

1632. July 7. L. RENTON *against* L. WEDDERBURN and Others.

IN an improbation of an inhibition, executed at the instance of two daughters of John Stuart of Coldinghame, against Sir George Hume of Manderston, who was constituted their debtor in some sums of money, and which inhibition was, by pursuit of improbation, quarrelled by the Laird of Wedderburn, the Lord Erskine and some others, creditors to the said Sir George; in the which improbation, the direct manner, viz. the messenger executor and witnesses insert, whereof one was dead, and the other two, who were living, were examined, and approved the inhibition and whole executions thereof; and in respect whereof the defender in the improbation *alleged*, That the process should be holden as concluded and advised; and the pursuer desiring that he might give in indirect articles of improbation, which the defender alleged ought not to be permitted, where all the direct were extant and approved. THE LORDS found, That they would receive the indirect articles, and consider and advise what substance and relevant argument was qualified in them; which being given in, the LORDS advised them, without any answer given in by the defender thereto; and one of these articles bearing, that the two parties, at whose instance the inhibition was raised and executed, viz. the two sisters, had corrupted the witnesses, and the one sister had given them forty double angels, and the other fifteen, at the least had promised the same to them; the LORDS found this article only admissible to be proved by the oath of the Laird of Renton, who had married one of the sisters; and found, That they would admit nor receive no other probation at all therein, neither by witnesses, nor by trial and examination of the witnesses alleged to be corrupted, nor by the oaths of the women alleged corrupters, whose oaths the LORDS found could not be taken in prejudice of the Laird of Renton, now husband to one of the sisters, nor in prejudice of the husband of the other sister, albeit the sisters were principal parties, and the husbands only were parties for their interests. And albeit it was *alleged*, That the giving or promising of so large money to the witnesses by the wives, could not be presumed to have been done but by the knowledge of the husbands, in respect both of the greatness of the quantity, and that the wives cannot in law be esteemed to have so much money without their husbands, *ob suspicionem turpis quæstus et ut talis suspicio evitetur*, it was questioned, if such promises or good deeds given to the witnesses were proved, and that the husbands were not accessory thereto, and that the deed itself were tried to be true, what should be the consequence; whereanent it is certain, that albeit the deed be true, yet if the party user of the writs, and who is reputed principal party, be accessory thereto, that he cannot in law reap benefit by such indirect dealing, which is prohibited in law; no more than the party, who, albeit in a just cause, gives bribes to

No 224.

In an improbation of an inhibition, the messenger and witnesses being examined, approved the executions. The Lords, notwithstanding, allowed the pursuer to improve indirectly.

No 224. his judge, *ut pro se ferat sententiam, pro quo vide, L. 2. § 2. D. De conditione obturpem causam.*—See PROCESS. PROOF.

Act. Nicolson & Morvat.

Alt. Stuart & Craig.

Clerk, Gibson.

Fol. Dic. v. I. p. 458. Durie, p. 641.

1674. January 7.

JANET M'MATH, LADY GRANGE, *against* LAURENCE OLIPHANT.

No 225.

Found that absolvitor pronounced as to the direct manner of improbation, hinders not to improve by the indirect.

IN an improbation pursued at the Lady's instance, as having right by progress to a bond granted to Sir Patrick Douglas of Kilspindie, whereupon she had used arrestment in the hands of Thomas Tyrie of Drumkilbo, who was debtor to Kilspindie, in the sum of seven thousand merks, against Sir Lawrence Oliphant of Gask, who had right by translation to the foresaid bond, flowing from Douglas of Lumsden, who was assignee, constituted by Kilspindie, for improving the said assignation, as false and feigned, it was *alleged* for the defender, That there could be no improbation of that assignation, because the only pretext being that it was false of the date, it was *res hactenus judicata in foro contentiosissimo*, in so far as by decret of the Lords, in *anno* 1656, it was found, That the assignation bearing date in April 1638, albeit it did relate to a decret of registration of the bond in July thereafter, whereupon there were letters of horning raised against the heir of Tyrie of Drumkilbo, yet that was not sufficient to make the assignation false *in toto*, but only *quoad datam*, which might have been done by an error; and the defender's condescending that it was truly dated in August thereafter, that same year of God, and that they did abide at the verity of the bond as a true deed by the foresaid decret, the LORDS did assoilzie from the improbation, upon that ground that it was false in the date, and did prefer the assignee to the arrester, in respect that the assignation was intimated by raising and executing letters of horning therein narrated; so that it being evident that the falsehood of the date was only *per errorem*, and not to prejudge them who had done no diligence until ten years thereafter; and by our law, a false date doth not make the writ questioned null and void, as being false *in toto*, unless it be alleged that it was *error notorius*, and done of design to prejudge a party having interest. It was *replied*, That the improbation ought to be sustained notwithstanding, because there being nothing formerly produced before the LORDS, when they gave their decret and assoilzied from the improbation, but an extract of the assignation, bearing date the 17th of April 1636, which certainly must be false, seeing it relates to a decret of registration obtained in July thereafter; likeas William Dalzell, writer of the assignation, being examined upon oath, did depone, That if ever he did write any assignation, it was in *anno* 1648 or 1649; and the same being then blank, it hath been filled up in the date, and made to have been written in April 1638, of purpose to