1671. *July* 14.

SIR DAVID DUNBAR *against* SIR ROBERT MAXWELL of Orchardtoun.

No 86.
The Lords sustained process in a reduction and improbation of a real right, without finding any necessity for the pursuer to call the defender's author; where the author did not appear to be liable to the defender in any warrandice, and so had no interest in the cause.

IN a reduction and improbation at Sir David's instance, as being infeft in the Lordship of Kirkcudbright against Orchardtoun, for reducing and improving all writs made to him by Lord John, or any of his predecessors, to whom he might succeed *jure sanguinis*; it was *alleged*, 1*mo*, That the pursuer did not produce a sufficient title, viz. an infeftment flowing from the said Lord John, as heir to any of his predecessors, granters of Orchardtoun's rights craved to be improven, 2*do*, All parties having interest were not cited, viz. the heirs or apparent heirs of the Lords Kirkcudbright, from whom the defender derived his right. It was *replied* for the pursuer, That there being a term assigned for production and certification craved to be extracted, these defences being but dilatory, could not be now proponed, and were not of themselves relevant; there being no necessity to produce any more for an active title but the pursuer's own infeftment, neither need the pursuers call the heirs or apparent heirs of the granters of the defender's right, seeing he himself might call them for his warrandice, which is the only pretended reason that they ought to be called. THE LORDS finding that in form and constant practice, the pursuer's author's right, in an improbation, should be produced where these rights are voluntary dispositions, which cannot be done in comprisings, being a legal diligence, ordained in place thereof, that the debtor's sasine, from whom they comprised, should be produced; as likewise, that the heirs or apparent heirs of Orchardtoun's authors, from whom he had right, being condescended on, should be cited before certification.

Gosford, MS. p. 187.

*** Stair reports the same case thus:

SIR DAVID DUNBAR of Baldune being infeft upon several apprisings in the estate of Kirkcudbright, pursues reduction and improbation against Sir Robert Maxwell of Orchartoun, of all rights of the said estate granted by Baldune himself, or by umquhile John Lord Kirkcudbright, or Thomas Lord Kirkcudbright, or any of their predecessors, to whom they may succeed *jure sanguinis* to the defender. It was *alleged*, no certification of any writs made by the predecessors of John or Thomas, Lords Kirkcudbright, to whom they might succeed *jure sanguinis*, because that can be no active title to the pursuer; for, if John Lord Kirkcudbright himself were pursuing a reduction, he would not have a sufficient active title to reduce the writs made by any person to whom he was apparent heir, unless he had been actually heir; so neither can the pursuer his appriser have further interest than Lord John himself; for albeit the clause is relevant *passive* against the defenders to produce all writs made to them, or to

No 86.

their predecessors, to whom they may succeed *jure sanguinis*, because reductions and declarators are competent against apparent heirs, without any charge to enter heir; yet they are not competent to apparent heirs till they be actually entered. It was *answered*, That the pursuer being publicly infeft, has good interest to call for all writs that may burden the land, to the effect he may improve the same, as an impediment hindering his infeftment; but specially an appriser who has not his author's rights; and that this has been always the stile of the general clause in improbations.

The Lords found the defence relevant, and would grant certification against no writs, but such as were granted by persons whose infeftments and retours should be produced before extract.

The defender further *alleged*, no certification against any rights made by Thomas or John, Lords Kirkcudbright, to the defender, because no person was called to represent them; whereas it is known that George, Lord John's nephew, is both apparent heir-male and of line, and that this has been the common defence always sustained. The pursuer *answered*, that the only ground of this defence is, when defenders have warrandice from their authors; and therefore the pursuer ought to call their authors, that their rights inferring warrandice upon them may not be reduced, they not being heard; but here the defender produces no right from Lord John, or Lord Thomas, and so the allegiance is not relevant against the production; but only in case such rights be produced, it will be relevant, when the pursuer insists to reduce the writs produced.

The Lords repelled the defence, and reserved the same, if any right should be produced by the defender bearing warrandice.

Fol. Dic. v. 1. p. 138. Stair, v. 1. p. 755.

1684. *November.*

Lord Advocate *against* Lord Cardross and Laird of Livingston.

No 87.
Authors liable in warrandice, must be called.

It being *alleged* by the defender in an improbation, that no certification could pass against writs granted by his authors, unless the authors immediate and mediate were called,

Answered for the pursuer, It is enough to call the immediate, who may intimate to the mediate authors, as they find themselves concerned.

Replied, The mediate authors ought also to be called, because they are liable in warrandice.

The Lords found, That all authors should be called by the pursuer, as they are condescended on by the defender, who is to give his oath of calumny, that the persons in the condescendence are authors, and liable in warrandice. And if the pursuer will not be at pains to cite old authors, he may pass from the rights made to or by them, and restrict the libel. Here was a condescendence