

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 intended 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

should recover the said debt, to pay 200 merks more, of which 100 merks was to be paid to the said Lawrie; and it cannot be thought, that Dumbar would have given away so considerable a sum, the bond and annualrent of the said sum extending to L. 100 Sterling, for 300 merks presently, and 200 merks upon the condition foresaid. 4. It appeared by the bond and assignation, that they were written with one hand, and the witnesses' subscriptions appeared to be all written with one hand. 5. The writer and witnesses are obscure persons and not known, and the designation of them is so general, that they could not be well found, being designed writers, indwellers in Edinburgh, and no otherways. 6. It appeared, by comparing other papers written by Dumbar, both as to the character and the spelling, that the said papers being written by Dumbar are the same write that the bond and assignation is of. 7. It appeared by some papers subscribed by Davidson, produced by Wauchope to astruct and approve, that his subscription to the said papers is not like that of the bond.

No 213.

Divers papers were produced, being alleged to be forged by Dumbar, being bonds granted by persons who were dead, and whereof the writer and witnesses were likewise dead; which did labour of the same grounds of suspicion and falsehood; and albeit they were not declared to be false, yet being questioned and a warrant being given by the Lords to apprehend Dumbar, he had escaped and was fugitive; and the said Dumbar is looked upon, and is *pessimæ famæ* as a falsary and a forger.

THE LORDS were ill satisfied, that their macer should have taken a right to, and used such a writ, but as yet have not censured him. *In præsentia.*

*Dirleton, No 385. p. 188.*

1697. July 29.

JOHNSTON *against* JOHNSTON.

WILLIAM JOHNSTON offering to improve a disposition produced by his brother Robert against him, and upon the abiding at the verity of it, being ordained to consign L. 40, in case he succumb, he represents by a bill, that he being in the poor's roll, he cannot command the money; and it were hard, because of his poverty, that forgery should escape, *cum crimina non debent manere impunita.* THE LORDS, on the other hand, considering calumny is not to be encouraged, therefore they ordained him to enact himself to undergo three months imprisonment, in case the disposition be found a true deed. *Qui non habet in ære luat in corpore.*

No 214.

*Fol. Dic. v. 1. p. 458. Fountainball, v. 1. p. 790.*