

1633. *Renton cont. Blacader. Vide Hadinton, at the 9th of December 1609, Spotswood and the L. of Westforton.*

*Advocates' MS. No. 297, folio 123.*

1671 and 1672. The EARL of SUTHERLAND *against* The EARLS of ERROLL and MARSHELL.

1671. *July 7.*—THERE is a declarator raised at the instance of the Earl of Sutherland against the Earls of Erroll and Marshall, for declaring that the precedency both in Parliament, Council, and other places, belongs to him; together with an improbation of all such writs as any way may instruct their antiquity beyond his, &c.

*Advocates' MS. No. 206, folio 103.*

*November 24.*—The hail terms of the improbation mentioned *supra* at No. 206, at Sutherland's instance against Erroll and Marshall, for the precedency, being run, certification was this day granted against all patents of honour, or other writs whatsoever, granted to the said Earls, which can any ways instruct their precedency, because they were not produced; but for any other writs that could adminicle the same or collaterally speak of the said Earls, belonging to other persons, refuses certification against these. But thought the said Earls *qua* Constable and *qua* Marshall to have the place, at least will not dispute thereon, because Sutherland's summons is not against them *qua tales* but only as Earls: so that this contest was only for the Ladies their place; for the Constabulary and Marischalate being personal dignities, their Ladies take no place thereby; but the Countess of Sutherland (if he be an older Earl) will take the place of them. It was judged a new practise to admit certification against patents; which are in public custody, and that the surest and most noble of all others, *viz.* the records of Parliament.

*Advocates' MS. No. 271, folio 115.*

1672. *January 16.*—My Lord Erroll's procurators having stopped the certification granted *supra* at No. 271, against all patents of honour, or other writs granted immediately and directly to himself and his predecessors, Earls of Erroll, in so far as they could instruct precedency before Sutherland; and they being of new heard upon that point, it was ALLEGED for Erroll, that no certification could be admitted, because patents of honour were not the subject matter of improbations nor certifications, unless the pursuer laid claim to the defender's title of honour, whereby he and his predecessors are created or designed Earls of Erroll, which is not the case. And in an improbation the defender's and pursuer's rights and interests must be *in eodem subjecto*, which is not here; the pursuer's title of honour and the defender's being things quite different, and which may both subsist as *res mere disparatæ*. And in an improbation the pursuer and defender must both be pretenders to dominion in the thing concerning which improbation is moved; as for instance, in improbation of rights of lands the pursuer must libel he stands infest in these lands, and the defender's rights called for must be rights of in-

feftment, or such rights as may affect the lands wherein the pursuer libels he stands infest, else his title will not be sustained, nor any certification granted; and the only proper way to pursue precedency is by a declarator.

REPLIED, though the pursuer and defenders' title were different things, yet he had good interest to pursue this improbation, because precedency which consequently arose from their patents, was the subject matter of the debate.

See the answers to this and the other replies in the information.

The Lords (*totis viribus obnitente præside*) found such writs as patents and the like were not the subject matter of a certification, because the pursuer's and defenders' rights were not *circa idem*. And my Lord Advocate reasoned against the pursuer's consequential interest, that if it were enough to sustain the admitting a certification, then, by the same rule, a man only served heir to his father might crave improbation or certification against writs granted by his goodsire or others, though he is not served heir to them, there being a good consequential interest. *2do*, A man infest in a mill might upon that ground crave certification against the evidents of another mill near him, by which he finds himself hugely grieved and prejudged in the thirl or sucken of his mill. *3tio*, One man having a fair might by this account improve the writs of another heritor's fair, whereby he finds his customs diminished; and yet all thir are absurd.

*Advocates' MS. No. 298, folio 124.*

1672. *January 16.*

A WOMAN in Aberdeen being at the point of death disposes some tenements of land and other heritage to . She, recovering of her sickness, raises reduction of the said disposition upon thir heads; as being *omnium bonorum, sine omni causa onerosa* done *in lecto ægritudinis*; and so as it might have been questioned by her heir, *multo magis* may it be done by herself, since the heir can have no greater power than the defunct had; that at most it was *donatio mortis causa*, which being in case of death, that not existing the donation falls; *magis enim vult se habere quam eum cui donat, et magis eum cui donat quam hæredem suum*; that it was *donatio inofficiosa*, the questioning whereof, though it was competent only to the children and other nearest of kin to the donatar, and that not for the whole, but only *in quantum* it was immoderate, and absorbed their legitim portions, yet *a fortiori* it seems most proper to the parties' self to reduce their gift to a mediocrity; that the *donatarii* were ungrate, in so far as they refused to reponer her to her own place upon her reconvalescence; and so of the common law she might annul and revoke her gift, &c.

To all which it was ANSWERED, That this action was a novelty in our law; that this age, as barren of all charity and gratuitous deeds, knows no donations, and therefore allowed no revocation of deeds once consummated; that it was not *in lecto*, since she did not die of that sickness; though the heir will be reponed against a deed done by his predecessor *in lecto*, yet it was never so much as attempted by the party's self; that she could not pretend to the benefit of minority