

No 72. tially import thirlage, viz. he might force him to produce the same by intending a negatory action and declarator of freedom.

Fol. Dic. v. 1. p. 446. Stair. Dirleton. Gosford.

*** This case is No 53. p. 6645.

1677. January 31.

GARDEN against PEARSON.

No 73.

In an improbation all bonds were called for, granted by the pursuer in favour of the defender, or to which he had right by assignation. Certification sustained, though both general, and in absence. Improbation is a general remedy to secure against any right, real or personal.

GARDEN having assignation to a bond granted by umquhile Balmadies in anno 1635, he obtained decret against this Balmadies in the court of Rosecobie. Balmadies suspends on this reason, that his father had long ago obtained a certification in an improbation against Mr Archibald Pearson, and against Lanton, Mr Archibald's good-father, who had meddled with his writs, and taken away blank papers subscribed by him, as also discharges of this and other bonds; therefore, for securing himself against both, he had no other remeid but by improbation, to force them to produce any bonds wherewith they could pretend to charge him, that he might clear the same in his own time. In which improbation, he called for some writs in particular; and in general, all bonds conceived in favours of either of them, or whereunto they had right by assignation; and did thereupon extract a decret of certification; after which, neither of them ever insisted till Balmadies was dead, and the prescription near run. The charger *answered*, *1mo*, That such general certifications can have no effect; *2do*, It was in absence; *3tio*, It is a legal advantage, and is taken off by another legal advantage, viz. The decret charged on, wherein the suspender compeared, proponed a defence of payment, and made litiscontestation; and therefore, this allegiance upon the certification is competent and omitted. It was *replied*, That competent and omitted in decreets of inferior courts is never sustained, but where it appears to be *dolose* omitted, and *animo protelandi litem*, as in the case of payment, compensation, or the like. But procurators of inferior courts understand not certifications, nor the effect thereof; neither did Balmadies himself, though he hath the privilege of an advocate, being without practice.

THE LORDS found the certification, albeit general, valid against this bond, being then assigned to the charger, whether he compeared or not, improbation being a general remeid to secure all the lieges against any right, real or personal, that might be pretended against them; and found competent and omitted in an inferior court, in matters not ordinarily understood there, not relevant. See PROCESS.

Fol. Dic. v. 1. p. 446. Stair, v. 2. p. 501.

* * * Gosford reports the same case.

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IN a suspension and a reduction of a decret recovered at the instance of Lawtoun against Balmadies, as representing his father, for payment of L. 500 contained in his father's bond, upon this reason, that the bond dated in *anno* 1636 was never pursued upon until within ten days of expiring of the years of prescription, and until the death of old Balmadies, granter thereof, who was jealous of his son's meddling with his papers and cabinets, who had married Lawtoun's daughter, and had got an assignation from Middleton, to whom it was granted. Likeas old Balmadies, for the security of himself and his eldest son, did pursue an improbation against Lawtoun, of all bonds and assignations to any bonds or writs of his from any person, wherein he obtained certification, which must take away this bond charged upon as false and feigned. It was *answered*, That the reason was noways relevant, because since the certification recovered by old Balmadies, there hath been a decret for payment recovered against the suspender his son, who compeared by his procurators, and proponed an exception of payment of the same bond, and thereby the verity thereof was acknowledged. *2do*, The certification being only general, and this bond or assignation not specially called for, cannot take away the same as false and feigned, and writs called for in general are never sustained, except it be of land and heritage, or parts and pendicles thereof. It was *replied* to the *first*, That the decret being only before the Bailie of Rosecobie, who was an inferior judge, and the compearance only by a procurator, could not prejudge the suspender to propone upon a certification against the same writ which is the ground of the pursuit, as false and feigned, *exceptio falsi* being *omnium ultima et in odium*, always receivable *ante vel post sententiam*. It was *replied* to the *second*, That all bonds and assignations being called for in general, and subjoined to several particular bonds also called for, the certification ought to be sustained; and the law presumes against the haver or assignee, that he did of purpose keep up the same, being conscious, that if they had been produced, they would have been taken away as false and feigned, or by discharges; neither is there any distinction in our law betwixt writs of land and bonds and assignations, which could not but be known to the havers, and put them in a worse condition than the havers of all writs and evidents of lands or heritage. The LORDS did sustain the reasons of suspension and reduction notwithstanding of the answers; and found, that in pursuits before inferior courts, compearance by procurators in their decreets does not hinder by way of suspension or reduction to take the same away upon certification and improbation of the same writs which were the ground of the decreets; but it is not so in decreets before the Lords; they found likewise, that the certification being general of all bonds and assignations, albeit not specially libelled, ought to be sustained, seeing the defender had the same, and kept them up, knowing the

No 73. hazard, and that law and reason were stronger in that case against them than in certification of old evidents of lands which are parts and pertinents.

Gosford, MS. No 951. p. 629.

No 74.

1687. *November.* EARL OF AIRLY *against* LAIRD OF PITLIVER.

IN a reduction and improbation at the instance of the Earl of Airly against Pitliver;

The defender *alleged*, No process, because the pursuer's active title of infeftment was expedite after executing of the summons.

Answered, The infeftment proceeds upon a retour, which is always drawn back to the time of the predecessor's decease.

Replied, That is sustained in removings, which are possessory actions, but never in actions petitory.

THE LORDS sustained the allegiance and reply, and found no process.

In this process they found also, That the persons by and to whom the writs called for were first granted, should be condescended on in the libel; that authors and representatives may be called; and that it was not enough to libel in general, that these were granted by some of the pursuer's predecessors to some of the defender's predecessors and authors.

Fol. Dic. v. 1. p. 446. Harcarse, (IMPROBATION AND REDUCTION.) No 573. p. 159.

1698. *January 19.*

KING'S ADVOCATE and his FACTOR *against* MARQUIS OF MONTROSE.

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Found, that, in an improbation, the defender was not obliged to produce any writs, but such as were specially called for, and that whether the King or a subject were pursuer. Found, that no certification could pass on a general libel of all writs.

HIS MAJESTY having granted a gift of L. 4000 Sterling, out of the bishop's teinds, where the tacks are expired, and out of their vassals entries, now in the King's hands, by the abolition of episcopacy, to Mr Johnston, late secretary, there is a reduction and improbation raised by his Majesty's Advocate, and Harry Douglas, his factor, against many persons, where the bishops were either superior of the lands, or titular of the teinds; and amongst the rest, the Marquis of Montrose being called, it was *alleged* for him, that being minor, he cannot be obliged to produce any writs but those which are specially called for, and no certification can pass on the general clause of the libel in improbations of all other writs; and it was so found in a late case betwixt himself and Lennox of Branshogle, and likewise in Dalzell of Glennan's case.* *Answered*, Whatever may hold among subjects who are obliged to know what they call for, this cannot militate against the King, who cannot so easily condescend. THE LORDS found there was no disparity, and sustained the Marquis's defence. In this process, there were two particulars noticed, but not debated. The *first* was, that it is of

* Examine General List of Names.