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 *instanter* 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 except upon dilatories against the interest of the pursuer, or his title. Nor can litiscontestation be made in this case, unless possession and prescription had been alleged *in initio*, which would have occasioned a complex act of production and litiscontestation. No 147.

THE LORDS granted certification *quoad ultra*.

Fol. Dic. v. 1. *p.* 451. *Forbes, p.* 309.

*** Fountainhall reports this case:

1709. *February* 3.—FARQUHARSON of Finzean pursues a reduction and improbation against Sir Peter Fraser of Durris, of his rights to the lands of Midbelty; and the terms being all run, Sir Peter produces a charter under the Great Seal, in 1653, of these lands from Oliver, then protector, and a sasine in his author's person. Finzean craves certification *contra non producta*, seeing it is only a charter proceeding upon a comprising, and the said comprising, being the warrant thereof, not produced; and so being an incomplete right, it cannot stop his certification. *Alleged*, It is sufficient to exclude you, because, 1*mo*, The charter is a year prior to any right produced in your person. 2*do*, It is valid by the act 12, Parliament 1617, introducing prescription, being more than 40 years ago; and so being fortified by prescription, there is no need by that act, to produce the warrant of the charter. *Answered*, It is not doubted but a defender in an improbation may say, I will not suffer you to get a certification *contra non producta*, because I have produced sufficiently to exclude your right; but then it must be such a production as instantly does it, without running into an act of further probation; but Sir Peter's is not such, for he must prove his 40 years possession to support it, and I must prove my reply of interruption, which runs a long course; and if you succumb, I just come back to the point I was at, of craving a new certification, after the delay of some years, which is absurd, and destructive of all form; and therefore this allegeance must be reserved to the debating of the reasons of reduction, after avisandum is made with the writs produced, and a warrant to discuss, and then it will come properly in; but here, it is noways competent. *Replied* for Sir Peter, My defence is instantly verified by my charter and sasine, dated more than 40 years ago, and prior to any right in your person; and possession is presumed conform thereto, unless you say interruption, or another possessed; and then it is not I, but your reply that gives rise to the delay. It is true, if the right produced were within prescription, then I behoved to produce the apprising, as the warrant of it; but being above 40 years, the title is good without the warrant. THE LORDS, by plurality, found a defender might exclude a certification, if it was instantly verified; but did not think Sir Peter's production a present verification, but behoved to run terms of probation to adminiculate and support it, No 147. which would make two acts of litiscontestation, and could not be received in this state of the process; and therefore granted certification, unless he produced the apprising as the title of his right. He was unwilling to produce it, because lawyers search nullities in such rights to overturn them, and a close charter-chest is oft the best security; but the Lords found *ut supra*. See Dunbar, 20th December 1662, No 140. p. 6715.; and 7th December 1667 Lauderdale, No 141. p. 6716.

Fountainhall, v. 2. p. 487.

No 148. 1740. *January* 18. Lamont *against* Lamont.

In a reduction and improbation of land rights, it is a good defence that the defender has a preferable title to the subject, exclusive of the pursuer's right, consequently that the pursuer has no interest to insist in the process; and the defender will be allowed a term to prove his defence in the ordinary way. But after a term is taken to produce and an act extracted, which is virtually an acknowledgement of the pursuer's title, an offer to exclude, or to show that the pursuer has no interest, by production of a preferable right, ought not regularly to be received, being competent and omitted; yet even in this case, an offer to exclude will be admitted of, provided it be instantly instructed. For this reason, after a term is taken to produce, the defender offering to exclude the pursuer by production of a habile title, and offering to prove a 40 years possession, the Lords will not admit of the proof in this state of the process, but will reserve it till discussing the reasons of reduction. *See* Appendix. See Farquharson against Fraser, No 147. p. 6720.

Fol. Dic. v. 1. *p.* 451.

*** The like principle of decision was recognized in the case, 29th January 1735, Ainslie against Watson. *See* Appendix.

1741. *June* 9. Cuming *against* Abercromby.

No 149.
Defenders in an improbation were allowed before production, to prove by witnesses, their own and their authors' immemorial possesion of the estate controverted.

It is a settled point in form, in a reduction and improbation, that the defender producing a right, whereby he pleads to exclude the pursuer, will not, after extracting the act on the first term, be allowed a proof to support his plea; but even where the defender produced a right *in initio* to exclude the pursuer, and in support thereof insisted for a proof of 40 years possession, a doubt was stirred by some of the Lords, whether or not in any case the defender, in a reduction and improbation, could be allowed to plead exclude, unless the right produced by him was such, as of its own nature did exclude without the aid of a proof.