own oath, who, to shun the passive title of uplifting the mails and duties of his father's lands, did cloath himself with these adjudications; and that he ought to be re-examined, and answer that interrogatory in this same process; though formerly they used to remit them to a new one, which the LORDS thought unnecessary, and resolved to follow this method in time coming.

No 285.

Fol. Dic. v. 2. p. 198. *Fountainhall, v.* 1. *p.* 583.

1696. *January* 24. EARL CASSILLIS *against* MONTGOMERY.

No 286.

A TACK of teinds being produced in a process by the defender, and the pursuer throwing in a reduction thereof *incidenter*, and the defender offering to take up his tack again; the LORDS found, that a party might take up any writ (not challenged as false) before allegeances were proponed thereon, or litiscontestation made in the cause.

Fol. Dic. v. 2. *p.* 197. *Fountainhall.*

*** This case is No 12. p. 33. *voce* ACCESSORIUM SEQUITUR PRINCIPALE.

1706. *February* 13.
HELENOR DAWSON and HILL, her Husband, *against* MURRAY of Spot and his CREDITORS.

No 287.
Found the reverse of Peacock against Baillie, No 269. p. 12140.

Here an exception of nullity was admitted, being instantly verified.

ARCHIBALD DOUGLAS of Spot having, 4th August 1671, disponed his estate to William Murray of Dunipace, his brother-in-law, upon his giving a back-bond of the same date for 40,000 merks, payable to the disponer and the heirs of his body; and, failing these, to be null; and, in all events, affected with the warrandice of the disposition; in the year 1699, Helenor Dawson, relict of the said Archibald Douglas, and Esquire Hill, her husband, pursued a declarator of trust and extinction of the said disposition, upon a back-bond they had right to, granted by the said William Murray to the said Archibald Douglas, dated 28th of August 1671, acknowledging his right to the estate of Spot to be only in security of L. 40,000, and that he should impute the rents exceeding the annualrent in payment of the principal sum. William Murray raised improbation of this back-bond as false and forged, and obliged the pursuers to abide by: And when they insisted in their declarator, it was *alleged* for Spot and his Creditors, That the back-bond pursued did not only lie under the violent presumptions of falsehood, but was null, and incompatible with the former back-bond, of the same date with the disposition, owned and acknowledged by Archibald Douglas's granting discharges of annualrent, conform thereto, during his lifetime, who lived long after the date of the pretended second back-bond.

No 287.

Alleged for the pursuers; It is not competent to offer other objections of nullity and incompatibility, after litiscontestation upon the exception of falsehood that is *omnium ultima.*

Answered for the defenders; Though *exceptio falsi est ultima* hath passed into a rule for preventing confused and superfluous debate, and that an exception, so grievous and troublesome to the party to whom it is made, might not be alleged at random; yet that cannot be so interpreted, as to exclude the exception of a manifest nullity, arising from the writ itself, and instantly verified. Since ordinarily, after litiscontestation upon any defence, and probation led, clear nullities instantly verified are allowed to be proponed at advising. All forms of procedure are but designed to serve justice; and no material prejudice can be alleged against the admitting of exceptions instantly verified. *2do*, Falsehood was not here objected by way of exception, but by way of action of improbation; in which case, it might be insisted in, without prejudice to the exceptions and defences competent to the pursuer, against the other party's declarator, when insisted in by them. Besides, it was Murray of Spot who raised the improbation, and never insisted therein, and his Creditors are now defending their rights and diligences upon his estate, to whom it is entire to object such obvious and pregnant nullities, or incompatibilities, against the pretended back-bond, notwithstanding that their common debtor thought fit to attack it first by an improbation. Yea, lately, in a case of falsehood insisted in betwixt Drummelzier and Wallace, witnesses having acknowledged their subscription, but that they saw not the party subscribe, the writ was found null, though not false. *3tio*, *Esto* the last back-bond were true and formal; yet Archibald Douglas's receiving payment of annualrents, conform to the first back-bond, long after the granting of the second, renders the second back-bond null and ineffectual, as incompatible with the first: For, by the first back bond, William Murray is proprietor, and Archibald Douglas only a creditor; whereas, by the second, the latter proprietor, and the former simply creditor.

Replied for the pursuers; If *exceptio falsi* be *ultima* as to other exceptions, it must be so as to nullities, which have no greater privilege than other exceptions, and rather should be less privileged, because they are obvious; and a person passing them over, and entering in litiscontestation, homologates the writ. But granting that nullities were receivable after proponing of falsehood, incompatibility is no nullity; *2do*, There is no incompatibility in the matter; for, in laws and contracts, *posteriora derogant prioribus*, and the second back-bond regulates the first; *3tio*, Incompatibility is a dangerous topic in matters of trust, *ubi aliud agitur, aliud simulate concipitur*, and those conveyances please and succeed best, that are in appearance most contradictory and mysterious.

THE LORDS found the objection of nullity and incompatibility receivable, notwithstanding of the objection of falsehood; and found the two back-bonds

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