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tion may make up a competent price of these lands he acquired so cheaply and fraudulently from his brother. *Alleged*, The backbond declaring Winton's gift to be for the apparent heir's behoof, Winton could adject no quality in his own favour, the right of those casualties being the heir's. *2do*, It is not conceived *irritanter et resolutive*. *Answered to the first*, Winton having given this backbond *ex gratia*, he might clog his donation with what qualities he pleased. *2do*, It being *in eodem corpore* with the declaration of trust, you cannot *pro parte approbare et reprobare*, but you have already used and accepted it. To the *second*, Though it be not under an irritant clause, yet it is implied in the nature of a writ, that if you fail, I shall be free.

This being reported, some of the LORDS inclined to ordain trial to be taken, before answer of the contraventions; but it was recommended to some of their number, to try what was the real worth of the lands, and what Bara paid for them, and to report, or else to endeavour to settle them. And the LORDS, to whom it was referred, having determined Pitmedden to get L. 150 Sterling, and to give a discharge and ratification of Bara's rights, he refused to ratify, in respect he had more to claim. Whereupon Bara gave in a bill, craving the cause may be advised. Pitmedden declared he passed from the pursuit. *Answered*, He cannot do it now by the act of sederunt, it lying at a report, and being a common process. *Replied*, He was content to pass from this instance *simpliciter*, and the tear the summons, &c. And that Lord Boyne was suffered to lift his process against Arthur Forbes of Balveny; and Yester his process against Lauderdale. THE LORDS allowed Pitmedden to pass from his process.

*Fol. Dic. v. 2. p. 196. Fountainhall, v. 1 p. 387.*

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1686. *January 26.* Mr JAMES HORN *against* JAMES STRACHAN.

DRUMCAIRNE reported the debate betwixt Mr James Horn and James Strachan, anent the horse infected with the *mord de chien*, and returned back again *secundum edictum ædilitium actione redhibitoria*. THE LORDS turned Horn's decret into a libel, in respect of this informality, that having referred his libel to the defender's oath, he had also led witnesses thereon; though it was *alleged*, That the witnesses were first adduced, and in so far as they did not prove, the libel was referred to the defender's oath; which the LORDS found irregular, these two probations being contrary and incompatible *super eodem subjecto*, and pursuers behoved to rest content with one of them. At last, the LORDS ordained the depositions to be transmitted here.

*Fol. Dic. v. 2. p. 201. Fountainhall, v. 1. p. 406.*