to be incompatible; and that the receiving of payments, conform to the first bond, after the date of the second, renders the second null, as incompatible with the first. No 287.

Fol. Dic. v. 2. p. 199. Forbes, p. 97.

1709. *December* 13. EARL LAUDERDALE *against* LORD YESTER.

No 288.

A DEFENDER having proponed peremptory defences, which would have subjected him to the passive titles, if libelled, but no passive title being libelled, save that of lawfully charged to enter heir, and yet no charge produced, which the proponing peremptors could not infer an acknowledgment of, since it never was; the LORDS refused to allow the pursuer to amend his libel, by inserting the other passive titles, in order to conclude the defender as to these.

Fol. Dic. v. 2. p. 198. Forbes.

*** This case is No 152. p. 12063.

1712. *July* 3.
AGNES COLQUHOUN, Lady MONBODDO, *against* The Laird and Lady NEWMAINS.

No 289.
No new conclusion can be added to a summons, after extracting act or decree thereon.

THE Lady Monboddo having insisted in a process against the Laird and Lady Newmains, for declaring her right to the lands of North-woodside and Kippo, disponed by her, in her contract of marriage, to Alexander Irvine of Monboddo, her husband, reserving her own liferent, upon this ground, that there was a clause in the contract irritating his right, in case he failed to perform his part of the contract, which irritancy was incurred; the LORDS, the day of assoilzied the defenders from the declarator, reserving the pursuer's right of liferent, as accords. After extracting this decreet of absolvitor, the pursuer added a new conclusion upon the margin of the principal summons, for declaring her right of liferent, and that the defenders should be liable to her for the rents of the lands.

THE LORDS found, that no new conclusion could be added to a summons, after an act is thereupon extracted, and far less after a decreet extracted; but allowed the pursuer to insist upon the summons, as originally libelled, as accords.

Fol. Dic. v. 2. p. 198. Forbes, p. 606.

1713. *July* 16.
JAMES DUNBAR, Merchant in Inverness, *against* The EARL of CROMARTY.

No 290.

THE Earl of Cromarty being charged at the instance of John Dunbar, upon two bonds for borrowed money, he suspended, and raised improbation of the

No 290. bonds, upon the head of falsehood; after the suspender's consigning L. 40, the charger's giving in articles of improbation, and abiding by the verity of the bonds quarrelled *sub periculo falsi*, but before any act was extracted, the Lords allowed the suspender to pass from his improbation, and found, upon payment instantly verified, by discharges produced, he always deponing *de calumnia*, that these discharges came to his hand after proponing falsehood; the meaning of the brocard, *exceptio falsi est omnium ultima*, being, that one who hath proponed the exception of falsehood cannot, after he is concluded by an act extracted upon it, recur to other defences, and payment instantly verified being the most favourable defence. But the Lords ordained the L. 40, consigned by the suspender, to be given up to the charger.

Fol. Dic. v. 2. p. 198. Forbes, p. 703.

1716. *July* 28.

The Laird of Meldrum *against* The Feuars of Meldrum.

No 291.
In a reduction and improbation, the Lords allowed the pursuer to eik to his libel the very points on which he insisted, not only after the outgiving, but even after two acts of production were extracted in the process.

There being a commonty at some distance from the town of Old Meldrum and arable ground belonging to the Laird interjected, there is contained, in the dispositive part of the Feuars' charters, (besides other things that are usual,) this clause: 'Cum libertate focalia sive glebas et cespites effodiendi, et lucrandi 'lapides molliores et duriores, *lie hard and free stone*, in et a quavis parte com-'munitatis dicti burgi baroniæ, ad emendanda ædificia super dictum tenemen-'tum ædificanda vel instauranda.'—By virtue of this clause, the feuars conceiving themselves entitled to common pasturage, casting feal and divot, &c. did for some years bygone use these servitudes, but were frequently interrupted by minority, *via facti*, lawburrows, &c.; and at length the superior raises reduction, improbation, and declarator, against them; in which process, the question coming to be, Whether the feuars, by the said clause in their charters, had right to feal and divot and pasturage on the commonty?

It was *alleged* for the defenders, 1*mo*, That, though their charters do not specifically contain the faculty of feal and divot, yet that is undoubtedly comprehended under the power to cast peats, dig stones, &c.; especially considering the common clause, (*cum pendiculis, privilegiis, et pertinentibus*,) which general words may well be interpreted to comprehend the privilege of casting feal and divot; especially considering, 2*do*, That, without that privilege, the feus could not subsist many years, they consisting mainly of houses, and but little ground annexed, and even that arable, which cannot afford materials necessary for upholding tenements; so that it would have been elusory to grant them stones to build their walls, unless it were understood that they were to be supplied with feal and divot for covering of the walls out of the burgh's commonty; and, therefore, though the words in the charter be not specific, yet it