

also the adjudications at Walter Reid's instance, led for the behoof of the said Mr James, for evacuating his trust for defrauding of other creditors, with the hail grounds and warrants thereof, that the LORDS may know the trust and fraudulent conveyance used by the defenders; with certification, that if they did not produce the said writs, betwixt and a certain day, would grant a term in the improbation conform to the pursuer's libel.

Sir P. Home, MS. v. r. No 500.

No 60.

1684. *March.* SECRETARIES OF STATE *against* ANDREW CRAWFORD.

IN a reduction at the instance of the Secretaries of State, of a gift of the office of Sheriff clerk granted by the Duke of Lauderdale, (then Secretary) to Andrew Crawford, upon this ground, that it did not contain the *modus vacandi* by Mr Andrew Ker the former clerk's death, demission, or deprivation, but adjoined Crawford to Ker, giving him the right of survivance after Ker's death, without any title to the profits *medio tempore*.

Answered; The reason of reduction is not relevant, in respect Ker and his son being conjunct in the office, with a clause of substitution, the father upon the son's death, made a demission of the half of the office *in favorem*, upon which the Duke's gift proceeded; and old Ker having died some years before the Duke, to whom the casualty fell if it had vaked by Ker's death, since the Duke did not quarrel the same, nobody else could; nor is it unusual to grant gifts to two persons with a clause of substitution and survivance, as was formerly found in the case of Commissaries and their clerks, and lately in the case of Alexander Maitland and his son Charles.

Replied; The granting of offices by way of conjunction and substitution, is very prejudicial; and if they may name two conjunct, they may, by the same reason name six.

THE LORDS assoilzied from the reduction.

Harcarse, (IMPROBATION AND REDUCTION.) No 548. p. 152.

1685. *January 8.*

SIR PATRICK HOME *against* The VASSALS OF COLDINGHAME.

SIR ALEXANDER HOME having disposed some lands of Coldinghame he stood infest in, to Sir Patrick his brother, who did not infest himself, a reduction and improbation was raised in both their names, against his vassals of Coldinghame, and terms taken; and Sir Alexander having afterwards, upon some incident differences with his brother, disclaimed the process, Sir Patrick craved certification in his own name.

No 61.

The Secretaries of State were refused reduction of a gift of an office granted by a former Secretary, in a manner, which, if irregular, he only would have been entitled to challenge.

No 62.

Action was sustained, where the disponent infest, and the disponent uninfest were joint pursuers, although during the

No 62.
process, the
disponer dis-
claimed.

Alleged for the defenders, That Sir Patrick was not infeft, and so could no insist in an improbation of these rights; nor could he crave certification in Sir Alexander's name, who had disclaimed the pursuit, and besides, was at the horn, and had not *personam standi*.

Answered for the pursuer; By the act of regulations all defences against the titles ought to be proponed before the taking of terms. *2do*, Sir Alexander could not disclaim the process, which was raised in Sir Patrick's name; nor could his rebellion, which is personal, prejudice Sir Patrick.

Replied; It was needless for the defenders to have quarrelled Sir Patrick's want of infeftment, while Sir Alexander was a joint pursuer; but the objection was competent whenever the two interests were divided.

THE LORDS repelled the allegiance and reply made for the defenders, in respect of the pursuer's answer; and found, That Sir Patrick's want of infeftment could not be quarrelled in this state of the process, the objection being in effect a dilator, which should have been proponed *ab initio*.

Harcarse, (IMPROBATION AND REDUCTION.) No 551. p. 153.

* * Sir P. Home reports the same case:

1684. November. SIR PATRICK HOME, Advocate, as having right to the lordship and barony of Coldinghame from Sir Alexander Home his brother, pursues a reduction and improbation against the vassals of Coldinghame, in Sir Alexander's name and his own, in which the terms being run, and certification being granted *qua non producta*, superseding extract until a certain time; and Sir Patrick having craved an extract of the certification; it was *alleged* for the vassals, That Sir Alexander's infeftment, which was the title of his action, was null, in respect he was not *habile modo* infeft, seeing the infeftment proceeded only upon horning, raised upon a decret against the apparent heir of Francis Stewart, to whom the disposition of the estate, which is the foundation of Sir Patrick's right, was granted; whereas adjudication should have first been obtained upon the decret, adjudging the estate from the apparent heir, for not fulfilling of the disposition; and the action being invented in Sir Alexander's name, as being only infeft, he had granted a declaration, by which he declares he has no interest in the estate of Coldinghame, and therefore disowns the action; as also Sir Alexander is debarred with horning, so that there can be no certification extracted, as was lately decided in the like case, of a reduction and improbation at the instance of the Earl of Home, No 59. p. 6651, where the Earl being debarred with horning, the Lords would not allow the action to be carried on in Mr Charles's, his brother's name, who had adjudged the estate from the Earl, in respect Mr Charles was not infeft upon adjudication. *Answered*, That it was not now competent to be objected against the pursuer's title after the act is extracted, and not only a term assigned, but all the terms run, and certification granted; it being expressly provided by the 25th act of the act of regulation,

that all exceptions competent against production be discussed before the assigning terms; but to know how groundless the allegiance is, the progress of Sir Patrick's right is as follows, viz. John Stewart being infeft in the estate, upon the act of Parliament of erection, in the year 1621, he grants a disposition thereof to Francis Stewart, his elder brother, who being deceased, Mr Harry Home, Commissary of Lauder, as creditor to Robert Stewart, the said Francis's son, having charged him to enter heir to Francis Stewart, his father, thereupon leads an apprising against him of the foresaid disposition of the estate of Coldinghame; and so coming in place of Francis Stewart, by virtue of the apprising, obtains a decret of transferring of the disposition against the deceased Captain Francis Stewart, over to the said John Stewart, granter of the disposition, as lawfully charged to enter heir to him; and upon the rest of the passive titles; by which the said Mr Harry Home obtained the disposition transferred in his person *active*, and against the said Captain Stewart *passive*, by which Captain Stewart is decerned to infeft the said Mr Harry Home in the foresaid estate, conform to John Stewart's obligation in the disposition to Francis, his brother, and thereafter Mr Harry Home; raises a special charge to enter heir against Captain Stewart; as also, raised letters of horning upon the decret of transferring, and charges Captain Stewart to infeft him in the lands, and to fulfil the other obligations in the disposition, upon which he is denounced and registrated at the horn; and the foresaid apprising and all the diligences done, thereupon being assigned by Mr Harry Home to Sir Alexander Home, there is a petition given in by Sir Alexander to the English Commissioners, making mention that he had right to the apprising of the foresaid disposition, and diligences following thereupon, and that he had done the utmost diligences against Captain Francis Stewart, by horning, and denounced and registrated him at the horn, for not infefting him and fulfilling the other obligations in the disposition, and upon the special charge to enter heir; and therefore craved that the Commissioners might grant warrant to the Director of the Chancery to issue furth a precept for infefting the said Sir Alexander Home in the estate, which was granted; and Sir Alexander having obtained a charter out of the Chancery, he was accordingly infeft; which was a proper and legal way for completing of the foresaid disposition, and the ordinary method used in the English time for completing such rights; and albeit were there any informality in it, as there is not, the same cannot be questioned, seeing all judicial proceeding, the time of the late usurpers, or rights of lands made by the Lords in authority for the time, are ratified and approved, and cannot now be called in question, there being no review raised thereof within the time allowed by the act of Parliament; and any declaration granted by Sir Alexander, declaring he has no right to the estate of Coldinghame, and disowning action, cannot prejudice Sir Patrick, seeing the declaration imports no more than the disposition that Sir Alexander has granted, which is only that he is denuded of the estate; and that he cannot disown the action, in so far as it is intended in his name, seeing a singular succes-

No 62.

sor may either insist in his own name, or his author's name, or in both, as he thinks fit ; and the horning against Sir Alexander cannot sist process in this case, because albeit Sir Alexander be only infest, and that Sir Patrick's right from him is not yet complete by infestment, yet the action being raised not only in Sir Alexander's name, but likewise in Sir Patrick's, from the beginning, and the terms being run, and certification granted, only the extract of the certification was superseded for some time, yet process cannot now be sisted by horning against Sir Alexander ; and the practick betwixt the Earl of Home and his Vassals doth not meet this case, because in that case the process was not intended from the beginning, in Mr Charles, his brother's name, nor were there terms taken, nor certification granted ; but when the Earl was insisting in the action, the vassals having debarred him with horning, and Mr Charles having compeared for his interest, and craved that process might be carried on in his name, by virtue of an adjudication that he had led against the Earl, the LORDS refused to allow the process to be carried on at his instance, not only because he was not infest upon the adjudication, but in respect the process was not raised in his name from the beginning. THE LORDS repelled the defence proponed against the pursuer's interest, in respect the process was sustained *ab initio* at his instance, and that all the terms were run ; and found the other defence proponed against the validity of the pursuer's title, and that Sir Alexander, his author was not validly infest, nor competent *hoc loco*, reserving the same to be prompquent, after the production shall be satisfied, and the reasons come to be debated.

Sir Pat. Home, MS. v. 2. No 624.

1686. February. DUKE of GORDON against His VASSALS.

No 63.

A pursuer's title having been only a sasine, the charter was ordered to be produced.

IN a reduction at the instance of the Duke of Gordon against his vassals,

It was *alleged* for the defenders ; No process, in respect the pursuer's title produced is but a sasine without a charter.

THE LORDS ordained the charter to be produced, and sisted process till that was produced.

It was thereafter *alleged* for the defenders, That the sasine being but an extract, and there being no precept of sasine in the charter, the precept ought to be produced ; *2do*, One of the defenders is minor, and *non tenetur placitare* ; *3tio*, The executions of the summons bear not the name of the dwelling-houses, where the defenders were cited ; *4to*, The executions are not stamped ; *5to*, The executions against the tutors and curators at the market-cross does not bear that a copy was left.

Answered ; The extract of the sasine is sufficient, and the precept needs not to be produced ; *2do*, *Minor non tenetur placitare* takes no place against the taking of terms in improbations ; besides, there was improbation upon the same