

1668. July 22.

SIR GEORGE MACKENZIE *against* BANNATINE OF NEWHALL.

Sir George Mackenzie insisting against Newhall for making up the tenor of the inventory made by his father-in-law, bearing an assignation to his children of their portions, and having produced the transumpt before mentioned under the clerk's hands, as likewise a double of the said inventory collated and subscribed by the defunct's brother in law, and son in law, a little before his death, in presence of his friends; it was alleged, That the transumpt did differ from the subscribed double in a point material, viz. The assignation, or that part of the bond, which formerly was provided to one of his deceased daughters, whom the transumpt did name Cicilia, and the double Lillias. This allegiance was repelled, seeing Newhall could have no prejudice thereby, seeing that part of the bond, whether it belonged to Lillias or Cicilia, was assigned to his wife: And they found, that it was only an error of designing the name by the writer out of the transumpt, reserving always, in case of any controversy thereupon, by any party concerned, what the same might import as to the right of that part. This action being sustained upon the adminicles produced, the witnesses to be adduced for proving of the tenor being condescended on, it was objected, That they could not be received, because they were uncle or cousin-germans to the pursuer's Lady; notwithstanding whereof they were admitted, because they were in like degree both to the pursuer and defender, and that it was not possible to prove the tenor of such a writ but by friends and relations, to whom the same was communicated.

Gosford MS. p. 16.

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Uncles and
cousin-ger-
mans to both
parties ad-
mitted in
proving the
tenor of a la-
tent writ.1669. November 9. LADY TOWIE *against* BARCLAY OF AUCHRADY.

In this action of improbation there being two witnesses brought over to depone, by virtue of a commission granted by the Lords, it was objected, that they could not be received, because they were *socii criminis*, and had declared to the party what they would depone *et sic prodiderunt testimonium*. The Lords repelled both these objections *in materia falsa*, seeing the direct manner of improbation could only be tried *per testes instrumentarios*, and so if *socii criminis* were a relevant objection, the direct manner could never be followed forth; and albeit they declared what they would depone, yet unless it were alleged and proved that they were corrupted, they found that it could not hinder them to depone, many things being allowed in the discovery of falsehood which is not in other cases. It was further objected, that the process of improbation had taken full effect in respect certification was granted and extracted, being a definitive sentence, the Lords could not receive witnesses, seeing nothing could follow thereupon but a criminal process, which ought to be intended before the Justice, who might examine the

No. 69.

*Proditio tes-
timonii.*