1632. *March* 20. LEE *against* ANGUS and LAUDERDALE.

No 43.
Defenders in an improbation produced rights by which they and their predecessors had possessed 160 years. The pursuer found to be excluded, on this account, along with the circumstance, that his sasine was, in some respects informal.

UMQUHILE David Stuart, Laird of Craigiehall, heritor of the lands of Braidwood, had two sons, John his eldest, and Alexander his second. John Stuart having served himself heir to David, disponed his right to the Laird of Lee, who raised an improbation and reduction, of the rights of the lands of Braidwood, against the Earls of Angus and Lauderdale, who had a right of the same, proceeding from the said Alexander, second son to David. After the defenders had produced their own and their predecessor's infeftments, by virtue whereof they had been in possession of the same lands by the space of a hundred and sixty years, they *alleged*, that they had produced enough to maintain them in their right and possession, especially against the pursuer, who had produced for his title a charter under the Great Seal, dated 1419, of the same lands given to David upon the resignation of his mother, who was heiress of the same, together with a sasine upon that charter; against which sasine were *alleged* these nullities; 1*mo*, It was disconform to the charter, in respect it made mention of one John Munfod, from whom the right of these lands was derived, of whom the charter spoke nothing; 2*do*, Instruments were not taken by David or his attorney, but by his mother, whose liferent only was reserved; 3*tio*, It told not the hour of the day it was given in, which was necessary, *ne quid de nocte fiat;* 4*to*, It had an unusual clause, speaking of the indiction *secundum usum ecclesiæ Scoticanæ*, with other three or four of the same nature; in respect of which nullities in the pursuer's sasine, and the defender's long right and possession unquarrelled, he could not be heard to improve or reduce their rights. The pursuer *replied*, That the arguments against his sasine were not of that force as to seclude him from his action; and next, the defender could never quarrel it, it being his own author's.——THE LORDS found the exception relevant, and assoilzied the defenders.

Spottiswood, (IMPROBATION.) *p*. 169.

*** Durie reports the same case:

IN an improbation, one Stuart descended and served heir by progress to Stuart of Craigiehall, and being infeft in the lands of Braidwood, pursues for improbation of the writs of the said lands, made by this pursuer's predecessor, to whom he was served, and infeft as heir in the same; and by the descendants enumerated in the summons; in which pursuit, the pursuer having produced his said predecessor, to whom he was heir, his charter under the Great Seal of these lands, and his sasine thereof, which was dated *anno* 1419, and his author's charter of the same, granted under the Great Seal to that author of before *anno* 1400, with sundry other evidents, granted to their successors since the Earl of Lauderdale's right, flowing from a second son of the L. Craigiehall,

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whom the pursuer *alleged* was never infeft, nor ever had any right to these lands, and which the pursuer called for as false; the defender *alleged*, That the sasine foresaid, granted to the pursuer's author, *anno* 1419, was null, and could not give interest to the pursuer to call for improving of the defender's writs, and to quarrel them after an hundred years progress of rights and possession, uninterrupted, in his own and his predecessors persons; because the charter, which was the warrant of the sasine, and the sasine were disconform; for the charter was granted to one Alexander Senescallus, and the sasine to Alexander Stuart; and the sasine bore, to be given by virtue of *Breve regis*, which presumed a retour of the party, whereas the charter flows upon the heritor's resignation, and not upon retour; albeit the pursuer *replied*, That Alexander Senescallus, and Alexander Stuart were both one, viz. the one Latin, and the other Scots; and *Breve regis* is to be taken off a precept of sasine out of the Chancellary, which, after 200 years and more, the party is not holden to shew. *3tio*, *Alleged*, The charter bears, 'That the lands are given to the fiar, with 'reservation of the resigner's liferent;' whereas the sasine is only given to the fiar; which the pursuer answered to be no defect, seeing the disponer, whose liferent is reserved, was the fiar's own mother, and she caused take the sasine to her son. *4to*, The sasine bore not, that the same was given to the said Alexander personally present, nor yet to his attorney, and made no mention of any tradition of earth and stone, which are necessary solemnities to the validity thereof; nor bears, that any took instruments for the fiar; whereto it is *answered*, That the sasine bears, 'To be given to Alexander Stuart,' which included that he was personally present, and that his mother took instruments thereupon, and that sasine was given *secundum consuetudinem, et ut moris est in talibus fieri*, which presupposes tradition of earth and stone, and that all solemnities were kept. It was further *alleged*, That the sasine was suspicious for insolite unusual clauses, viz. the indiction of the Pope, enumerated therein, with this clause, *secundum computationem ecclesiæ Scoticanæ*, which phrase was not then used, neither were sasines then in use. Whereto *answered*, That that was no defect in the sasine, in respect of the schism then among the Popes at the Council of Constance, there being three Anti-Popes. Further *alleged*, The sasine made no mention of the hour when it was done, as it ought, and is necessary, that it might be known that it was done at such an hour of the day, *ne quid de nocte fiat*. Whereto *answered*, That the sasine bore, 'To be done on 'a special day therein exprest,' which is enough, and there is no prohibition to have it done in the night, albeit it had been so done, which is not; and to all he opponed the sasine done in so ancient a time, and wanting no requisite solemnity, and proceeding upon a warrant of a charter under the Great Seal, and that no right subsisted in the person of the defender's author, ever flowing from his predecessor foresaid, by progress to the pursuer.——THE LORDS, notwithstanding of the exception, first found, on the 15th of March, that this sasine was sufficient to give the pursuer action, and interest to pursue this action

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of reduction and improbation against the defenders; but this day the defender producing some of the writs called for, and the pursuer craving certification against the rest not produced, the defender resumed the foresaid exception against the sasine, and *alleged*, that the same could not be sustained now after production, to furnish action to the pursuer to seek certification against the defenders, who, and their authors these 120 years and more, had bruiked their lands by virtue of these rights uncontrouled. Which allegeance the LORDS sustained, and found therefore the sasine null, notwithstanding the antiquity thereof, and not to furnish action of improbation.

Act. *Nicolson* & *Advocatus*. Alt. *Stuart* & *Burnet*. Clerk, *Gibson*.

Durie, p. 630.

1632. *December* 1.

WILLIAM CARNEGIE and PANTER *against* WILLIAM DICK.

No 44.
A sasine upon a precept of *clare constat* was sustained as a title in an improbation, of rights made by the pursuer's father concerning the lands in dispute, the precept being produced *cum processu*, and evidence brought that the father was infeft.

ONE Panter being infeft in some lands, upon a precept of *clare constat*, by the town of Montrose, superiors of the lands, as heir to his father, pursues reduction and improbation of the rights made of that land, by his father, to certain other persons particularly libelled, and consequently, that the comprisings flowing from these parties, alleged acquirers of the right from his father, might fall, upon this reason of reduction, because his umquhile father had never made any right thereof to them; wherein the defenders *alleging*, That they being infeft by the superior in the lands libelled, before the pursuer's precept of *clare constat* granted to him, that precept of *clare constat*, he never being served nor retoured heir to his father, could not give him interest as heir to instruct him *active* to be heir, to furnish him a title and action, as heir *active*, to reduce their rights, anterior to his, and public also; this exception was repelled, and the pursuer found to have sufficient interest, as heir instructed by the sasine, proceeding upon a precept of *clare constat* mentioned therein, to pursue this action as heir *active* so instructed, albeit he was not served nor retoured heir, in respect that the pursuit was only for reducing writs, depending upon the deeds done by his father, to whom he was so qualified heir, and in this subject of lands, wherein his father was infeft, and himself by virtue of that precept; whereas, if he had been pursuing as heir, by virtue of such a precept, *extra hoc subjectum*, the question had then been more considerable, if the deeds quarrelled had not depended only upon his father's fact; but it was found, that he ought to prove *cum processu*, that his father was infeft, and sicklike he should produce, *in termino probationis*, the precept of *clare constat* whereto his sasine was relative.

Act. *Nicolson et Mowat*. Alt. *Stuart*. Clerk, *Gibson*.

Fol. Dic. v. 1. *p.* 442. *Durie, p.* 655.