

No 115.

* * Kerse reports this case :

FOUND that the double of an inhibition satisfies the production in an improbation, notwithstanding of the act of Parliament 1581, which requires the principal to be produced.

This same found betwixt James Dundas and Howburn.

Kerse, MS. fol. 206.

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Charters under the Great Seal, retours, &c. being called for, it was found not sufficient to bar certification, that the defender offered to condescend that they were in *publica custodia*.

1633. March 20.

The KING against E. of STRATHERN.

THE King's Majesty pursuing the Earl of Strathern, for production and improbation of all writs and charters under the Great Seal, and retours of any of his predecessors, of and concerning the Earldom of Strathern; the LORDS found, in the consideration of these writs called for to be produced, that, albeit charters under the Great Seal might be extant in the King's public register, and that retours might be extant at the Chancellery, whereby it might be doubted, if they ought to be decerned to make no faith for not production, before the said registers were sought by the parties, pursuing such causes, and that it were made known to the LORDS, if any such writs were extant or not, by the Officers intrusted with the custody of the registers, rolls, and Director of the Chancellery, for, if they were extant, it might be thought, that the pursuer should produce them, and that they could not be taken away for not production, as said is, albeit the defenders called were absent, or did compare, and not produce them; even as writs registered in the books of Session, will not be decerned to make no faith, for not production, nor reduced, albeit the defender produce them not; the LORDS found, that the pursuers of such causes, either of improbation, or of actions of reduction, are not holden to search the registers, nor Chancellery, for such writs, viz. charters or retours, nor to extract, or produce them, albeit they were extant there; but if parties, defenders called to that effect, did not satisfy the production thereof themselves, that the certification of the summons should and ought to pass against them. And this case of evidents differs from cases of decreets of Session, or writs registered in the books of Session, which are known thereby, to have passed *in rem judicatam*, whereby that which is decerned by the Judge cannot be taken away for not production, seeing their clerks ought to be answerable therefor, and to extract the same, or to exhibit the warrant registered; whereas, the other foresaid charters and retours are original securities, properly concerning the parties, wherein no other person has interest; and in this case of the King's, this was the rather found, because the Earl compeared, and did not allege this.

Act *Advocatus Regis.*

Alt. *Mowat, Primrose, & Neilson.*

Clerk, *Hay.*

1633. *March 22.*—In the cause mentioned 20th March, betwixt the King and the Earl of Strathern, which was both an action of improbation and reduction, and whereby the King, and his Treasurer and Advocate, craved reduction of two retours and services, whereby this Earl of Monteith was served nearest heir of blood to umquhile Eupham Countess of Strathern, and Patrick Graham, her spouse, and also to David Earl of Strathern, son to King Robert the Second; to the which David, the said Eupham was designed by the said defender, in the same retours, to be the only bairn and daughter, and of which Eupham the defender was retoured, the just, lawful, nearest descendant, in manner, and conform to the progress expressed in the retours; and also the King craved all writs to be reduced, whereby it might be qualified, that the said progress was instructed to the assizers, and which yet might instruct the same; or that Eupham was daughter, and only bairn to David, or that Patrick Graham was her spouse, and that the defender is nearest descendant to them in that marriage, and that Melissus, to whom the defender alleged himself to be heir, was the son procreated betwixt Eupham and Patrick Graham, as the retour bears; and, generally, all writs which might qualify any such thing, were called to be reduced and improved; and also a renunciation of the lands of the Earldom of Strathern, made by the Earl of Monteith, defender, in favour of the King, and which was accepted by the King's Advocate for the King, wherein the Earl designed himself nearest heir to the persons foresaid, which renunciation preceded the retours: Likeas, at the services, the Advocate produced this renunciation, and took instruments, that the services should proceed for corroboration of the renunciation made by him as heir; and also a charter granted by the King, which also preceded the services, was desired to be reduced, whereby the King gave to the defender some of the lands of the Earldom of Monteith, which were excepted in the foresaid renunciation; in which charter the King confirmed the defender, and gave the lands to him, as heir to the said persons. The reasons of reduction were, that the defender was not that person who could be heir to them, and was neither qualified to the assize to be heir, nor can be yet so shewn to be descended, and nearest to them; but, by the contrary, that the King was heir to Earl David, seeing he died without succession, as all the other brethern of Earl David died without succession; and the King's Majesty was nearest, having lineally descended of Robert the Third, brother to Earl David; of which King Robert there was only succession extant; and, as to the renunciation made by the defender, as heir, and accepted *eo nomine* by the King and his Officers, and the foresaid charter of the tenor foresaid, which preceded the service, with a patent of honour of the Earldom, and dignity of Strathern given to him, as heir foresaid to David, since the service, they were craved to be reduced, because they proceeded upon wrong information made to the King, affirming him to be heir, who was not truly so; and the King being now better informed, might

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reduce these deeds, and could not be prejudged by such confessions made, when the contrary, in verity, is truly tried; and his officer's omission cannot prejudice the King; but yet he might be heard, notwithstanding of any such sinistrous affirmation made to the Prince, whereupon the writs proceeded. These reasons were sustained, and found relevant to reduce the retours and services; and it was declared, that the defender was not heir, neither could he be to these persons; and that he was not of blood to them, but declared, and it was found that the King was sole and only heir. And it being *alleged*, That the King had no interest to quarrel the retours, in respect of the writs foresaid, wherein he confessed the defender to be heir, and that his officers compearing at the service was a consent thereto; the exception was repell-ed, and the King's interest sustained, notwithstanding of these writs; and found that the King might now quarrel the same; and the wrongous information, and omission of the officers could not prejudice the King; and in this process, error being also concluded against the assizers, they were assoilzied from all error and punishment, because it was found, that they had just and probable cause to have served him heir, where the King's Advocate compeared the time of the service, and did not oppone thereto; but protested, that the proceeding therein should be for corroboration of the renunciation made in the King's favour, whereby, in effect, *tacite* he consented thereto, and which was found sufficient to liberate the assizers, together with the charter granted by the King, bearing that designation, whereby it appears, that the officers are hereby taxed for suggesting to the King that which was unwarrantable. In this cause, the treasurer-depute sat, and judged, reasoned, and voted, albeit he was pursuer. See KING. RETOUR.

Act. *Advocatus.*Alt. *Mowat, Neilson, & Primrose.*Clerk, *Hay.**Fol. Dic. v. 1. p. 448. Durie, p. 682. & 683.*

No 117.

1661. *December 3.* SIR ROBERT FARQUHAR *against* LYON of Muiesk.

SIR ROBERT FARQUHAR, pursuing a reduction of a disposition, against John Lyon of Muiesk, upon circumvention,

THE LORDS granted certification, unless not only the extract, but the principal disposition were produced, in respect they were registered at that time, when the principals were given back to the parties.

Stair, v. 1. p. 63.

No 118.

1665. *January 20.*LITTLE *against* EARL of NITHSDALE.

WRITS registered in the Court of Session being called for, a condescence of the dates of registration was sustained to bar certification, because that was