

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