

improbate, before which it was thought there was no litiscontestation made in the improbation.

No 266.

Fol. Dic. v. 2. p. 198. Spottiswood. Durie.

. This case is No 173. p. 6750. voce IMPROBATION.

1636. July 20. EARL QUEENSBERRY against The LORD TORTHORWOLD.

THE Lord Torthorwold being summoned to insist in a reduction of the rights of Tortholwold, moved at his instance against the Earl, after protestation, as use is in such cases; and a term being assigned to the Lord Tortholwold, compearing then by his procurator to insist, with certification; at the day whereof assigned by the act, the procurators declared that they would not compear; and it being questioned, if the certification of the summons should be granted against him, as compearing, or as absent, in respect of his procurator's declaration, that he would be absent; and who *alleged*, That he might be lawfully absent, sicklike as in improbations, after terms assigned to defenders compearing, and taking days to produce, they might thereafter, nevertheless of their compearance to take days to produce, lawfully be absent, and it is permitted to them in form, to pass from their compearance, so ought the like in this case. THE LORDS found, that after protestation granted in the principal cause, and after citation by an ordinary action, by two summonses to insist, and after a term given and taken by the party, then compearing to insist, he could not thereafter pass from his compearance, and be absent; but the LORDS found, that the certification ought to be granted against him, as compearing, and decerned so against him, he having taken a day to pursue his own action, and not doing the same, being his own pursuit; and the LORDS were of the mind, that although such certifications were granted in absence, yet that such sentences and certifications should be irreducible.

Act. Advocatus & Nicolson.

Alt. Stuart & Johnston.

Clerk, Scot.

Fol. Dic. v. 2. p. 196. Durie, p. 818.

1639. January 29. LADY WESTMUIRLAND against LADY HUME.

IN an action betwixt them, wherein litiscontestation made, and some articles of the summons were admitted to the Lady Westmuirland her probation, which were found only probable, either by writ, or oath of party, and at the term assigned for probation, the pursuer producing incident diligence, for recovering of the writs, whereby she would prove, the defender asked instruments thereupon, and *alleged*, That seeing the summons was probable, and so found, either by writ or oath, that now the pursuer should make her election, and declare by what

No 267.

Found that, after protestation, after citation to insist, and after a term given, and taken by the party then appearing, he could not thereafter pass from his appearance.

No 268.

A party who had chosen his mean of proof, by writ or witnesses, and allowed the term for proving to elapse, was not admitted

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