No 124. the day assigned for improbation, they found no cautioner, nor would not, but passed from the probation, and so the pursuer protested for circumduction of the term. Thereafter the defenders *alleged*, That although the instrument, and every point thereof, were of verity, yet it was not sufficient to compel them to give a reversion, in respect of the act of Parliament, that all reversions, and bonds of reversion, should be sealed and subscribed by the party maker and promiser thereof; or if it be under form of instrument, the same should have been registered in the books of some ordinary judge, or else to have no faith; and by reason this instrument was not registered, it was not sufficient to prove their intent. The pursuer *alleged*, They should not be heard to use that allegeance, because in the term assigned to them to unprove the instrument, they passed from the same, and therefore they affirmed the instrument to be true in itself, and every point thereof; and it is of truth, that the said instrument bore the said promise, and, in respect of the pursuer's allegeance, the defenders should not be heard to allege invalidity of the said instrument; and yet, notwithstanding, if they should unprove as of before, they should yet be heard, but not otherways; which allegeance of the pursuer the LORDS found relevant, and repelled the defenders allegeance.

Fol. Dic. v. 2. *p.* 188. *Colvil, MS. p.* 237.

1583. Lady ESSILMONTH *against* Earl of ERROL.

No 125. The Lords refused to allow a party to propone an exception *rei judicatæ* after litiscontestation.

THE Lady Essilmonth, sometime Countess of Errol, having warned certain tenants to flit and remove from certain lands pertaining to her in liferent, they *excepted*, That she had given a back-bond to her husband; that although she was infeft in the said lands in liferent, yet if she, after his decease, intromitted with any of his goods, she should renounce that infeftment, and it should be null. And they offered to prove, that she had intromitted with 1000 merks worth of his gear. This exception being admitted to probation, and in termino probatorio, witnesses being produced, her advocates *alleged*, That no process should be received, because the thing to be proved was her intromission with her husband's goods and gear, which was taken away by the testament lawfully confirmed, wherein there rested no free gear but only L. 6. Likeas also she being charged by this Earl of Errol before the Commissary of St Andrews, to make count and reckoning of her husband's gear, she was exonered and discharged of all intromission therewith, except only L. 6. And so two judicial sentences standing, given by the said Commissary, obstabat perpetua rei judicatæ exceptio, and so the witnesses could not be received. *Answered*, The party could not be heard to propone that, post statutum terminum probationis, et litem contestatam, as is the ordinary practick. *Replied*, The exception made was exceptio rei judicatæ; et dicuntur hæ exceptiones rei judicatæ, jurisjurandi, et transactionis, exceptiones perpetuæ; quæ in quacunq; litis parte

proponi possunt, tam ante quam post litem contestatam: Quia res judicata semper pro veritate accipitur, juxta, L. Præscriptionem, C. De Except. For otherwise there might be two contrary sentences of one thing, quod semper evitandum est. THE LORDS would not admit the defenders to propone this allegeance illo statu causæ. No 125.

Fol. Dic. v. 2. p. 186. *Spottiswood*, (LITISCONTESTATION.) *p.* 197.

*** Colvil reports this case:

THE Lady Essilmonth, and sometime Countess of Errol, having warned tenants of Redgoil to flit and remove from certain lands, as appertaining to her in liferent, it was *excepted* by the tenants, That they ought not to flit and remove, because the said Lady, *non obstan. suo vitali reditu*, made a covenant to her husband, that albeit she was infeft in the said lands in liferent, yet if she, after his decease, intromitted with his goods and gear, she should renounce the said land and covenant, likeas it was of verity that she had intromitted with 5000 merks worth of his gear after his decease. The exception being admitted to probation, *et in termino probatorio*, witnesses being produced, it was *alleged* by the said Lady's advocate, That there ought no witnesses to be received, because the thing that was admitted to probation was her intromission with the gear, the which was taken away by her husband's testament, lawfully confirmed, whereuntil there rested no free gear, but only the sum of ; and also the said Lady being charged by my Lord of Errol, before the Commissaries of St Andrews, to give count and reckoning of her husband's gear, she was exonered and discharged by the said Commissaries of all her intromission of her husband's gear, except only the sum of specified in the said decreet, and so these judicial sentences standing of the two Commissaries *obstabat perpetua rei judicatæ exceptio*, and so the witnesses could in no manner of way be received. To which it was *answered*, That the party could not now be heard to propone the said allegeance, post statutum probationis terminum, et post litem contestatam, but the same would have served for a relevant reply to have elided the exception; and of the daily practick post terminum admissum, the party will not be heard to come back to propone any new allegeance. To this was *answered*, partly by the advocates at the bar, and partly among the LORDS themselves, That the allegeance which was made was exceptio rei judicatæ, et dicuntur hæ exceptiones rei judicatæ, jurisjurandi, et transactionis exceptiones perpetuæ quæ in quacunque litis parte proponi possunt tam ante quam post litiscontestationem, quia res judicata semper pro veritate accipitur, L. 8. C. De Exceptionibus, et ibidem Doctores, for otherwise it might fall forth that there should be two contrary sentences, and decreets of one thing, which should be a great absurdity, quod semper evitandum est. THE LORDS, after long reasoning, found by interlocutor, that they would receive no new allege-

No 125. ance of whatsoever estate or quality, post litem contestatam, et statutum terminum, licet nonulli in contraria fuerunt opinione.

Colvil, MS. p. 362.

1610. *November* 30. WEIR *against* KNIELAND.

No 126.

HE who submitted as heir to his brother, will thereby be proved to be heir, albeit no decreet follow upon the submission, but that the same be deserted.

Fol. Dic. v. 2. *p.* 188. *Haddington, MS. No* 2026.

1612. *June* 23. RAE *against* Laird of KELLY.

No 127.

IN an action of recognition pursued by Adam Rae *contra* the Laird of Kelly, there were proponed certain exceptions peremptory, for proving whereof, there is an incident diligence used; which incident, by compearance of party, is denied, and litiscontestation is made therein, and a term assigned to prove; at the which term, the defenders *allege*, That the execution of the first summons was false and feigned. THE LORDS sustained the exception of improbation, notwithstanding it was *answered*, That the party has approved the citation by compearance, and had omitted this exception *tempore litiscontestationis*.——(*See* No 53. p. 6459.)

Fol. Dic. v. 2. *p.* 186. *Kerse, MS. fol.* 205.

1614. *January* 20. GORDON and CHALMERS *against* GORDON.

No 128.

IN an action of special declarator by George Gordon and George Chalmers of Nock against George Gordon, at the Kirktown of Tyrie, upon a horning executed against him for slaughter of Alexander Chalmers, of Knockburly, in an exception proponed upon a submission which was not expired, repelled in respect it was a dilator, after a peremptor, not verified in the slaughter; and when they declared that they proponed it peremptorily, the LORDS fand, that they could not alter the nature of the declinator, by turning it into a peremptor.

Fol. Dic. v. 2. *p.* 186. *Kerse, MS. fol.* 242.