No 210. A party incarcerated upon suspicion of forgery.

1621. *July* 14. LIVINGSTON *against* GALLOWAY.

IN an action of double poinding betwixt Livingston and Galloway, wherein a term was assigned to Galloway to improve Livingston's comprising, after that the witnesses and comprisers were examined in presence of the Lords, and that the Lords had found, that the foresaid comprising produced by Livingston should make no faith, the LORDS incontinent, before the pronouncing of the sentence against Livingston, as they had found before, found that Galloway should not be suffered to insist or prosecute the foresaid improbation, but decerned Livingston to be answered, and obeyed, and committed Galloway to the tolbooth of Edinburgh; the reason whereof was, because Galloway had, upon an extrajudicial declaration made by the persons, apprisers, taken instruments under the subscription of a notary and witnesses, bearing, That they never made any such apprising, which instruments Galloway produced; whereby the LORDS found that to be a suspicious and unallowable diligence upon the improver's part, and which tended to engage the apprisers, by abiding at the instrument, to impugn the comprising, which the LORDS found to be of a dangerous consequence; and therefore decerned, as is above mentioned, That by this proceeding, others should beware to do the like, and to seek such extrajudicial confessions. And here it is to be observed, that no subornation was tried against Galloway.

Act. *Livingston, younger.* Alt. *Craig.* Clerk, *Gibson.*

Durie, p. 2.

No 211.

1661. *July* 26. LORD LAMMERTON *against* EARL of LEVEN.

IN a reduction and improbation, there appearing some grounds of suspicion against the writs produced; upon application of the pursuer, the producer was ordained to be kept close prisoner in the tolbooth till the event of the proof.

Fol. Dic. v. 1. *p.* 458. *Stair.*

*** This case is No 174. p. 6753.

No 212. Improbation not sustained against titles of honour.

1671. *November* 24. EARL of SUTHERLAND *against* EARL of ERROL.

THE Earl of Sutherland pursues the Earl of Errol for declaring his priority of dignity, and for that effect, calls for improbation of all patents of honour, charters, and other writs, granted to the Earl of Errol, or his predecessors, containing any title of dignity; and also, of all other writs granted to what-

soever parties, whereby the dignity of the Earl of Errol is mentioned, or whereby it may be instructed; wherein the last term for production being come, and these points being new and difficult, the Lords did hear the same in their own presence; where certification being craved for the Earl of Sutherland *contra non producta*, it was *alleged* for the defender, no certification against any other writs than such as are granted to the Earl of Errol and his predecessors, but not against the writs of any other persons, which the Earl of Errol cannot have, until by an incident he recover the same, for proving his priority, which cannot be till litiscontestation be made upon the reasons and declarator of the property; and it were against reason to declare other men's writs false, because the Earl of Errol is neither mentioned therein, as witness, or otherwise. It is *answered*, That the writs of other parties will not be prejudged by any certification, except only in so far as concerns the Earl of Errol, and if no certification can be granted against the same, the plea will never terminate. It was *answered*, if the pursuer insist in his declarator, and obtain decreet against the defender compearing, if he do not propone upon, and produce other men's writs, *ad modum probationis*, the pursuer will obtain a decreet *in foro*, which will sufficiently secure him. No 212.

THE LORDS granted certification only against the writs made to the Earl of Errol and his predecessors, but not against other men's writs wherein they were mentioned.

1672. *January* 16.—THE Earl of Sutherland insisting in his reduction and improbation and declarator, whereof mention is made 24th November 1671, and craving out his certification according to the interlocutor therein, against all patents of honour or infeftments expressing the dignity of the Earl of Errol or his predecessors, it was *alleged*, That the dignity of an Earl not being necessarily constituted by writ, neither by patent nor infeftment, but *via facti*, by the King's declaring the party Earl, and calling him to Parliament, or girding him with a belt or robe, it was not the subject of an improbation. 2*do*, That improbations were only introduced to secure real rights, and were never extended to dignities; and being a remeid proper to Scotland, different from the common law, and introduced by custom, the same is not to be extended. 3*tio*, That improbation takes only place where the pursuer hath a decreet and express right, as his title; which holds not here, because the Earl of Sutherland hath no express right, bearing him to be anterior to the Earl of Errol; but both of them having right to their dignities as several Earls, the precedency is but a consequential right, not contained in any gift, but deduced by consequence, that the pursuer's evidences are prior to the defender's.—It was *answered*, That improbation hath been introduced in this kingdom upon very excellent grounds, wherein our law doth exceed the law of any other nation; and the motive and intent thereof was, that pleas and debates might be brought to a secure and unalterable issue; for whereas in the pursuits of declarator of right,

No 212. the defenders might allege upon any relevant right, which either might be ordained to be produced before answer, it being hard to distinguish relevancy and probation founded upon writ of special nature, wherein all the certification was only, that no respect should be had to any writ not produced, which did never extend further than to such writs as the parties had in their hands; and though defences were found relevant upon writs not produced, and that either the writs produced *in termino*, were found not to prove, or not being produced, the term is circumduced; in either case, decreets following thereupon are reducible by other writs or documents, *noviter venientia ad notitiam*, or in a declarator. If the defender were absent he might without all difficulty suspend or reduce upon production of any evident, so that these remeids came not up to make an unalterable close, for remeid whereof, improbations were introduced; by which the pursuer, libelling that all the writs and documents by which the defender could pretend right, were false and feigned, and that the defender ought to produce the same, to the effect the pursuer might improve the same, with certification that if he did not produce them, his contumacy should not be profitable to him, but the writs should be holden and reputed as false and feigned, which did enforce the defender to produce, that he might shun the certification; and so all writs being produced, whereupon he could found, without further delay both the relevancy and probation were jointly concluded; and there are two terms at least granted to the defenders to search and produce before the certification, and oft times considerable delays after certification were granted before extract, wherein the defender might use exhibitions and incident diligences for recovery of the writs he would make use of; so that if the defender were either absent or present at the terms assigned, and produced not, the said certification being granted, he could never make use of any writ not produced, upon pretence that it was new come to his knowledge. But there was a final end to that debate for ever, than which there can be nothing more useful and excellent for any kingdom, which remeid having its reason general to make an absolute end to processes in all subjects, it were of great disadvantage, and most incongruous to the reason of the law to refuse it in any case, whether it were lands, servitudes, rights of bonds, or other personal rights, dignities, or honours; neither is there any thing to show that it was introduced for infeftments only. And though debates of precedency be rare, there is no ground to except the same from the common rule and reason of the law; and precedency being a right, resulting upon the priority of the dignity, parties may justly libel that they have good right thereto, and consequently to remove all impediments that may hinder them to enjoy the same, and so to improve any writs or documents contrary thereto, if they were produced, or to take certification against them, if not produced; which is very congruous to the civil law, *ubi prætextu instrumentorum de novo repertorum sententiæ non sunt retractandæ*; neither will the certification hinder the defender to use all evidences for instructing the antiquity of his dignity granted to him *via facti*, without writ, or by enrolment of Parlia-

ment, or other men's evidents, whereby he is designed Earl, but only that he cannot thereafter make use of patents, or infeftments granted to himself, or his predecessors. No 212.

THE LORDS refused to grant certification, even against patents or infeftments granted to the defender or his predecessors; but allowed the pursuer to insist in his declarator; many of the LORDS being of a contrary opinion.

Fol. Dic. v. 1. *p.* 453. *Stair, v.* 2. *p.* 9. & 46.

*** Gosford reports the same case:

IN a reduction and improbation raised at Sutherland's instance against the Earl of Errol, wherein certification was craved in the improbation of all patents of honour or writs, whereby the Earl of Errol could crave precedency before the Earl of Sutherland, it was *alleged* for the defender, That no certification could be granted, 1*mo*, Because titles of honours were such rights as were conferred without any patents, which began to be in use only in King James III.'s time, before which, by the the solemnity of bringing to Parliament, putting on their robes, and belting and enrolling them among the degree of nobility, to which they were to be advanced, the title and dignity was conferred upon them and their successors; which deeds being ancient, and not contained in any writ, could not be quarrelled as false and feigned, being such as could not but fall under the knowledge of witnesses; and it were of a most dangerous consequence after so many revolutions of ages and troubles, to grant certification against such writs which might bring in question the most part of the titles and dignities of honour of the most ancient families of the kingdom. 2*do*, Improbations are never sustained but where the pursuer and defender have a real interest in one and the same writ, which cannot be alleged here, the pursuer's and defender's patents and titles being distinct in themselves, and granted to their distinct and several families; whereas in improbations of the rights and evidences of lands and heritage, or jurisdictions, the pursuer must always instruct that he hath a right or infeftment in that same land or subject, to which the defender pretends right. 3*tio*, There being an ordinary remedy prescribed by the Parliament and council, that the nobility should be ranked according to the antiquity of their evidences, which were produced for the time, which hinders not the pursuer to intent a declarator upon more ancient rights, he ought not to recur to this extraordinary remedy of an improbation. It was *replied* for the pursuer, That he craving only certification against patents and infeftments, bearing erection of lands in an earldom, or other writs whereby the same might be instructed, certification could not be refused, it being the ordinary and only proper remedy to secure all the subjects, that their rights and titles shall never be thereafter drawn in question. 2*do*, The point in question and debate, being the right of precedency wherein the pursuer may be hindered and obstucted by the defender's patents or other writs, alleged granted to him, he hath good interest to pursue an improbation for removing all impediments that can hinder

No 212.

him to enjoy his place and precedency; and albeit an action of declarator be competent to him, yet that not being the sole and last remedy, cannot prejudge him to pursue the action of improbation.

THE LORDS did refuse to grant certification, and ordained the pursuer to insist in his declarator of precedency as being the only one which was allowed by Parliament, and heretofore sustained either before the council or Lords of Session, in respect that it was not to be imagined, any nobleman by keeping up his writs, would suffer his precedency to be taken from him by declarator; and that it might be of a dangerous consequence to force them to produce all ancient infeftments of lands which might bear the erection and title of honour and dignity, wherein the pursuer could pretend no interest, seeing thereby the rights of their lands and inheritance might be drawn in question.

Gosford, MS. No 441. *p.* 229.

1676. *November* 16. DAVIDSON *against* WAUCHOPE.

No 213.
A party was committed to prison during improbation of a bond as forged, on account of the strong circumstances; although there could be no direct evidence, the writer, witnesses, debtor, and creditor being dead.

JOHN WAUCHOPE, one of the macers before the Lords, having taken a right, by translation, to a bond of 700 merks, alleged granted by the deceased James Davidson jailor in the Canongate to ——— Horseburgh; and a reduction and improbation being intented of the said bond, the LORDS did decern in the improbation, and found the said bond to be false and forged, and remitted —— Dumbar forger to the Justice; albeit the writer and witnesses, and the debtor and creditor being all deceased, there were no means left for improving the said bond directly; which the LORDS did, in respect of the indirect articles aftermentioned, and concurrence in great number and pregnancy, of the presumptions and evidences of falsehood, arising intrinsically upon the inspection of the writ, and the comparing of papers and otherways, viz. 1. That the debtor Davidson was a person most responsal, and the creditor Horseburgh indigent, so that, the bond being of date 1644, it could not be thought, that if it had been a true bond, the creditor or his relict would, or could have wanted payment so long, nothing being done to recover payment until after 1669. That the said bond being assigned to ——— Lawrie, was transferred in favours of John Wauchope, after all the means of improbation had failed by the decease of of writer and witnesses. 2. The said ——— Lawrie and John Wauchope being examined upon oath, it appears by their declaration, that the assignation of the said bond in favours of ——— Lawrie was never delivered to him, but was still retained by ——— Dumbar, who had married the relict of the said Horseburgh, and pretended that the said assignation was made by Horseburgh in favours of his wife, but left blank, and that Lawrie's name was filled up to the use, and in behalf of the said Dumbar and his relict, for security of a small debt due to the said Lawrie. 3. That John Wauchope did give to Dumbar for a translation from Lawrie only 300 merks, and did promise, in case he