

No 84. though they were in his hands, because his authors being liable for warrantice, ought to be called to defend their own rights. The pursuer *answered*, The defender might intimate to them the plea. The defender *answered*, He was not obliged to intimate the plea; but the pursuers to call the authors. In this case, the summons was sustained for his authors' writs, in anno 1659; and now the pursuer insisting for the defender taking a second time to produce, the defender having a review of the said act and interlocutor,

"THE LORDS reponed the defender, and would not sustain the pursuit or act as to the authors' rights uncalled."

Stair, v. 1. p. 73.

1662. July 3. ALISON KELLO *against* PAXTON.

No 85.

In a process betwixt these parties, an exception having been proponed, the LORDS, before answer, ordained the proponer to produce the writs, with certification, that the defence should be held as not proponed. *In termino*, certification being craved, an incident was produced, because the writs were the propounders authors's writs and in their hands. It was *answered*, That the incident was not competent, there being no *litiscontestatio*. It was *answered*, That it was most competent wherever there was a certification, as in acts in reduction and improbation.

"THE LORDS found the meaning of such acts and certifications to be only, that the parties should produce their own writs, they would make use of, and such of their authors' writs as they had the time of the act, and that the other party might have their oath thereupon if they pleased, and therefore refused the incident."

Stair, v. 1. p. 120.

1669. November 9. LADY TOWY *against* CAPTAIN BARCLAY.

No 86.

Certification
extracted
found not to
terminate a
process of
reduction.

THE Lady Towy having pursued improbation of a bond of an L. 100,000, alleged granted by the umquhile Laird of Towy to Captain Barclay, and of a disposition of the estate of Towy, alleged made by the tutor of Towy, the day after the Laird of Towy died, at the barns of Towy; which tutor fell heir-male to the Laird, who had only one daughter; the foresaid bond and disposition being produced judicially before by Captain Barclay, though not in this process, he refused now to produce the same, but suffered certification to be granted against it. The question having arisen whether any further process could be in the improbation, in respect that the principal writs were not produced, but copies bearing the tenor, date, and witnesses inserted,

THE LORDS the last Session did examine Captain Barclay, and Steel, one of the witnesses inserted, and certain others, and Steel confessing the forgery, and Captain Barclay denying the same after he was confronted with Steel, and denying the having of the principal writs, the LORDS sent Captain Barclay and Steel to the tolbooth of Edinburgh, to be kept there till the event of the plea, or further order, and did thereafter permit Steel to come out upon sufficient caution for a great sum; and the other witnesses inserted being summoned, and not compearing.

THE LORDS granted caption against them, and gave commission to certain persons to search for them; and now John Ross, the other witness in the disposition, and Alexander Ferguson, who filled up the date and witnesses, both in the disposition and bond, and subscribed witness to the bond, and insert himself as witness in the disposition, but subscribed not as witness in the disposition, being brought to the Bar,

It was *alleged* for Captain Barclay, That the said witnesses could not be examined, *imo*, because there was now no process depending, in respect that the improbation, which was only civilly intended, was determined by the decret of certification, which now is extracted; and albeit the Lords did before examine Captain Barclay and Steel, yet the process was then depending, and the certification not extracted. *2do*, It was *alleged*, That Ross and Ferguson were not habile witnesses, having appeared most partial upon the pursuer's part, having staid a long time with her in her house, *et prodiderunt testimonia*, in so far as not only they had declared what they would depone, but that they had set the same under their hands; and that, by their said subscription, they acknowledged themselves accessory to the forgery, and so by their confession they are *socii criminis*, and being culpable of so great a crime are infamous, and their testimonies can make no faith against any but themselves. It was *answered* for the pursuer, That improbations (even civilly intended) are not totally determined by the certification, which is of its own nature but an interlocutory sentence; and if the pursuer should, notwithstanding thereof, find out, and produce the principal writ, he might proceed to the improving thereof, it being very well consistent, that it might be holden and reputed false by the certification, and might also be proved to be false; and though the pursuer could not produce the writ, yet the process is not wholly determined by the certification, but it may be justly desired, that all evidences of the forgery that were possible, without production of the writ, might be taken to remain *in retentis*, in case the principal should after be found; for there might be clandestine assignments of the writs made by Barclay, and intimated at the pursuer's dwelling-house, or forged and antedated intimations made up, so that the certification would not be effectual against the assignees; and though parties should not insist, the King's Advocate, who is also pursuer of the process, might insist, that the witnesses might be examined, for detecting of the forgery; and there could be no case more favourable than this, wherein Captain Barclay had judicially

No 86. produced the writs, and now wilfully refuses to produce the same ; and if forgers shall escape, and be in no more hazard, but suffer certification, though they have burnt, or wilfully kept up the writs, it will be an open door to encourage all forgers ; neither have the witnesses betrayed their testimonies, albeit being examined by the Lord Fivv, a nobleman in the country, one of them did subscribe, who had just ground to think that it was no voluntary deed, but that the Lord Fivv might have sufficient authority for that effect ; but whatever objections were against witnesses, they are ever received in improbations, and the LORDS, at advising of the cause, do consider what their testimonies may work, at which time only it will be proper to object.

THE LORDS notwithstanding these alleigances examined the witnesses.

ROSS acknowledged, that he being servant to Captain Barclay, he called him up to subscribe witness to a writ, but told him not about what it was, nor did let him hear nor see what was written therein, but rolled it up, and presented only to him the white paper, near about the end of the writ, and desired him to subscribe witness ; and he saying, that he could not be witness, because he saw no body subscribe, the captain answered, that that was nothing to him, and that he should stand betwixt him and all danger, and that he would be loath to bid him do any thing would do him harm ; whereupon he did subscribe as witness, and saw not the tutor subscribe at all, nor saw his name put to the writ at that time ; and that this was not at the Barns of Towy, the time of the Laird's death, as the date of the paper bears, but at Achready five weeks thereafter. Ferguson deponed, That Captain Barclay having been his tutor, he induced him to write over the bond of L. 100,000, whereof he had formerly gotten a draught from James Middleton notary, wherein debtor, creditor, sums, and date, were blank, and that he filled up umquhile Towy debtor, and the Captain creditor, and the sum L. 100,000, and put in a date as if it had been before the Laird's sickness, albeit it was truly after his death ; and that the Captain shewed him Towy's subscription in a letter, and caused him feign it to the bond as near as he could ; and likewise depones, that the Captain's brother was the other witness, but that he saw not what the deponent had done, nor knew not thereof. He also deponed, that he filled up the date, and inserted the witnesses in the disposition of the estate of Towy, at the Captain's desire, and made the date to be at the Barns of Towy, at the Laird's death, albeit it was done at Achready about a month or twenty days thereafter, and that there was no subscription put thereto at that time, but that the Captain told him that he would get the tutor to put his hand to it thereafter ; and that the deponent refused to subscribe witness, because the tutor's name was not thereat.

Upon these testimonies, both these witnesses and Steel, who was formerly out upon bail, were put in prison.—See case between these parties *voce* WITNESS.