

1634. December 3. LO. JOHNSTON *against* JOHNSTON.

No 45.

An apparent heir not retoured, found to have no title to pursue an improbation of deeds derived from his predecessors. See No 1. p. 6615.

An apprising with a charge without infestment, is a title, in an improbation of all rights affecting the lands, so far as to force production.

THE Lord Johnston having charged one Johnston of Neis to enter heir to James Johnston of Lochouse, who was his debtor, and who had right to the lands of ———, and having so comprised from him, as lawfully charged to enter heir, all the said James Johnston of Lochouse's right, and also as having right made to him by the said Johnston of Neis, as apparent heir to the said James Johnston of Lochouse, pursues the Earl of Queensberry, and certain others, for improbation of all writs made to them of the said lands, by the said James Johnston; in which action of improbation, the LORDS found no process at the pursuer's instance, *super hoc titulo*, as having right from the apparent heir; for the apparent heir himself, without infestment or retour, could not be heard to pursue an improbation *super hoc titulo* as apparent heir; albeit an apparent heir may call for exhibition and production of writs, which pursuit is only sustained for exhibition, that he may advise whether he will enter heir or not, but not for delivery, which the apparent heir cannot crave; and as the apparent heir cannot pursue to produce to be improven [for if the defender compear not, no certification decerning to make no faith can be granted to the apparent heir] no more therefore at the instance of one having right from the apparent heir; but process was sustained at the Lord Johnston's instance, as having comprised from the apparent heir, who was charged to enter heir, for that charge and comprising, so long as they stood, were as sufficient as if he had been retoured heir.

Act. *Stuart et Cunninghame.*

Alt. *Nicolson.*

Clerk, *Scot.*

*Fol. Dic. v. 1. p. 442. Durie, p. 739.*

\*.\* The same found Dunbar against Maxwell, 14th July 1671, *voce CITATION*, No 86. p. 2223.

1635. February 4. EARL OF DUMFRIES *against* LAIRD OF GRANT, &c.

No 46.

IN an action of improbation and reduction, pursued at the instance of the Earl of Dumfries against the Laird of Grant, Marquis of Huntly, Laird of Earnside, and others, it is libelled, that the said Earl pursued for writs made by his predecessors and their successors; against which it was alleged, that 'the successors' was not relevant, except the successors were condescended upon by way of reply, although they were not contained in the summons.

*Auchinleck, MS. p. 99.*