

a reason sustained, that it was not proven without publication of the testimonies, and without redarguing the Lords with iniquity. And therefore, though, in decreets in absence, defenders may be heard when the probation was by writs, which are always published, and not so accurately considered in absence ; or though the party absent may propone a defence eliding the libel, though proven : yet, it being the Lords' sole trust to advise probation by witnesses with close doors, without publication or dispute upon the testimonies, wherein they use a like accuracy in all cases, seeing the parties are not to know what are in the same testimonies ; therefore they can sustain no reasons against the probation by witnesses, even in decreets in absence.

The Lords repelled both these reasons, and adhered to the decret, and found the letters orderly proceeded.

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1678. *December 17.* SIR ALEXANDER HOME *against* Mr PATRICK HOME.

UMQUHILE Lord Rentoun, Justice-Clerk, upon consideration of the indisposition and weakness of his eldest son, Sir Alexander Hume, granted a tack to his second son, Mr Patrick, of his whole estate, for payment of an annuity to Sir Alexander for his aliment, and the rest of the rents to the creditors : Whereupon there being a connt and reckoning betwixt Sir Alexander and Mr Patrick, Mr Patrick proponed a total defence,—That he had the sole right to the estate of Rentoun, by a disposition granted, by Sir Alexander to Frank Stuart, of the lordship of Coldinghame, comprehending the barony of Rentoun ; by virtue of an apprising of the said barony of Coldinghame, comprehending as said is ; and for all other right, title, and interest the said Sir Alexander had to the said barony of Coldinghame, comprehending the said lands of Rentoun and others ; or to any part thereof, in any manner of way : and to which disposition the said Frank Stuart had made the said Mr Patrick Hume his assignee ; whereby Sir Alexander was excluded from any interest he had in the lands of Rentoun, any manner of way.

Sir Alexander having raised reduction and declarator, that the foresaid disposition granted by him, could not be extended to the property of his own estate of Rentoun, but only in so far as it was comprehended as a part of the barony of Coldinghame, which was appraised upon a bond granted by the apparent heir of Coldinghame,—to the effect, that, without entering heir, he might attain his predecessor's estate ; which apprising was deduced in the name of Sir Alexander, his nearest cousin to his own behoof, and he dying, the said Frank Stuart became nearest apparent heir ; and therefore Sir Alexander, according to his trust, did dispone the apprising to Frank. And as to the clause, “ for all other right,” it is no part of the dispositive clause, but only in the procuratory of resignation ; and must either be the error or fraud of the framer of the disposition, that the said clause was adjected, omitting the words that rationally should have followed, *viz.* “ by virtue of the said apprising,” which at length is narrated, and only dispered.

The Lords, before answer, having ordained Frank Stuart, the writer, and witnesses inserted to be examined, how this disposition was procured, Frank deponed, That it was delivered to him by John Bannatine, one of the witnesses in-

served ; and that there was no antecedent communing about it : and Bannatine deponed, That a mean servant of the Justice-Clerk gave him the disposition as now it is subscribed, and desired him to carry it to Sir Alexander, which he did ; and Sir Alexander subscribed the same, and gave it to him to be delivered to Frank Stuart, which he did accordingly ; and that nothing was expressed by either party what their intention or meaning was ; neither yet what was meant by the assignation by Frank Stuart to Mr Patrick.

The Lords found, That the clause “ for all other right,” &c. not being in the dispositive clause ; and that it did not appear who was the framer of the disposition, or by whose order, (the writer thereof, who was the other witness, being dead ;) and that Mr Patrick, acting by a tack, acknowledged Sir Alexander’s right of property : that therefore the disposition could not be extended to the property of the estate of Rentoun, but only to the superiority, or the feu-duty thereof ; as having been holden of the Abbacy of Coldinghame, erected in a temporal lordship to Frank Stuart’s predecessors ; and comprehended in the said lordship as a part of the vassalage thereof, and as no part of the property.

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1679. *January 8.* CREDITORS OF EAST-BARNS *against* The EXECUTORS thereof.

INGLIS of East-barns did grant an infestment to Patrick, his eldest son, of his estate, bearing, for relief of debts,—wherein his son was cautioner, conform to an inventory : whereupon the son was infest in February ; and, in December thereafter, he did infest his wife in an annualrent out of that same estate, in place of a provision of a contract of marriage. Whereupon she craved preference : because both infestments being base, hers, though posterior, was preferable ; because, being for implement of a contract of marriage, it requires no other possession but the husband’s, and so was valid from its date : whereas the son’s infestment was clad with no possession, till the ladies’ infestment ; at least any possession he had was but simulate,—he being unmarried, with his father in the family,—and got only a simulate delivery of the goods on the mains, which was ploughed, and a part of it sown by the father. *2do.* The son’s infestment was fraudulent, without an adequate cause onerous ; in prejudice of the lady, who is an anterior creditor by her contract of marriage.

It was ANSWERED for the creditors, That they had proven possession in all that could be attained by the son’s right, *viz.* by a real delivery of the possession of the mains, and all the goods upon it ; and the father, being a beadle, never meddled thereafter, though he lived two years ; but the son bought plough, oxen, seed, and paid the servants’ fees. All which the Lords found proven. And the question arising, whether the possession of the mains would extend to validate the infestment as to the rest of the estate,—

The Lords found, That it would validate the same, in so far as might be extended to the lands in the same infestment with the mains ; and, as to the fraudulency of the son’s right, the creditors offered to prove, that it was for a cause onerous, equivalent to the worth of the land. But the question arising, that, if the cause onerous were not equivalent, whether the son’s infestment should be sustained and preferred, in so far as the cause onerous was instructed,—