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.

No 149.

But it was observed, that anciently there were no such general improbations as are now in use, calling for all a man's writs; that there was no other improbation anciently known, but that wherein special writs were called for to be improved as false, and then there could be no excluding the pursuer on any pretence; but now for a century the general improbation now in use has been practised, as what we call a tentative process, against which it cannot be refused to the defender, in consistency with the act of prescription, to plead an exclusive right, and to support his plea by proof; for as it is statuted by the act of prescription, that after one has possessed 40 years upon an habile title, he cannot be disturbed nor disquieted upon any ground whatsoever, except falsehood; to refuse him a proof of possession in support of his plea of exclude, would be directly to refuse him the benefit of that act of Parliament; for then he would be disquieted notwithstanding his 40 years possession on his title produced, were he notwithstanding obliged to produce his charter-chest to be pryed into by all and sundry.

THE LORDS "found that the defender ought to take a term in the improbation, but that he should be allowed the same term to prove possession in order to support his allegeance of an exclusive right."

Fol. Dic. v. 3. *p.* 311. *Kilkerran*, (IMPROBATION.) *No* 2. *p.* 280.

*** C. Home reports the same case:

IN this process of improbation, the defenders insisted for a diligence against witnesses, for proving their own and their authors' immemorial possession of the estate.

Answered for the pursuer, That the form of the action excluded the allowing any proof by witnesses, until the chequer were closed by a certification; that the defender behoved to take terms to produce, unless he could exclude the pursuer's title by written documents; that no proof by witnesses of any sort could be admitted, till the production were closed; that no act of litiscontestation could be pronounced, until the production were closed; see 19th January 1672, Earl of Queensberry, No 142. p. 6717; 21st January 1709, Finzian, No 147. p. 6720; 8th July 1738, Ainslie.*

Replied, The law allows this process to try the rights to their predecessors' or authors' estates, and in that view it is reasonable. But on the other hand, the law has secured proprietors against the unnecessary propaling the titles to their estates, and the giving an opportunity to prying people to discover any accidental defects that might be in them, however equitable and just their title were; therefore, it has always been held a good defence against this process, and against all other production, if the defender instructed an absolute right of property in the estate. 2*do*, A charter and sasine, with 40 years possession, is a sufficient right to any estate in Scotland; if this were not true, no body could

* This is probably Ainslie against Watson, mentioned p. 6722, although the dates are different.

No 149.

be secure from propaling the titles to their estate, to any person whose predecessors, at whatever distance of time, were possessed of the estate. *3tio*, The defenders cannot discover upon what ground this pretended form of process is founded; the process itself is not grounded on any statute that has given it this form; and as it must be allowed a good defence against producing their titles, that the estate is their property, they must be allowed the opportunity of proving the same; for that a defence should be good, and yet the party not allowed to prove it, seems to be a contradiction.

The Lords allowed the defenders to prove their possession for 40 years backward, &c.

C. Home. No 170. *p.* 286.

1760. *December* 23.

John Grant younger of Rothmaise, and Robert Fleming, great-grandson of John Fleming of Board, *against* Lady Cementina Fleming, and Charles Elphinston, Esq; her Husband.

No 150.
Not competent, in a reduction-improbation, to allow a proof of possession, in order to found prescription upon titles produced, as sufficient to exclude, after acts have been extracted for the first and second terms.

Upon the 24th of August 1374, King Robert II. confirmed a charter granted by Robert Lord Erskine, to Patrick Fleming, of the lands of Board, and others, to be held *de Domino Baroniæ de Lenzie, in feodo et hæreditate.* These lands were possessed by Patrick's descendants, and were in 1583, disponed by John Fleming of Board, to John Fleming then younger of Board, his eldest son.

John Grant younger of Rothmaise, having got a trust-bond from Robert Fleming, great-grandson of the said John Fleming younger of Board, charged him to enter heir to his predecessors in these lands; and in the year 1741, obtained a decreet of adjudication; upon which title a process of reduction, improbation, and declarator, was brought against Lady Clementina Fleming and her Husband, in order to set aside any claim they might pretend to the property.

In this process, days were assigned to the defenders for satisfying the production, and acts for the first and second terms were extracted; but when certification was craved for not-production on the second act, they produced certain writs vesting the barony of Lenzie in the person of Lady Clementina; and *alleged*, That although the lands of Board were not particularly mentioned in these writs; yet as she and her predecessors had possessed them for more than 40 years, as part of the barony of Lenzie, they had acquired right to them by the positive prescription; and had therefore produced sufficient to exclude the pursuers.

Objected by the pursuers, *1mo*, It is not competent to a defender, in a process of this nature, to resort to the plea of an exclusive right, after the pursuer's title has been sustained, acts for the first and second terms extracted, and the