

## No 268.

thereafter to refer the libel to the defender's oath.

manner she will prove; after which declaration, that it might be found that she could not vary again, and therefore seeing if she used the incident, which was an election to prove by writ, that she could never be heard thereafter, to refer it to the Lady Hume's oath, or to crave her oath. THE LORDS permitted to the pursuer, to make her election, whether she would prove by writ, or by the party's oath; and having chosen any one of them, the LORDS found that she could not be heard, to return to the other; so that if she used incident diligence, and took terms therein, she could have no liberty to crave the defender's oath, albeit she were at present at the bar; and which the LORDS declared they would ever observe in all time to come, to cut off that delay, whereby, after long and many terms' delay, it has been usual, after all the terms were run out, to refer the matter, for which the incident was used, to the party's oath, which the LORDS found that they would refuse hereafter, as a thing also unreasonable in this case, to be granted, as it were against reason, if the matter were referred to the party's oath, and sworn, to suffer writ to be produced to prove the same, and to impugn the oath.

Act. Nicolson, Morwat, & Hog.

Att. Advocatus & Stuart.

Clerk, Gibson.

Fol. Dic. v. 2. p. 200. Durie, p. 871.

1662. July 3. AGNES PEACOCK against MATTHEW BAILLIE.

## No 269.

Improbation of a writ by exception being proponed, and an act extracted, the defender was not permitted to allege nullities.

AGNES PEACOCK, as executrix to her husband, having pursued Matthew Baillie for payment of a sum of money, he offered to prove payment, and at the term produced a discharge, whereupon the pursuer took instruments of the production, and offered to improve the same; and craved that the defender might be ordained to compear personally, and bide by the same; and a term being assigned for that effect, and the pursuer ordained to consign a pawn, in case she succumb in the improbation, and an act extracted thereupon, the defender coming from the country, and appearing personally, the pursuer *alleged* the discharge is null, wanting witnesses. The defender *alleged non competit* in this state of the process, after the exception of falsehood, *quæ est exceptionum ultima*; but if the defender had alleged the same at the production, the defender would have replied, that it was *holographon*, and excluded any improbation.

THE LORDS found the exception of nullity not competent in this state of the process.

Fol. Dic. v. 2. p. 199. Stair, v. 1. p. 120.

1663. February 10.

CRAWFORD against INGLIS.

## No 270.

AN executor-creditor insisted against a debtor of the defunct's, who was before pursued by the defunct himself in another Court, in which process there

was litiscontestation: This was found a good defence to the debtor, so that he could not be pursued elsewhere; and the executor-creditor was obliged to desert this, and take up the former process.

No 270.

*Fol. Dic. v. 2. p. 197. Stair.*

\* \* This case is No 156. p. 12068.

1665. *January 23.* ———— *against* EARL OF KINGHORN.

————— HAVING pursued the Earl of Kinghorn, upon a bond granted by his father, he proponed improbation, by way of exception, which was sustained, and a term assigned to prove, and that same term to the pursuer to bide by his bond. The defender supplicated, that seeing the act was not extracted, albeit the term was come, that he might have yet liberty to propone payment. It was *answered*, He could not, because *exceptio falsi est omnium ultima*, after which no other could be proponed, much less after the term was come, and the pursuer come to bide by the writ.

No 271.  
Improbation of a bond being sustained as an exception, the defender was afterwards allowed to propone payment.

Yet the LORDS sustained the defence of payment.

*Fol. Dic. v. 2. p. 198. Stair, p. 343.*

1671. *December 15.* HAMILTON OF KINKEL *against* AITON OF KINADIE.

HAMILTON OF KINKEL having pursued Aiton of Kinadie, as heir to his father, to fulfil a minute anent the disposition of certain lands. Kinadie compeared and alledged prescription, whereunto interruption being replied; he insisted no further in that defence; he did also *allege*, that the pursuer, or his author, was denuded, which was repelled as *jus tertii*, at last he *alleged* that the minute was fulfilled;

No 272.  
After proponing peremptors, the defender may not deny the passive titles; but before extracting the act, he may pass from his peremptors.

Which was found relevant; but thereafter he desired, before extracting of the act, that he might be admitted to deny the passive titles.

The pursuer *answered*, That after proponing of peremptors he might not deny the passive titles, it being only proper to a person who represents to make litiscontestation upon peremptory defences. Likewise, the pursuer's oath was taken upon the performance, and so he could not resile from that peremptory. It was *answered*, That it was only an oath of calumny, and no act as yet extracted.

THE LORDS found that the pursuer was not obliged to prove the passive titles, if the defender adhered to his peremptory; but they allowed him to pass therefrom, and admit the libel and passive titles to the pursuer's probation.

*Fol. Dic. v. 2. p. 199. Stair, v. 2. p. 26.*