1667. *January* 3.

EARL of SUTHERLAND *against* EARLS of ERROL and MARISHALL.

No 48.
Whether a retour, being the sentence of a court, altho' posterior to retours called for, ought to be sustained as a title to require production of the defender's rights?

THERE being a decreet of Parliament ranking the Nobility, whereby the Earl of Sutherland was put after the Earls of Errol and Marishall; in which decreet there is a reservation to any to be heard before the Judge Ordinary, upon production of more ancient evidents; whereupon the Earl of Sutherland pursues reduction of the decreet of ranking, containing an improbation of all writs, patents, and other evidents granted to the defenders, or their predecessors, whereby they are constituted or designed Earls. They did produce the decreet of ranking, and the Earl of Errol's retour, whereupon the pursuer craved certification *contra non producta*, after all the terms were run.—The defenders *alleged* no certification, because they had produced sufficiently, by producing the decreet of ranking and their retours, and the pursuer had only produced his own retour, which was since the decreet of ranking; so that the decreet of ranking was sufficient to exclude all his titles produced.—It was *answered*, The retour being the sentence of a court, serving this Earl as heir to his fore-grandsir grandsir's grandsir's fore-grandsir's goodsir; who is designed Earl by King Alexander II. it was sufficient *in initio litis*; likeas he did formerly produce the original evidents, and which was now in the clerk's hands, and might have been seen by the defenders if they pleased.

THE LORDS found the retours not sufficient alone, and ordained the rest to be reproduced, and seen, by the defenders.

Stair, *v.* 1. *p.* 424.

No 49.
A defender in a reduction and improbation, having produced an infeftment in the lands, the rights of which were craved to be reduced; and the pursuer alleging that these lands were part of those contained in his title, he was obliged to prove this averment, before a term to produce was granted against the defender

1669. *January* 20. MR JOHN HAY *against* TOWN of PEEBLES.

MASTER JOHN HAY the Clerk having pursued a reduction and improbation against the Town of Peebles, of all right of Ascheils belonging to him in property, containing also a declarator of property of the said lands of Ascheils, and that certain hills lying towards the town lands of Peebles, are proper part and pertinent of Ascheils; he *insists* in his reduction and improbation, for certification, or at least, that the defenders would take terms to produce.—The defenders *alleged* no certification, because they stand infeft in these hills in question, *per expressum*, and the pursuer is not infeft therein.—The pursuer *answered*, That he offered to prove that they were proper part and pertinent of the lands of Ascheils, whereof he produces his infeftment.—The defenders *answered*, That till the same were proved, they were not obliged to take terms to produce, or otherwise, upon this pretence of part and pertinent, before the same were instructed, any party might necessitate all his neighbours to make patent to him their charter-chests.—The pursuer *answered*, That the defenders ought to

take a term to produce, and that before certification, at that term he would prove part and pertinent, and alleged the practique in the case of the Town of Stirling, observed by Durie, 24th June 1625, No 18. p. 6621. No 49.

THE LORDS sustained the defence. and would not put the defenders to take terms, till the lands in question were first proved to be part and pertinent, and allowed the pursuer to insist *primo loco* in his declarator for that effect; and as to the practique alleged, they found in that case, the defenders alleged upon no right, whereas the defenders propone here upon an express infeftment.

Fol. Dic. v. 1. *p.* 445. *Stair, v.* 1. *p.* 585.

*** Gosford reports this case:

1669. *January* 19.—IN an improbation pursued at Hayston's instance against the Town of Peebles, bearing likewise a declarator of property of the lands of Eastshiells, wherein he called for all evidents of the Town of Peebles, of a commonty which he alleged was part and pertinent of Eastshiells; the LORDS refused to grant certification, seeing the pursuer was not specially infeft in the said commonty, which was contained in the Town of Peebles' infeftment; but ordained him first to insist in his declarator of property, because there was no reason to cause the Town produce all their evidents to a person who was not specially infeft.

Gosford, MS. No 87. *p.* 31.

1671. *July* 14. DUNBAR *against* MAXWELL.

No 50.

AN apparent heir, not retoured, has no title to pursue an improbation of deeds derived from his predecessors. See Johnston against Johnston, No 45. p. 6640.

Fol. Dic. v. 1. *p.* 442. *Gosford. Stair.*

*** This case is, No 86. p. 2223.

1671. *November* 22.

The LAIRD of Rowallan *against* The EARL of TWEEDDALE, LORD RUTHERFORD, and Others.

No 51.
A general service is a sufficient title in an improbation of rights affecting an estate, in which the

IN an improbation pursued at Rowallan's instance, as heir to his predecessors, who were infeft in the lands of Ingerston and Spittlehaugh, it was *alleged*, 1*mo*, That he being only general heir, could not pursue an improbation, which was to take away the defenders real right of their lands. This defence was repelled, in respect his predecessor's infeftment was produced, to whom he was served heir in general, and the allegeance only competent in a reduction. 2*do*, It was