

1683. *January.* BOGLE *against* WILLIAM ANDERSON.

No 24.

A procuratory for using an order of redemption, must be produced in a reduction, even after 20 years.

IN an improbation, certification being craved against a procuratory for the using an order at a second appriser's instance against the first,

Alleged for the defender; That the instrument mentions the procuratory; and procuratories are not looked upon as necessary to be kept more than precepts of warning; and now it is 20 years since the granting of the procuratory in question; and the defender offers to make faith, that such a procuratory was truly given.

Answered; The procuratory being an essential part of the order, it ought to be produced; and if there was no procuratory, there could be no order. Now here the notary to the instrument has given a declaration under his hand, that the order was false, and forged by himself; and has fled away from justice.

THE LORDS granted certification against the procuratory; but superseded extracting till the 20th March; and allowed the proving of the tenor of the procuratory *incidenter*.

Fol. Dic. v. 1. p. 354. Harcarse, (IMPROBATION & REDUCTION.) No 534. p. 148.

ECT. IV.

Grounds and Warrants of Apprisings.

1628. *February 29.* E. NITHSDALE *against* L. WESTRAW.

No 25.

Found, that certification could not be granted against comprisings, on which sasines were expedite; but if no infestment had been taken, they must be produced.

IN an improbation betwixt the E. Nithsdale and Westraw, the LORDS found, That pursuers of such actions may pursue for improbations of retours, whereby the defender in these cases, or any of their predecessors, are served heirs to their predecessors in the lands controverted; for if the retours fall, the lands will be in non-entry, and so the pursuer has sufficient interest to quarrel them, and crave production thereof. *Item* it was found, that albeit retours be registered in the chancellery, yet that the defenders, who are called therefor, are holden to produce the same, and if they do not, that certification should be granted against them, and that the pursuer is not holden to produce and extract them. It was also found, That no certification, neither for retours nor services, should be granted, which are of any date anterior to the year 1546, in respect of the burning of the town, and most public places in the country, whereby it may

be supposed, that public registers were then destroyed. *Item* it was found, that comprisings, whereupon sasines and infeftments were expedite, could not be discerned to make no faith for not production, seeing they remained at the signet for the warrant of the seal, the time of the expeding of the signature for infeftment thereupon, and so the party called in the improbation could not be holden to produce the same; but touching comprisings, whereupon followed no infeftment, the party called was holden to produce the same, because it was to be presumed that they were in his own hands.

Act. Hope, Nicolson, & Stuart.

Alt. Aiton.

Clerk, Gibson.

Fol. Dic. v. 1. p. 354. Durie, p. 352.

* * Spottiswood reports the same case :

EXCEPTIONS proponed in an improbation of the Earl of Nithsdale's against the Laird of Westraw.

1mo, No certification against retours, because they are to be had in the chancellery, which is a public register. This was repelled, for there will be certification granted against any infeftments if they were not produced, albeit they may be had in the director of the chancellery's register; much more against retours.

2do, No certification against retours nor services before the 1544, (at which time the registers were burnt by the English,) relevant for all retours, and for services likewise, which the defender will make faith are not in his own hands.

3tio, No certification against comprisings, because they are to be found at the signet, where they were wont to be left for its warrant, (till of late that signatures were past upon comprisings,) relevant for comprisings whereupon infeftment has followed, but not for those upon which infeftment has not been taken. In an improbation pursued by the Chancellor against his vassals of Ratray, this being proponed, the Lords would not give answer upon the general, but remitted it till the production came to be satisfied, at which time they would consider what comprisings should be produced, and what not, 6th July 1631.

4to, This action was pursued in James Maxwell's name, who had the lands libelled disposed to him by the King, in whose hands they were resigned *ad remanentiam* by the Earl of Somerset.—It was *alleged*, No certification at the pursuer's instance, as having right from the King by the resignation of Somerset, till the procuratory of resignation made by Somerset was shown. This was found relevant; but suffered the pursuer to produce it *cum processu*.

5to, Because there were called for all writs made to the defenders by the Lords Maxwells, in whose right the pursuer had succeeded through the late Lord Maxwell's forfeiture.—It was *alleged*, No certification for such writs made by the Lords Maxwells at this pursuer's instance, unless he show where the Lord Maxwell had right to these lands; for he could be in no better case than

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my Lord Maxwell himself, in whose right he succeeded ; who, if he were pursuing these defenders, behoved to show a right.—*Answered*, That he might pursue as heir to his predecessor, and needed not show any other right.—*Duplied*, That was in respect he would be obliged in warrandice of his predecessor's deed, to whom he was heir ; for which cause it was ever sustained that an heir had good interest to improve any deed done by his predecessor, which he would be bound to warrant, albeit he instructed no other interest ; but it was not so in a singular successor, who was not bound in warrandice.—*Triplied*, He needed not instruct that the Lord Maxwell had right, for if the defenders had taken any infeftment of him as having right, they had acknowledged as much. This allegiance was repelled.

6to, He could not seek retours to be improven *principaliter*, but only *in consequentiam*, as to hear and see improven sasines and infeftments, with all that had followed thereupon, whether services or retours ; because, by the acts of Parliament 1494, cap. 57. and 1617, cap. 13. it is ordained that there shall be no process for reducing of retours after three years.—*Replied*, That is only for reducing them for error and inordinate process ; but as for improbation, as false and feigned, it is competent any time, *cum nunquam præscribatur falsum*, except it be enacted otherwise by a statutory law.

Spottiswood, (IMPROBATION.) p. 166.

1665. January 20. LITTLE against EARL of NITHSDALE.

No 26.

Certification is not sustained against an apprising, if the infeftment thereon be produced.

LITTLE pursues an improbation and reduction against the Earl of Nithsdale, of the rights of some lands, wherein the LORDS sustained the pursuer's interest on a comprising and charge without infeftment, and though the apprising was on Little's own bond, simulate and assigned to himself ; and found such deeds might make him liable, as behaving as heir, if he intromitted, and were sufficient titles any other way.

THE LORDS also found, That certification ought to be granted against retours and charters, though in public registers, but not against writs registered in the books of Session, the date being condescended on by the defender ; was sustained against all writs granted to the defender and his authors ; but such as seem to represent them are called ; not against writs granted by the pursuer, his predecessors, or authors, but only his predecessors, to whom he doth succeed *jure sanguinis*, and such authors as he produces right from ; but they would not admit certification against apprising, if the infeftment thereupon were produced.

See IMPROBATION.

Fol. Dic. v. 1. p. 355. Stair, v. 1. p. 253.