

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 uncontroled. Which allegiance 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.*

No 43.

1632. December 1.

WILLIAM CARNEGIE and PANTER *against* WILLIAM DICK.

ONE Panter being infest 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 infest 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 infest, 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 infest, and sicklike he should produce, *in termino probationis*, the precept of *clare constat* wheretoe his sasine was relative.

Act. *Nicolson et Mowat.*Alt. *Stuart.*Clerk, *Gibson.**Fol. Dic. v. 1. p. 442. Durie, p. 655.*

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 infest.