

1716. November 22. Sir PATRICK HOME against The EARL of HOME.

SIR PATRICK HOME pursues a reduction and improbation against the Earl, calling for the production of all the writs of the earldom of Home; in which process, the title being an adjudication upon which no infestment followed, the LORDS did restrict the reasons of reduction to falsehood alone; and Sir Patrick having insisted for certification, the Earl craved Sir Patrick's oath of calumny, if he had reason to allege, that all the writs of the earldom of Home were false; and *alleged*, that every pursuer is obliged to depone *de calumnia* on his libel *et e contra*.

It was *answered* for Sir Patrick; That reductions and improbations are introduced to clear the subject of all competing rights, whereof the reasons are libelled, so as to reach every right; and falsehood is subjoined to all; and if pursuers were obliged *in initio litis* to depone, no such process could be sustained; but how soon the production is satisfied, then the pursuer will not decline to give his oath of calumny with relation to any particular writ produced.

It was *replied*; That general improbations are not favourable; and therefore the title of an adjudication is not sustained to force production of rights or writs whereupon infestment hath followed; but Sir Patrick having invented a method to evade that well known fixed practice, by restricting his reasons to falsehood, only because a reason of falsehood is good at the instance of an adjudger; which invention, if it succeed in Sir Patrick's case, will become a common practice, whereby certification will be obtained against writs not produced, and the pursuer will have a clear view of all the production, and so be in a condition to raise some other manner of process, and wholly elide the rule; and therefore, if Sir Patrick restricts his reason to improbation, the Earl has good reason to require his oath of calumny upon that reason.

It is *duplied*; That custom has indeed prevailed so far as not to allow an adjudication to be a title of calling for infestments, or writs whereupon infestment hath followed; but that is a practice founded upon no reason; for why should not an adjudger be entitled to reduce an infestment, or a right whereupon infestment hath followed, upon any legal nullity, as well as falsehood? And it is as known a rule, that action of improbation is sustained upon the reason of falsehood, without an infestment in the pursuer's person; and it can never be instructed, that improbation restricted to a reason of falsehood, should sist till the pursuer depone *de calumnia* that he has reason to believe that all the writs called for are false; so that the novelty is upon the Earl's part.

THE LORDS found, that the pursuer was not obliged to give his oath of calumny before production.

No 50.

In a reduction and improbation upon falsehood, the pursuer is not bound to give his oath of calumny, before production.