

1632. *March 3.* SHERIFF of the FOREST *against* EARL of ANGUS.

No 264.

IN an action of reduction and declarator of redemption of the lands of Selkirk, pursued by the Sheriff of the Forest, against the Earl of Angus, there was produced by the Sheriff a contract betwixt George, Marquis of Angus, and the Sheriff's predecessors, anent the wadset of said lands, upon production whereof the Earl asked instruments, which were granted by the Lords: The cause being disputed, the Sheriff took up his process, and suffered the Earl to get protestation; and the Earl desired the extract of his instrument, which the Sheriff refused, in respect he had taken up his process. THE LORDS found he needed not give out this instrument.

Auchinleck, MS. p. 172.

1633. *January 24.* M'CONNALD *against* LAIRD of MAINE'S MILL.

No 265.

AGNES M'CONNALD pursues the improbation of a bond made for astringing her lands to the Laird of Maine's Mill, which mill pertained before to Monro of Newton. After the whole diets of the ordinary and direct manner of improbation had run out, and rested to proceed in the indirect manner, the pursuer of the improbation of the said bond desires that she might be heard to propone a peremptory defence that will take away the said bond, viz. that the same is discharged by the party to whom it is granted, which defence or exception she should verify *instantly*, by production of the said discharge, and the proposer of the exception would give his oath that the discharge was lately come to his hands; which discharge being read *in præsentia Dominorum*, seeing the discharge was not clear enough to take away the bond, but ambiguous, and the proposer of the exception was not present at the bar, nor in the town to give his oath, that the discharge was lately come into his knowledge, the LORDS would not receive the said exception, in respect of the state of the process, but ordained the pursuer to go on with his incident improbation.

Auchinleck, MS. p. 173.

1635. *February 5.* KER *against* FORSYTH.

No 266.

A PARTY having first offered to improve a writ, and then *alleging*, That he had also a nullity to propone against it, which he craved might be reserved to him *per expressum*, in case he should fail in the improbation; the LORDS refused to reserve it to him, but allowed him to pass from his improbation, if he pleased, and take him to his nullity, because there was no term yet assigned to him to

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