

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.