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.