

No 65. trine would quite enervate the design of that excellent useful process of reduction and improbation, where certification passes against the writs not produced ; which invention is peculiar to this kingdom, and forces the parties to bring all their rights and claims upon such lands into the field, that in a competition it may appear who has the best right to the property ; and I may remove all impediments out of the way that can disturb my property or possession, from whatsoever person they flow, as Stair observes, lib 4. tit. 20. sect. 14. And to restrict the effect of certifications only to writs flowing from the same authors whom you represent or derive your right from, is to narrow, diminish, and abridge this useful process. *Replied*, Whatever inconvenience may be in this restriction, there is more danger and damage the other way ; for, suppose a man adjudges lands from his debtor, and puts in baronies and tenantries whereto he never had any right, shall this entitle you to pursue an improbation against the heritors and possessors of these lands, and make them open and propale their charter chests to you, who show no right in your debtor's and author's person to these lands? Such a practice were of the utmost consequence to shake the security of the lieges ; and therefore the LORDS have ever restricted this general clause calling for production of the hail writs and evidents of the lands in question only to those granted by themselves, their authors and predecessors, whom they represent, and no further, as Hope observes, 20th Dec. 1622, Lord Cathcart against his Vassals, No 14. p. 6617. ; Durie, 18th Dec. 1623, Monymusk against Forbes, *voce* PRESCRIPTION ; and Stair, 24th July 1673, Shaw against Watt, No 52. p. 6644. and many since, as Hay of Alderston, Dallas of St Martin's, Cathcart of Carbiston, * &c. *Replied*, The old decisions run somewhat in that strain, before improbations were fully understood or brought to a consistency ; but the latter have not been so uniform, and Stair seems to think it an inconvenient custom.—THE LORDS would not recede from the current practice, and therefore sustained the defence, That the pursuer had no interest to reduce any writs or rights, but those flowing from his authors, or to whom he connected a progress ; but wished some regulation thereof in time coming by an act of sederunt ; but that will require mature deliberation, that by such general clauses the lieges may not be vexed, nor forced to debate with one who has no right from their author, but from a third party ; and it were fit the inconveniencies on both sides were rectified and prevented.

Fol. Dic. v. 1. p. 444. Fountainball, v. 2. p. 542.

1712. *January 29.*

JAMES OGILVIE, Son to the deceased JAMES OGILVIE, younger of Boyne;
against DAVID EARL of LEVEN.

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A bond being
granted for
the price of
land by the

JAMES OGILVIE having right by progress to a bond granted by William Hamilton of Wishaw, to Walter Boyston, for a part of the price of the lands of

* Examine General List of Names.

Weddersbie, sold to Wishaw by James Arnot of Fairnie, whereby Wishaw obliged himself to pay to Boyston 8000 merks at Martinmas 1669, provided always, That James Arnot did purge and take away all inhibitions raised and executed against him before the date of the disposition of the lands granted by him to Wishaw; he James Ogilvie insisted in a reduction and improbation against the Earl of Leven, wherein he called for an inhibition executed against Fairnie by the Earl of Melville, the defender's father.

Alleged for the defender; Though reduction of the inhibition called for might tend to the pursuer's advantage, that consequential interest could not furnish a sufficient active title in such a process, to him who is neither heir nor creditor to James Arnot of Fairnie, nor hath any pretence of right to the lands affected with the inhibition; more than an apparent heir could sue a reduction and improbation for clearing the inheritance of incumbrances; no man having interest to debar another's right but he that hath right himself. Besides, an absolvitor in this action would not be *res judicata*, to hinder Wishaw to plague the defender again with the like process. *2do, Esto*, The bond had been granted for a part of the price of the land, the pursuer could be in no better case than an assignee to the price of land contained in a minute, who could not, by a reduction and improbation, purge these lands of incumbrances, for want of a title, although he could not claim the price till incumbrances were purged. Again, if no personal creditor can reduce a disposition of lands, June 24. 1709, Brown of Thornidykes against his Brother, *voce* TITLE TO PURSUE; far less can the pursuer, who cannot so much as pretend to be a creditor, or to have any interest in the lands affected, reduce or impugn any real diligence affecting the same.

Replied for the pursuer; Albeit a personal creditor cannot reduce real rights and diligences affecting lands, yet as Fairnie and Wishaw, deriving right from him, had each of them an unquestionable title to quarrel and reduce inhibitions affecting their land; so by the burdening the sum in the bond granted to Boyston, with the purging of the inhibitions, he became delegated as debtor for the performance; and their right or title is understood to be conveyed to him, since otherwise the bond granted to him had been elusory and of no effect. An absolvitor in this process would secure the defender against all action upon the foresaid bond, in whose person soever it may come, but not from pursuits upon separate titles. *2do*, It is contended, That an assignee to the price of land contained in a minute, comes in place of the person obliged to dispoise, and hath the same action competent to him for disburdening the lands that is competent to the principal contractor; and for the same reason an executor of a dispoiser of lands, who hath right to the agreed price, could purge incumbrances.

THE LORDS sustained the pursuer's title, and found the defender obliged to take a term to produce the inhibition called for.

Fol. Dic. v. 1. p. 445. Forbes, p. 581.

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purchaser to a third party, payable only after the seller should have purged all inhibitions used against him before the sale, that third party was found entitled to pursue reduction and improbation of inhibitions obstructing his payment.