SECT. XIX.

Turpis Causa;—Proof of the Tenor,—how Proponabe.

No 79.
In a reduction of a bond at the instance of the granter's heir; pleaded against the creditor, that he was only a name for a *pellex* of the deceast, consequently there was *turpis causa*. Found that this, implicating a charge of adultery, could not be thus incidentally inquired into.

1624. *February* 18. FERNE *against* Captain WISHART'S HEIR.

IN an action betwixt the heir of umquhile Captain Wishart, and one Ferne, whereby a bond was desired to be registrate, at the instance of Ferne, against the heir foresaid, which bond was made to the said Ferne, by umquhile Captain Wishart, containing the sum of 1000 merks; against the which the defender using for an exception, his action of reduction of the said bond, and reasons thereof, viz. that the name of the creditor insert in the bond, was only borrowed, to the behoof of Katharine Leyes, who was concubine to the Captain, giver of the bond, with whom he conversed, and the same granted to her, he having then a married wife, and so the same being given *ob turpem causam et ut præmium adulterii*, ought not to be sustained, to produce any action thereupon. THE LORDS found, That this defence and pursuit of reduction, tending to the trial and probation of a fact of adultery, was prejudicial, and in effect a precognition to a criminal pursuit, which might be moved against the woman, for adultery committed by her; which being moved before the Justices, this action preceding, might be a probation to the Justices, and assize, whereupon her life might be indamaged; and therefore found, that the trial of that turpitude could not be taken in this pursuit, or defence, which tended so prejudicially to the conviction of the party, and hazard of her life before the Justices; and consequently found no process, in the reduction, and repelled the defence of the alleged turpitude, while the same should be tried before some ordinary and competent judge.

Act. *Aiton & Stuart.* Alt. *Hope & Nicolson.* Clerk, *Gibson.*
Fol. Dic. v. 1. *p.* 176. *Durie, p.* 112.

No 80.
In an improbation of the grounds and warrants of an inhibition *in re antiqua*, a proving of the tenor was re-

1701. *June* 12. MEIN *against* DUNSE.

THE Lord Crocerig reported Mr Andrew Mein of Eastmoriston *contra* Mr Thomas Dunse of Graveldykes. Bell of Raccleugh, John Dunse, and Wilkieson of Eastmoriston, grant bond to John Sheill for L. 1200 in 1652; and Dunse having paid the debt in 1653, he took assignation thereto, and pursued the heirs of Wilkieson in 1662, and obtained a decreet against them, whereon he served inhibition, and adjudged, and pursued for mails and duties. Mein acquires the

No 80.
ceived *incidenter* in the same process.

lands of Eastmoriston from Wilkieson, and being pursued in a reduction *ex capite inhibitionis* served prior to his right, he raises a reduction and improbation of the grounds and warrants of the inhibition; wherein Dunse, for satisfying the production, gives in the extract of the bond, bearing to be registrate in November 1652, and also an extract of the assignation. Mein insisting for certification against the principals, it was *alleged*, That *in re tam antiqua* no certification could be granted, seeing the bond was registrate 49 years ago, and much diligence had followed thereupon, and was never quarrelled during all that time; and for the *casus omissionis*, it might very probably fall by and miscarry in that time; and they had raised a proving of the tenor on the foremention articles and adminicles. And in a circumstantiate case like this, an extract was sustained to stop a certification, 2d January 1675, observed both by Stair and Dirleton, Thoirs against Forbes of Tolquhoun, *voce* IMPROBATION. *Answered*, Improbations were the great security of the people, and extracts of personal bonds can never be sustained; for where they are not extant, law presumes they have been paid, retired and cancelled, which is all that uses to be done in such cases; as Stair, in his Institut. shews, part 4. anent proving of tenors, and Dirleton's *dubia juris*, *voce* TENORS;—and no regard to the raising of the tenor, for it was not done till the certification was craved; in which case, the Lords use not to regard them so as to stop certification, as was found in the late process Brown against Craw, *voce* TENOR. And for the decision, there was a homologation of the debt in that case which influenced the Lords, and it also stood suspended, so it noway meets: But there is a practique which makes for the pursuer, No 37. p. 1755. Fumerton *contra* Lutefoot, where an extract was refused, though the debt had attained possession.—— THE LORDS thought it hard to refuse his proving of the tenor *hac loco*, though he had been long in raising it; and, on the other hand, it was unreasonable to delay the pursuer of the improbation; therefore they declared they would receive the tenor *incidenter* in this same process, and hear them summarily on the relevancy of the adminicles, without farther delay. Some proposed to grant certification, and leave them to prosecute their tenor, as accords; others to supersede extracting of the certification till November next, that *medio tempore* they may insist in making up of the tenor; but the LORDS took the middle course betwixt these two. There was one circumstance which rendered this probation of the tenor the more suspect, that at the time when this bond was registrate in November 1652, the English Judges gave the party back the principal writ together with the extract, and it was not kept at the register, as is done now; and so the party is more answerable for its miscarrying when it was in his own custody, than he can be reasonably supposed to be in the other case; though in both he is bound to produce the principal, when called for by improbation.

Fol. Dic. v. 1. *p.* 176. *Fountainhall, v.* 2. *p.* 113.