

Which the LORDS sustained.

The defender further *alleged*, That, as to the reason of reduction upon the nullity, he would condescend upon the writer, which hath always been sustained to elide that nullity.—The pursuer *answered*, That the act of Parliament doth declare such writs simply null, wherein writer and witnesses were not designed: And though the Lords have admitted of designations to be condescended on, yet that was only *in casu recenti*, where the writer and witnesses were alive, that they might be adduced to improve. But here, in a matter so ancient near 50 years since, the defender cannot be admitted to supply this nullity, by designing a writer at random, who cannot be known, especially seeing there are so many evidences of falsehood in the writ.

THE LORDS found the discharge null, for want of the designation of the writer; but if the defender will presently design a writer that is alive, or though he be dead, will produce several of his manuscripts, that may be compared with the hand-writing of this discharge, they will consider the same with the indirect articles of the improbation.—*See WRIT.*

Fol. Dic. v. 2. p. 188. Stair, v. 2. p. 420.

1677. June 15.

BINNIE against GIBSON.

CAPTAIN JOHN BINNIE, as assignee to a bond of Gibson's of Clayships, pursues him for payment, who *alleged*, That the pursuer having raised improbation of this bond, and succumbed, he could propone no other defence; because, *exceptio falsi est omnium ultima*.—It was *answered*, That here there was no exception; but an action.—The pursuer *replied*, That there is *par ratio*, that parties be not encouraged to propone falsehood, which is a common exception, and would breed long delay, and would be ordinary, if, after they succumb therein, they might propone other allegiances, by way of defence.—It was *duplied*, That, albeit the allegiance of falsehood might exclude allegiances of payment, as inconsistent, yet it cannot exclude compensation, especially where the bond in question was old.

THE LORDS found, that an action of improbation against an old bond did not exclude compensation against the same, after absolvitor in the improbation.

Fol. Dic. v. 2. p. 188. Stair, v. 2. p. 526.

. Gosford reports this case :

IN the action depending at the instance of Binnie against Gibson, for payment of a sum of money contained in a bond, there being a defence of compensation proponed, it was *replied*, That no defence was now competent to elide the said bond; because, the defender had intended an improbation, wherein he had led full probation; and finding that he was like to succumb, hath not

No 143.

No 144.
Improbation
by action be-
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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 ; *2do*, That, in that prior action, there was no decret, condemnator nor absolvitor, but the action passed from ; yet, if there had been a decret, 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 advocacion 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 iudicii est iudicis 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 ;