

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.