

No 268.

thereafter to refer the libel to the defender's oath.

manner she will prove; after which declaration, that it might be found that she could not vary again, and therefore seeing if she used the incident, which was an election to prove by writ, that she could never be heard thereafter, to refer it to the Lady Hume's oath, or to crave her oath. THE LORDS permitted to the pursuer, to make her election, whether she would prove by writ, or by the party's oath; and having chosen any one of them, the LORDS found that she could not be heard, to return to the other; so that if she used incident diligence, and took terms therein, she could have no liberty to crave the defender's oath, albeit she were at present at the bar; and which the LORDS declared they would ever observe in all time to come, to cut off that delay, whereby, after long and many terms' delay, it has been usual, after all the terms were run out, to refer the matter, for which the incident was used, to the party's oath, which the LORDS found that they would refuse hereafter, as a thing also unreasonable in this case, to be granted, as it were against reason, if the matter were referred to the party's oath, and sworn, to suffer writ to be produced to prove the same, and to impugn the oath.

Act. Nicolson, Morwat, & Hog.

Att. Advocatus & Stuart.

Clerk, Gibson.

Fol. Dic. v. 2. p. 200. Durie, p. 871.

1662. July 3. AGNES PEACOCK against MATTHEW BAILLIE.

No 269.

Improbation of a writ by exception being proponed, and an act extracted, the defender was not permitted to allege nullities.

AGNES PEACOCK, as executrix to her husband, having pursued Matthew Baillie for payment of a sum of money, he offered to prove payment, and at the term produced a discharge, whereupon the pursuer took instruments of the production, and offered to improve the same; and craved that the defender might be ordained to compear personally, and bide by the same; and a term being assigned for that effect, and the pursuer ordained to consign a pawn, in case she succumb in the improbation, and an act extracted thereupon, the defender coming from the country, and appearing personally, the pursuer *alleged* the discharge is null, wanting witnesses. The defender *alleged non competit* in this state of the process, after the exception of falsehood, *quæ est exceptionum ultima*; but if the defender had alleged the same at the production, the defender would have replied, that it was *holographon*, and excluded any improbation.

THE LORDS found the exception of nullity not competent in this state of the process.

Fol. Dic. v. 2. p. 199. Stair, v. 1. p. 120.

1663. February 10.

CRAWFORD against INGLIS.

No 270.

AN executor-creditor insisted against a debtor of the defunct's, who was before pursued by the defunct himself in another Court, in which process there