

1668. July 22.

SIR GEORGE MACKENZIE *against* BANNATINE OF NEWHALL.

Sir George Mackenzie insisting against Newhall for making up the tenor of the inventory made by his father-in-law, bearing an assignation to his children of their portions, and having produced the transumpt before mentioned under the clerk's hands, as likewise a double of the said inventory collated and subscribed by the defunct's brother in law, and son in law, a little before his death, in presence of his friends; it was alleged, That the transumpt did differ from the subscribed double in a point material, viz. The assignation, or that part of the bond, which formerly was provided to one of his deceased daughters, whom the transumpt did name Cicilia, and the double Lillias. This allegiance was repelled, seeing Newhall could have no prejudice thereby, seeing that part of the bond, whether it belonged to Lillias or Cicilia, was assigned to his wife: And they found, that it was only an error of designing the name by the writer out of the transumpt, reserving always, in case of any controversy thereupon, by any party concerned, what the same might import as to the right of that part. This action being sustained upon the adminicles produced, the witnesses to be adduced for proving of the tenor being condescended on, it was objected, That they could not be received, because they were uncle or cousin-germans to the pursuer's Lady; notwithstanding whereof they were admitted, because they were in like degree both to the pursuer and defender, and that it was not possible to prove the tenor of such a writ but by friends and relations, to whom the same was communicated.

Gosford MS. p. 16.

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Uncles and
cousin-ger-
mans to both
parties ad-
mitted in
proving the
tenor of a la-
tent writ.1669. November 9. LADY TOWIE *against* BARCLAY OF AUCHRADY.

In this action of improbation there being two witnesses brought over to depone, by virtue of a commission granted by the Lords, it was objected, that they could not be received, because they were *socii criminis*, and had declared to the party what they would depone *et sic prodiderunt testimonium*. The Lords repelled both these objections *in materia falsa*, seeing the direct manner of improbation could only be tried *per testes instrumentarios*, and so if *socii criminis* were a relevant objection, the direct manner could never be followed forth; and albeit they declared what they would depone, yet unless it were alleged and proved that they were corrupted, they found that it could not hinder them to depone, many things being allowed in the discovery of falsehood which is not in other cases. It was further objected, that the process of improbation had taken full effect in respect certification was granted and extracted, being a definitive sentence, the Lords could not receive witnesses, seeing nothing could follow thereupon but a criminal process, which ought to be intended before the Justice, who might examine the

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*Proditio tes-
timonii.*

No. 69. witnesses in order to the crime and punishment of falsehood. The Lords notwithstanding did examine the witnesses, seeing the commission to bring them over was direct before the extracting of the certification; and upon their confession that they were accessory to the falsehood, did imprison them, and ordained their depositions to lie *in retentis*, that if thereafter any of the writs against which certification was granted should be made use of by an assignee or any other party, these depositions might be made use of; as likewise in a criminal pursuit before the Justice.

Gosford MS. p. 80.

* * See Lord Stair's report of this case, No. 86. p. 6672. His Lordship likewise reports the following sequel of this same cause.

The Lady Towie insisted in the improbation of a disposition, alleged granted by the tutor of Towie, whose estate was provided to heirs-male, but he had disposed his estate to the pursuer his daughter, upon which, no infeftment had followed in his life; and also for improving of a bond of £103,000 alleged granted by the deceased Laird of Towie, both granted in favours of Captain William Barclay. In which improbation, because the writs were not produced, a decret of certification, holding them as false and feinzied, and declaring them to make no faith, was pronounced and extracted; and thereafter the pursuer desired, that Alexander Steil, and John Ross, witnesses insert in the disposition, and Alexander Ferguson writer, and witnesses in the disposition, and witnesses in the bond, should be examined, lest by their death, the means of improbation should fail, in case the writs were hereafter produced.

Whereupon the Lords examined the witnesses. Steil and Ross, by their depositions, acknowledged, that they being servants to Captain Barclay, he had induced them to subscribe as witnesses to a writ, which he had followed up, and did not read to them; but they saw that there was no name, as a subscription thereto, at that time, but the Captain told them, that he would get the tutor of Towie's subscription thereto, and that he had thereafter dealt with them to bide by the writ, as a true writ; and that albeit it bear date at the Barns of Towie, the day after the Laird died, yet that it was truly subscribed at the Captain's house of Achridie, about a month thereafter, Ferguson did depone, that he had written over the said disposition, and that it was subscribed at Achridie about a month after Towie died; and that he had insert himself witness therein, but had not subscribed as witness; and that he was insert, and subscribing witnesses in the said bond, to which he forged, and set to the hand of the deceased Laird of Towie, at the desire of the Captain, whose pupil he had been. The other witness in the bond was Richard Barclay, who appeared not: Upon the foresaid disposition Captain Barclay had made resignation before the Lords of Exchequer, and the same had been produced by him, and made use of in processes before the Lords, as appeared by the sub.

scribed minute, by Mr. Alexander Birnie his advocate, acknowledging the getting up of that disposition from the Clerk, which he had produced for Captain Barclay's interest, and which he had delivered to the Captain immediately, as he had received the same from the Clerk. Captain Barclay's goodson Arnage, was also examined, who deponed that he had received a message from the Captain, to deal with the witnesses to come over to Edinburgh, and bide by the writs. Captain Barclay himself was also examined upon oath, and confronted with the witnesses, but he denied all the foresaid points in their testimonies, and deponed that the said William Steil being his servant, had run away from him, and carried away the said disposition and bond, and had gone over to the Lady Towie, and conspired with her for his destruction. The tutor also being examined upon oath, acknowledged he had subscribed several dispositions of the estate of Towie, in favours of Captain Barclay, and that some of them were subscribed, no witnesses being present, but that he had bidden the Captain put in what witnesses he pleased; and that whereas before he had declared, that he had subscribed no disposition, yet he had done it, being in the power of the Lady Towie's friends, who told him that Captain Barclay being next heir-male of Towie, had a mind to take his life, which he found afterward not to be true, and was willing to do any deed for conveying of the estate to the Captain, seeing he had no heirs-male of his own. The Clerks of Exchequer, advocates, and several writers and their servants, were also examined upon oath, anent the having of the said disposition and bond. The Clerks of Exchequer deponed that the disposition was produced in Exchequer, and resignation made thereon; and the rest deponed, that they had seen the disposition and bond, and were consulted thereupon by the Captain, but had given them back to him.

Upon the whole matter, the pursuer craved, that now, seeing there was sufficient probation of the forgery of the writs, and that the Lords had produced before them a just double of the disposition, presented to the Exchequer, that therefore the Lords would proceed to improve the same, and to declare that the same were false, and forged by the Captain, and that they would remit him to the Justice General, according to the ordinary custom in improbations. It was answered for the defender, that the Lords could not proceed to improve the writs, because the writs were not produced; and never any writ in Scotland was improved, but when the principal writ itself was produced; neither can it otherwise be, for improbation before the Lords, being *ad effectum civilem*, to take away the writ, and right therein, the same behoved always to proceed upon particular and individual writs, which therefore behoved to be produced before the Lords and witnesses; for suppose it could be proved that a writ of such a date, and such a tenor, was fabricated, and forged at such a time and place, which might infer a crime against the forgers, yet it could not take away all right by such a writ, because there might be several writs of the same date; and the making up and improving of a false writ of such a date, could not take away the true writ of the same date, unless the principal writ itself had been produced, that the Judges and witnesses might know that that was the writ in question. And therefore our custom hath settled and

No. 69. fixed upon this remeid, by allowing a certification, that if the writs called for to be improved, were not produced, they should be holden and repute as false and feinzied, and should make no faith; but did not find them proved to be forged and fenziend; but only to make no faith, as if they had been fenziend, which in this process has been done, and the Lords have neither law nor custom to do any further. *2dly*, Albeit the witnesses have by their own testimonies declared themselves to be forgers of false writs, their testimonies cannot prove that Captain Barclay was either author, or accessory to their forgery, because they are *socii criminis*, and have by their testimony made themselves infamous, as falsers; and so there is no faith to be given to their testimonies, against any other but themselves: Besides, they have given partial counsel to the pursuer, and have betrayed their testimonies, by voluntarily coming to them, and declaring what they would depone; and therefore the Lords can neither improve the writs, nor remit Captain Barclay to the Justice, as a falser. The pursuer answered, that albeit the ordinary course in improbations be only certification, when the writs are not produced; yet there is nothing to hinder the Lords to use extraordinary remedies, in extraordinary cases; and there can be no case more extraordinary than this, where there is an evident tract of forgery, for taking away a considerable estate of six score chalders of victual improved by the very witnesses insert, and that the writs have not been produced is the defender's own fault, who knowing them to be false, wilfully abstracts the same; and it will be a very great encouragement to forgery, if the forger knew that all his hazard will be, to suffer certification, if his forgery take not; neither were ever witnesses in improbation of writs, excluded in the civil process, as being *socii criminis*; but if they acknowledged the forgery thereof, they were improved, though they themselves were accessory to the forgery, otherwise if witnesses can be induced to subscribe as witnesses to a forged subscription, there was no possibility of remeid, seeing it cannot be thought, they would suffer any other to be present, or that the forger himself would confess.

The Lords refused to proceed to improve the writs, not being produced, or to remit the parties to the Justice: But they did declare, that by the processes, they found Steil, Ross, and Ferguson, the witnesses, to be guilty of forgery, by their own confession; and that they found Captain Barclay had made use of the writs acknowledged to have been forged, and therefore ordained those of their number, that were upon the privy council, to represent the case to the council, that they might cognosce what further censure they saw just to be inflicted; and it was the private opinion of most of the Lords, that at least the witnesses, and Barclay himself should be banished; but they found it not proper for them to express their opinion, or prelimit the council. But withal, the Lords found the probation adduced, sufficient to declare Captain Barclay and the witnesses infamous, and did declare them such accordingly.