

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 decret of Parliament ranking the Nobility, whereby the Earl of Sutherland was put after the Earls of Errol and Marishall; in which decret 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 decret 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 decret 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 decret of ranking and their retours, and the pursuer had only produced his own retour, which was since the decret of ranking; so that the decret 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-grand-sir grandsir's grandsir's fore-grand-sir'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 given 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