

No 241.

1621. *December 18.* Lo. DUNNIPACE *against* DRUITASKEN.

IN an action of improbation, where litiscontestation was made by taking a day to produce, the LORDS found an exception relevant to be proved by witnesses, viz. that the writs called for were delivered to the pursuer since litiscontestation.

Fol. Dic. v. 2. p. 197. Kerse, MS. fol. 207.

No 242.

1622. *June 15.* L. ROSLIN *against* L. HALTOUN.

L. ROSLIN pursues a declarator of liferent of the lands of Alderstoun against the L. Haltoun, wherein Haltoun having proponed an exception of improbation against the hornings whereupon the declarator was sought, and being admitted, and the cause holden as concluded upon that improbation, after the conclusion, and before the advising of the process, the pursuer produced certain articles of approbation of the hornings, which he desired to be received and discussed by the Lords; which the LORDS found ought not to be received, nor taken in after the improbation was concluded; and sicklike refused to take the improver's oath upon the verity of the hornings, which was desired by the pursuer, in respect that the process was concluded by receipt of the depositions of the witnesses inserted, after which it was not time to ask the party's oath.

Act. Hope & Fairlie.

Alt. Nicolson & Lermonth.

Clerk, Gibson.

Fol. Dic. v. 2. p. 201. Durie, p. 25.

No 243.

1622. *June 15.* GORDON of Clunie *against* M'CULLOCH, or M'CLELLAN.

IN an action of spuilzie pursued at the instance of ——— Gordon of Clunie against one M'Culloch, or M'Clellan, wherein after litiscontestation made, admitting the summons to probation, in absence of the defender, the defender compeared, and desired to be restored to propone a peremptory exception, which he offered to verify instantly, there being no witnesses produced, neither of before, nor at that term any ready to be produced, nor no other probation deduced by the pursuer: Which the LORDS would not admit, nor suffer the defender to compear to propone any defence, albeit the pursuer had adduced no probation upon the libel, because of the state of the process, which stood not at the first term of probation, but that it was at the second term of further diligence, after which the order and course of the process could not be interrupted as after the first term, by receiving of any exception; and so found.

that in the like cases, after the second term, the defender should not be heard to propone any defence against the action, which was competent before litiscontestation.

No 243.

Act. *Belshes.*Alt. *Nicolson.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 199. Durie, p. 26.*

* * * *Nota*, This same was found in the like case *in terminis*, betwixt the Sheriff of Forest and the Earl of Nithsdale, February 2. 1625, Nicolson being for the pursuer, Hope for the defender, Gibson clerk.

Durie, eodem loco.

1624. June 9.

L. TOUCH against E. HUME.

IN an action betwixt the L. of Touch and the E. of Hume, after litiscontestation was made, and the term of probation come, admitted for proving of an exception, the pursuer desired to be permitted to propone and reply for eliding of that exception, which reply was newly come to his knowledge, since litiscontestation, and whereupon he was content to make faith: The LORDS found, that, after litiscontestation, neither exception or reply might be proponed, as *noviter veniens ad notitiam*, where the same consisted *in jure*, seeing no party ought to be ignorant of the law; and therefore that allegiance, of *noviter venientis ad aures*, could not be desired to be proponed by any party, but where the same consisted *in facto*, and also where the proponer instantly shewed the instruction and verification thereof: But it being contested by the defender, that it was against all law, to suffer a pursuer to propone a reply, as *noviter veniens ad notitiam*, seeing it was only competent in an exception, and not in a reply; the LORDS gave no answer to this doubt, if the pursuer might propone a reply, as *noviter perveniens ad notitiam*, or not, but left it undecided.

No 244.
After litiscontestation the Lords refused to receive either exception or reply, as *noviter veniens ad notitiam*, where the same consisted *in jure*.

Act. *Stuart & Craig.*Alt. *Hope.*Clerk, *Gibson.**Fol. Dic. v. 2. p. 200. Durie, p. 127.*

1625. June 10.

Dr JOLLY against _____

FOUND by the LORDS, where the pursuer passes from his compareance *pro loco et tempore*, that the defender ought not only to have his interlocutor, but also sentence absolutor frae all exceptions that are found relevant and proven.

Fol. Dic. v. 2. p. 196. Kerse, MS. p. 183.

No 245.