

1678. July 13. MADAM GUN *against* SINCLAIR of South Dun.

No 55.

THE LORDS sustained a pursuit, where the retour was dated after the summons, because an universal title; as they do with an executor producing a confirmed testament before extract; but if the pursuit be on a singular title, as an assignation, the Lords make a distinction of this from the other cases, and require the title to be before the summons, as was decided between Mr John Abercromby of Cliesh, and Anderson, 15th November 1666, No 48. p. 13277.

Fol. Dic. v. 2. p. 303. Fountainhall, MS.

1683. March —. Lord LIVINGSTON *against* GORDON.

No 56.

IN an action of mails and duties, at the instance of a donatar of forfeiture, it was *objected*, no process till the gift be declared. THE LORDS allowed declarator to be raised *incidenter* in the present process.

Fol. Dic. v. 2. p. 307. Harcarse. P. Falconer.

* * * This case is reported by Harcarse, No 18. p. 3416. *voce* DECLARATOR; and by Harcarse and P. Falconer, No 41. p. 4714. *voce* FORFEITURE.

1683. November 10. DUNDAS *against* WALLACE and BIGGAR.

No 57.

LORD CARSE probationer reported Mr William Dundas Advocate his reduction and improbation against Hew Wallace and William Biggar, anent the estate of Wolmet. The LORDS found the pursuer being only a naked adjudger could not call for production, in order to reduction, (for if he restricted himself to improbation, he might,) of any real right, or infestments, but only of personal rights, whereupon no infestment had followed, and that the charge Mr William had given to the Earl of Lauderdale, superior of Wolmet, as a part of Musselburgh, to enter him, was not sufficient to give him interest to call for real rights, because the charge was done since the raising of his summons. Though a retour posterior to a summons will be drawn back, because it is only declaratory of the heir's prior right, yet an adjudger from an apparent heir being a singular successor, ought not to have that personal privilege, and therefore they found he could not urge that charge, unless he raised a summons posterior thereto. Some are of opinion, that even a charge against the superior (without also denouncing him, or an actual infestment,) is not a sufficient ground in a reduction to force the production of real rights. See TITLE TO PURSUE.

A charge against a superior, given by an adjudger; after intending a process of reduction, not allowed to draw back to support the process.

Fol. Dic. v. 2. p. 305. Fountainhall, v. 1. p. 241.

No 57.

* * * Harcarse reports this case :

1683. *November*.—IN a reduction at the instance of a simulate creditor of an apparent heir, who had adjudged from him as lawfully charged,

Alleged for the defender, No process on the adjudication, which is but a judicial assignation, in respect the pursuer is neither infest thereon, nor hath charged the superior.

Answered, There is a charge produced.

Replied, The superior was not charged till after the process was called, so that the pursuer having no sufficient active title in his person the time of the summons, the posterior charge cannot accresce to make a title to him a singular successor, though it would be effectual to an universal successor in removings, which are possessory judgments.

THE LORDS sustained the adjudication as a title *quoad* personal rights called for, viz. backbonds, discharges, renunciations, &c. without respect to the charge, whether prior or posterior to the summons, seeing the right of these passes by simple assignation, to which the adjudication answers; but found that the charge or infestment, after the executing of the summons and day of compareance, was informal *quoad* charters, sasines, and real rights of lands, and would not sustain process as to that conclusion, the cause being unfavourable upon the pursuer's part. See TITLE TO PURSUE.

Harcarse, (IMPROBATION and REDUCTION.) No 540. p. 150.

* * * Sir P. Home also reports this case :

1683. *December*.—MR WILLIAM DUNDASS having adjudged the lands and estate of Wolmet from Patrick Edmonston, as charged to enter heir to James and Mr Archibald Edmonstons, his brethren, pursues a reduction and improbation against William Wallace, of the rights of the said lands, granted by the said James and Mr Archibald Edmonstons. Dundas *alleged* for the defender, That the pursuers title being only an adjudication, whereupon no infestment had followed, it could not be sustained as a title to call for production of real rights, and albeit there was a charge against the superior, which would be sufficient in the case of competition of creditors, to prefer the adjudger to any posterior infestment granted by the superior to another creditor, yet that cannot be sustained as a title in a reduction and improbation, unless the pursuer were actually infest, as also the charge against the superior was given since the intending of the process. *Answered*, That a charge against the superior is sufficient not only in the competition of creditors, but also to be a title in reduction and improbation, being reputed in law equivalent to an infestment; and albeit the charge was given after the intending of the pursuers process, yet it doth accresce, as in the case of a reduction pursued at the instance of an ap-

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