

parent heir, who is served and retoured, which will be sustained, if he be infest before he insist in the action, and in the case of a pursuit at the instance of an executor decerned, which will be sustained, the confirmed testament being produced before extract, albeit the confirmed testament be absolutely necessary to make up the title. THE LORDS sustained the improbation, as also sustained the reduction, towards the production of all personal rights, such as backbonds and others, but refused to sustain process of any real rights.

*Sir P. Home, MS. v. 1. No 512.*

No 57.

1686. *March.*

The CHILDREN of BANGOR *against* DUKE and DUCHESS of HAMILTON.

No 58.

AN adjudication led by the Duke of Hamilton being quarrelled as null and informal by another adjudger, because, *imo*, There being a summons against the defunct's debtor's son, containing both a transferring of an act of count and reckoning against the father, and a charge to the son to enter heir, for payment of the debt libelled in the principal summons; and the son having renounced to be heir, the pursuer took out a decret *cognitionis causa* for payment, without extracting a distinct sentence of transference, as he ought to have done; *2do*, The decret was extracted upon a licence to pursue without confirming the debt, whereas the licence was conceived *excludendo sententiam*.

*Answered*; The diligence is formal, in so far as, *imo*, The same hath proceeded upon a sentence both in the transference and *cognitionis causa*; and the Lords use not to loose adjudications upon such a nicety; *2do*, It is only the interest of the Commissaries to quarrel the not confirming before extract; and the Duke could not confirm, not knowing if he would recover payment by the diligence; but, upon payment, he is content to confirm, and grant discharge.

THE LORDS would not annul the Duke's adjudication, but allowed the pursuer to debate against the debt and ground thereof, and sustained the adjudication only *in quantum* the debt adjudged for was not convelled, and declared it current and redeemable.

*Fol. Dic. v. 2. p. 307. Harcarse, (COMPRISINGS.) No 321. p. 79.*

1695. *January 24.*

KEITH *against* Mr JAMES CATHCART.

No 59.

MERSINGTON reported Alexander Keith *contra* Mr James Cathcart of Carbis-ton, in a reduction and improbation of the rights of a tenement. *Alleged*, Your title cannot force me to produce any real rights, because you are not infest on your adjudication. *Answered*, He has a charge against the superior, which is equivalent. THE LORDS found this title sufficient to force production in the im-

Found in a process of reduction and improbation, that an adjudication with a charge against the superior, was

## No 59.

not sufficient title in the pursuer, to cause the defender to produce real rights, *quoad* the reduction, but only in the improbation. The pursuer having, after that interlocutor, procured infestment, the Lords received the title, though posterior to the summons.

probation, because any having interest may propone "false and feigned;" but that he could not insist in the reduction of real rights perfected by infestment, unless he were also infest, no more than he could pursue a removing.

1695. December 3.—MERSINGTON reported Alexander Keith writer in Edinburgh against Mr James Cathcart of Carbiston. The Lords, 24th January last, had found his title of an adjudication, with a charge against the superior, not sufficient to cause the defender produce his real right *quoad* the reduction, but only in the improbation. Since that time Mr Keith procures himself infest, and now insists that he may take a term in the reduction also. *Alleged*, His title to pursue the reduction being formerly cast as null, and now made up, not only since the citation on the summons, but posterior to the Lords' interlocutor, the former instance perishes, and he must raise a new summons, especially in such an unfavourable pursuit, else it should be *filius ante patrem*. *Answered*, That he had a title, only the Lords found it defective and incomplete; and he having now perfected it, *actiones non sunt multiplicandæ sine necessitate*; and the Lords have oft permitted a part of a title to be produced *cum processu*. See 21st July 1676, Drumelzier, No 52. p. 13282.; and lately, John Jolly against the Viscount Kenmuir, and the Duke of Gordon against his Vassals, see APPENDIX.; and in a pursuit for executry, the Lords have allowed to confirm before extract. THE LORDS received the title *hoc ordine*, though posterior to the summons, and found that there was no necessity of raising a new process. See TITLE TO PURSUE.

*Fol. Dic. v. 2. p. 305. Fountainhall, v. 1. p. 662. & 682.*

1702. January 22.

DAVID GRANT, Wright, against DANIEL SIMPSON, Writer to the Signet.

## No 60.

A purchaser of a tenement having, upon his disposition, raised a declarator of immunity from a servitude, process was sustained, though he was not infest till after the date of the summons.

EACH of them having a tenement at the Netherbow, Daniel claimed a passage or entry through David's land to his own, and stopped a syvor for carrying off the water; whereupon David raises a reduction, and a negatory action of declarator of his immunity and freedom from any such servitudes, and that the close is his own, and the little shop therein, and so cannot be made a common entry by Daniel, &c. *Alleged*, No process, because your sasine is posterior to the date of the summons and day of compareance, and so is *filius ante patrem*, and he must raise a new summons; and that it has been oft so decided, 20th March 1623, Lord Yester's Heirs, No 15. p. 6618. where the process was cast, because the sasine was posterior to the summons; and 1st December 1630, Ramsay of Cockpen, No 40. p. 6634.; 20th June 1627, Laird of Touch, No 4. p. 10430.; and 20th January 1665, Little, No 26. p. 5194. *Answered*, That his sasine, though posterior to his summons, was given out therewith, and