

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 intended *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 ;