

as to the defender's father's charter, it cannot exclude the pursuit, unless the defender were infeft, at least served heir to his father. *2do*, The pursuer produces his father and goodsire's infeftments, anterior to the defenders. The defender *duplicated*, That the common stile in all improbations and reductions, is a production of all rights made to the defender and his predecessors, to whom he may succeed *jure sanguinis*, and therefore the defender produceth sufficiently, viz. his father's charter, to whom he may succeed *jure sanguinis*, which is anterior to, and exclusive of the pursuer's infeftment. Neither is his reply relevant to force the defender to produce upon the production of his father or goodsire's infeftments, unless he were actually served heir to them; for his being apparent heir is no active title, though the defenders being apparent heir, is sufficient to exclude any farther production.

THE LORDS found the defender's father's infeftment being anterior to the pursuer's infeftment, did exclude certification, though the defender did not instruct himself heir to his father; but found the pursuer could not urge certification upon any of his predecessor's infeftments, unless he were served heir to them; and that he ought instantly to verify the same, being his active title, at least before any production; and would not sustain it to be proved that he was heir, by reply; and therefore assoilzied the defender *ab hac instantia*, upon the priority of his father's right to the pursuer's title produced.

Fol. Dic. v. 1. p. 451. Stair, v. 2. p. 784.

. See the sequel of this case, No 27. p. 5195, *voce* GROUNDS AND WARRANTS.

1682. February.

ROBERT DEANS *against* OSWALD.

No 145.

IN a reduction and improbation at the instance of a posterior against a prior appriser, the defender having produced his apprising, the pursuer craved certification *contra non producta*.

Alleged for the defender, No certification can be granted *contra non producta*, in respect the defender hath produced sufficiently to exclude the pursuer's title, viz a prior though unexpired apprising; just as a prior infeftment would the title of a posterior, although it might be more doubtful if his apprising could be obtruded against a postesior right of the lands by disposition and infeftment.

THE LORDS found there could be no certification *contra non producta*; but that they might reason on the production.

Harcarse, (IMPROBATION AND REDUCTION.) No 525. p. 145.

1696. February 7.

SIR DONALD BAIN of Tulloch *against* SIR ROBERT GORDON of Gordonston.

No 146.

IN a process between Sir Donald Bain of Tulloch and Sir Robert Gordon of Gordonston, for reduction and improbation of his rights on the lands of Ar-

No 146.

boll, Sir Robert at first produced three apprisings; then he took them up all but one, and Tulloch craved certification *contra non producta*. He *alleged*, you cannot, because I exclude you with what I have already produced. *Answered*, I am not bound to debate the validity of my title till the production be satisfied, else this were to discuss the reasons before *avisandum*; and if you succumbed in this, then you might drop in the second, and so a third and fourth, and renew the debate on every one of them, by which the production should never be got closed, nor certification obtained. THE LORDS found he might debate why his first production excluded the pursuer, and so needed to produce no more; but if that were not found sufficient to exclude the pursuer's title, then certification was to be granted, if he made no further production, without allowing him again to renew the debate that he had produced sufficiently, and needed not produce any more; else they might draw in the discussing the reasons of reduction before the *avisandum*, contrary to all form, and debate on every single writ they produced, which might spin out reductions *in infinitum*. See Lauderdale against Biggar, No 141. 6716.

Fol. Dic. v. 1. p. 451. Fountainhall, v. 1. p. 709.

1709. January 21.

ROBERT FARQUHARSON of Finzean *against* SIR PETER FRAZER of Doors.

No 147.

The defender in an improbation having produced a charter and sasine on an apprising prior to the pursuer's right, without producing the apprising, the Lords granted certification *contra non producta*, altho' the defender offered to support his right by proving 40 year's possession thereon, which was not competent in that state of the process to exclude the pursuer.

IN the reduction, improbation, and declarator, at the instance of Finzean against Sir Peter Frazer, the defender having produced a charter and sasine upon an apprising, *anno* 1653, of the lands in controversy, a year prior to the eldest right produced by the pursuer, the pursuer craved *avisandum* might be made with the production and certification *quoad ultra*, because, the charter produced could not exclude his title, unless the apprising on which it proceeded were also produced, seeing the charter is but a relative writ.

Alleged for the Defender, Though this charter and sasine *per se* within the years of prescription, would not suffice to exclude the pursuer, the same is a good title of prescription in the terms of the act 12, Parliament 1617, which doth not distinguish whether the charter be an original or relative writ: And the defender and his authors have possessed thereby for the space of 40 years.

Replied for the Pursuer, He must have certification *contra non producta*, unless the defender could exclude his title *instante* by the writs produced; for prescription is not competent to be alleged in this state of the process to support the defender's right, which would lead the pursuer into an act of litescontestation, while he is only in an act of production, and can only be obliged to debate upon excluding in the terms of that act; seeing in a process of improbation, till the production be satisfied, there can be no dispute