk granted the said bond : And, by the said back-bond, he was obliged only to pay the said sum in case he should get payment ; and he was so far from getting payment of the said sum, that having comprised, not only upon the said bond granted to Margaret Carnagie, but for other debts, exceeding far the said debt due to her ; yet got payment of neither.

It was REPLIED by the suspender ; That he was not concerned to dispute whether he got payment or not ; but the charger having disposed the comprising as to the said sum, without the consent of the said ——— Carnagie and her children ; and without the burden of the said back-bond, it was equivalent as if he had got payment : it being all one upon the matter, as to the interest of ——— Carnagie, whether Northesk had got payment of the said sum, or had disposed the comprising in so far as concerns the same.

The Lords, in respect of the conception of the bond granted by Northesk, found, that either he should procure a retrocession of the said bond, and comprising thereupon *pro tanto* ; or that he should pay the damage and interest sustained by the suspender's cedent, through Northesk's granting of the right of the said bond and comprising to Hattoun : And, in that case, that the damage and interest should be presently liquidated ; and, being liquidated, should be a ground of compensation.

Glendoich, *Reporter*. Monro, *Clerk*.

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1675. *January 12.* LETTER by the LORDS of SESSION to the KING.

MY Lord Lauderdale, his Majesty's secretary, having written to the President, concerning the above-mentioned process betwixt Captain Gordon and the Swedes, anent the ship called the Wine Grape ; that the Swedish envoy had made application to his Majesty, and had represented, that the decret against the strangers was carried but by two votes : and had given in a list to his Majesty of those that were for, and against the said decret ; with divers reasons against the same. It was thought fit that a letter should be drawn to his Majesty, containing the grounds whereupon the said decret proceeded : Which being done by those who were appointed by the Lords ; some of the Lords did object against the same,—That they did mention the Lords indefinitely to have given the said decret ; whereas his Majesty was informed of the contrary ; and the information was true : and therefore it was desired it should bear, that, upon the votes of the major part, which is usual in all cases, the decret was pronounced : Specially, seeing the said letter did contain the grounds of, and did assert the justice of the said decret : so that these who had voted against the same, could not belie themselves, and put under their hand the contrary of what they had voted. And albeit, in all judicatories, even in Parliament, what is done by the plurality doth overrule and conclude the dissenters, so as to submit to the same ; yet, they are not obliged to maintain, or assert the justice of a sentence and act, that they had been against in their judgment and vote.

It was, notwithstanding, carried by a plurality, That, without the amendment foresaid, the letter should be subscribed by all the Lords ; the President having promised to write to my Lord Lauderdale, what was truly *res gesta* when the