time out of possession, he might lawfully take a right from the Master of Gray superior, who might have recovered the right of property *ad remanentiam*, or by recognition; so that the sight of the pursuer's right could not put Watson out of doubt of his own right. It was *replied*, That there was neither resignation nor recognition, nor did Watson propone any thing thereupon in the reduction. No 36.

THE LORDS found the mails and duties due since the citation on the reduction.

Fol. Dic. v. 1. *p.* 111. *Stair, v.* 2. *p.* 76.

*** Gosford reports the same case; giving the defender the name of Howison.

In a pursuit for mails and duties at Gray's instance, as infeft as heir to his father in the lands of ———, holden of the Master of Gray, from the date of the citation of the reduction formerly pursued at his instance against Howison, wherein he had obtained decreet, it was *alleged*, That the defender was only liable *post latam sententiam*, he being *bona fide* possessor, as being infeft upon a charter granted to him by the master of Gray, who was infeft in the said lands. It was *replied*, That the defender could not be reputed *bona fide* possessor, seeing the pursuer's father died infeft, and had been long in possession of the said lands as heritor; and that, after his death, the pursuer's tutor had continued in possession during his lifetime, which was well known to the defender, who did marry the tutor's wife's sister, and by collusion made her to remove, and so did enter to the possession without any pursuit or decreet obtained against the pursuer, who was minor; and, if he had been called, would have defended against any right granted by the Master of Gray, who was only superior, and could neither remove, nor pursue him for mails and duties.——THE LORDS did repel the defence, in respect of the reply, and found, that albeit where parties are *in probabili ignorantia*, and have a title, they are sometimes only found liable after sentence or litis-contestation, as to which they have a latitude according to the merits of the cause; yet, where the entry to the possession is not legal, *et viis et modis*, but by collusion, they ought to be liable as possessors *malæ fidei*.

Gosford, MS. p. 252.

1675. *July* 15. FUMARTOUN *against* LUTEFOOT.

No 37.
In a reduction and improbation of a disposition granted by a woman, and assigned by her to her husband in their contract of marriage,

THOMAS DUNMUIR granted a disposition of the fee of half a tenement in the Canongate, to Janet Bartan his wife. There is now improbation thereof intented, at the instance of Janet Dunmuir, heiress to Thomas Dunmuir her granduncle, and John Fulmartoun her assignee, against Sarah Elder, daughter to the said Janet Bartan, and John Lutefoot her husband; which disposition was registered in the books of the Bailie-court of the Canongate. And the pursuer insisting for certification, the defender produced the extract, and therewith the register

No 37.
the hasband was not found liable for the by-gone profits from the citation, but from the time only that clear evidence was brought of the nullity and falsehood of the disposition.

itself. The pursuer *alleged*, That any writ registered in an inferior court, was upon the peril of him that registered the same; so that if it miscarry, being in the custody of those inferior clerks, the extract could not satisfy the production in an improbation. The defender *answered*, That where the right registered is ancient, and adminiculated with infeftments and possession, the samen is sufficient to elide the presumptive falsehood, upon the not production, as was lately found in the case of Mr David Thores *contra* the Laird of Tolquhoun.* The pursuer *replied*, That the adminicles here produced were no ways sufficient, because it is evident, by the register itself, that the clerk hath written upon the margin of this disposition, that the principal was given up to the party, which could be no other than Bartan the wife, to whom it was granted; for the disposition bears, 'That the husband, granter thereof, was then inclosed for the plague, and that he did not subscribe, nor touch the pen, for fear of infection, but only gave warrand to two notaries;' so that it could not be delivered to her; and therefore the disposition being in the time of the plague, and the husband having shortly died, the wife having liferented the half of the tenement, continued in possession. And the husband's heir seeing a disposition in the register, and infeftment thereupon, did not suspect the falsehood; to whom the pursuer succeeded, being an infant, and indigent; so that till of late, upon inspection of the register, it was not questioned; but now it being evident, that the disposition was taken up by the wife, the infeftments and possession thereupon can no ways adminiculate the verity thereof, as in the case of Mr David Thores, wherein there was a constant tract of process, and the granter of the bond in question having been charged, taken with caption, and suspended, never pretended falsehood. The defender *duplied*, That the adminiculation was stronger in this case, because there were thirty years possession, and no possession was attained on the apprising upon that bond in Thores' case for many years. *2do*, If need be, the defender offers to prove the tenor of the disposition in question; and insists in the summons of tenor raised for that effect; and for adminicles, produces the extract, the register, and the infeftments; and offers to prove the tenor by witnesses who saw the principal disposition. Likeas the register is fortified by this, that Mr James Logan, who was clerk of the Canongate, was one of the notaries, and did also register it; and now he and the other notary, and all the witnesses, being dead, if after so long a time, and probably upon design, after the witnesses death, infeftments clad with so long possession, and come to singular successors, shall be overturned for the fault of the clerk, in not producing of the principal, who, to palliate the same, hath written upon the margin that it was delivered to the party, it will be a dangerous preparative. It was *triplied* for the pursuer, That the verity of this disposition is no way adminiculated by what is produced; but the forgery is the more suspect, that one person was notary thereto, and registrater thereof; and it cannot be imagined that his marginal note was to palliate his negligence, in respect his giving up thereof was a breach of his trust, much worse than negligence; neither can the tenor be sus-

* Stair, v. 2. p. 253. & 297. *voce* IMPROBATION.

tained to supply the production, because in all tenors there must not only be adminicles in writ, but there must be a probable *casus amissionis*; and in any doubtful case, *rei gestæ veritas* must be proven; but here there is no warrantable *casus amissionis*; but the parties taking up the principal, without instructing how he lost it; neither is there any pretence that there are witnesses who saw the husband give warrant to the notaries to subscribe; and therefore the naked sight of a writ, in a case so suspicious, is no way sufficient to astruct the verity, or to instruct the tenor thereof: And if this method were sustained, it lays a sure way for all forgery, that the forger may register the writ, and then take it up; and after showing of it to some witnesses, destroy it, and prove the tenor thereof by those witnesses, who could not exactly know the truth of the subscription, much less when it is by notaries. No 37.

THE LORDS granted certification, and improved this disposition, and refused to sustain the tenor thereof, as it is libelled. *See* TENOR—PROOF.

And the defender having then *alleged*, That he being a singular successor, and having bruiked *bona fide* by a disposition from his wife, in their contract of marriage, could not be liable for the bygone profits, and therefore the improbation could not be simple improving the writ *ab initio*, nor yet from the citation, till by production of the register his *bona fides* were interrupted.

Which the LORDS sustained, and found also, that the reparations made by the defenders, in so far as they were profitable and increased the mail, should be restored.

Fol. Dic. v. 1. *p.* 111. *Stair, v.* 2. *p.* 347.

1677. *December* 14. DICK *against* OLIPHANT and Others.

No 38.
The proponing of improbation, which is ordinary and of course, not being sustained, but reserved, was not found to induce *mala fides*.

SIR THOMAS TYRIE of Drumkilbo as principal, and the Lord Oliphant as cautioner, being addebted to Janet M'Math in the sum of 10,000 merks, she arrested the like sum in the hands of Sir Archibald Douglas of Kilspindie, and having pursued to make furthcoming, it was *alleged*, That Kilspindie had granted assignation to Douglas of Lumsdean, of the sum in question, which was intimated by a horning produced; whereupon Sir Laurence Oliphant of Gask, as having right from Lumsdean, was preferred; and the arrester having then *alleged* that the said assignation was false, relating to a decreet of registration of a later date than the assignation, and offering to prove the same; yet the assignation was preferred, and the improbation was only reserved: Whereupon the arrester *insisted* in an improbation, in which the foresaid assignation was improven, which was found forged, and made up to answer to the charge of horning, which proceeded upon, and did relate to the assignation; and the true assignation was produced, which was of another tenor, bearing 'to be granted to Lumsdean for 'relief of Kilspindie's cautionry;' but by several writs produced it was instructed, that this true assignation was made only in trust, and was never delivered to Lumsdean; and therefore the arrester was now preferred. And Dick of