No 144. farther insisted; so that, not having prevailed, he can never farther be heard in this action, to propone a defence to take away the debt.—It was *duplied*, That, albeit in our law, as to all titles and executions, produced for instructing a process, *exceptio falsi est omnium ultima*, and the defender cannot recur to any new defence, yet where the improbation was intented *via actionis*, it did not hinder the debtor, when he is pursued for payment, to propone all other defences, to take away that bond, and debt therein contained.—The Lords did consider this as a general case, and sustained the defence of compensation founded upon, notwithstanding of the action of improbation, upon these reasons, that *exceptio falsi est omnium ultima*, and did exclude all other defences, but that was not to be extended to a prior action of improbation; 2*do*, That, in that prior action, there was no decreet, condemnator nor absolvitor, but the action passed from; yet, if there had been a decreet, the case had been a little harder.

Gosford, MS. No 978. *p.* 658.

*** Dirleton also reports this case:

The Lords found, That a party, being pursued as representing his predecessor, for payment of the sum due by a bond, might propone a defence of payment, notwithstanding that he had, before, pursued an improbation of the said bond; in respect the bond being ancient, and not granted by himself, he was *in bona fide* to pursue improbation of the same; and thereafter it appearing to be a true bond, he may also allege payment; giving his oath of calumny upon the defence.

Dirleton, No 456. *p.* 221.

No 145. 1681. *June.* George Wilson *against* Mr Alexander Hay.

One being pursued before an inferior court for a debt he had before suspended, and having proponed defences, upon which litiscontestation was made, and thereafter raised advocation upon incompetency and iniquity, in so far as the defence of *lis pendens* before the Lords was unjustly repelled;

The Lords found, that such a defence might be repelled, not being proponed before litiscontestation, seeing primus actus judicii est judicis approbatorius.

Fol. Dic. v. 2. *p.* 186. *Harcarse,* (Advocations, &c.) *No* 12. *p.* 4.

No 146. 1688. *July* 13. Burnside *against* Crawfurd.

In a reduction and improbation at the instance of a posterior against a prior appriser;

Alleged for the defender, No process; because the pursuer was not infeft. No 146.

Answered; It was not necessary for the pursuer to take infeftment, his right being only an apprising of the legal, especially if the lands held ward.

Replied; No person but he that is infeft can reduce rights that are real by infeftment, or pursue removings; although a bare comprising may be a title to call for production of contracts, or personal rights; nor is the pursuer within year and day of the first effectual apprising.

THE LORDS sustained the allegeance and reply for the defender.

Thereafter the pursuer *alleged*, That this is a dilator, which cannot be proponed now, after the taking of terms; which the LORDS found relevant, and repelled the defence *in hoc statu processus*.—See TITLE TO PURSUE.

Fol. Dic. v. 2. *p.* 186. *Harcarse*, (IMPROBATION, &c.) *No* 581. *p.* 162.

1695. *December* 26. ROBERT FALL *against* MARGARET NISBET, *&c.*

No 147.
A donatar of escheat having pursued intromitters, they pleaded the goods did not belong to the defunct. They were not, after failing to prove this, allowed to deny intromission.

IN the concluded cause, Robert Fall, Bailie of Dunbar, against Margaret Nisbet, and Charles Emilton, her son; the LORDS found Emilton liable for the moveables, seeing it was not proved, in the terms of the act, that they belonged to the first husband; and the second husband dying in possession thereof, it presumed property, and so made them fall to Fall, the pursuer, donatar to his escheat; and he needed not prove the defender's possession of the same, seeing the defence was proponed without denying their intromission, quantities, or prices. Against this interlocutor Emilton gave in a petition, representing, it were hard to make the negligence or omission of his Advocates, or the Clerk, in proponing or minuting the debate, to bind him, and it was only sustained as a tacit acknowledgment of the libel, where a defence of payment was founded on, but not in other exceptions; and cited Zoesius, ad tit. D. De Probationibus, that a defender's succumbing to prove his defence does not exoner the pursuer from proving his libel; and farther *alleged*, That he, his mother, and brother, being all convened in one summons, the decerniture ought to divide, and he only be found liable for a third.—*Answered* for Bailie Fall, He was not in the case stated by Zoesius, where *actor nihil probavit*; for he had proved these goods were in the rebel's possession the time of his decease, and they being all *correi debendi*, were liable *in solidum*, it being only a continuation of a joint possession, and all had accresced to him by the other's death.—THE LORDS refused the bill, and adhered to their former interlocutor. But he at last recurring to minority, and alleging he was minor at the time, the LORDS would not receive it *hoc ordine*, not being instantly verified, but reserved his reduction, as accords.

Fol. Dic. v. 2. *p.* 187. *Fountainhall, v.* 1. *p.* 692.