

1680. July 29. The LAIRD of Strowan *against* The MARQUISS of ATHOL.

THE Laird of Strowan insisted in his reduction, whereof mention is, *voce* IMPROBATION, and produced a retour serving him heir to his goodsir's grandsir, and thereupon he craves certification against a decret of spuilzie, alleged obtained at the instance of John Earl of Athol, against Robert Robertson, the pursuer's goodsir's grandsir, and an apprising following thereupon, with the infestments thereon, and all other rights flowing from the pursuer's goodsir's grandsir to the defender, or any of his predecessors *jure sanguinis*. The defender produced the charter of John Earl of Athol, his predecessor, upon the fore-said apprising, relative thereto in *anno* 1515, and alleged that he had produced sufficiently, and that no certification could be granted against the apprising, because before the year 1626, all apprisings were left as the warrants of infestments following thereupon, which hath been ordinarily sustained since. And as to the decret of spuilzie, he was not obliged to produce the same; for if it was a decret of an inferior court, the clerks thereof are only liable to produce, and if a decret of Session, the clerks thereof are also liable to produce it, though the party must condescend upon the date, which cannot be required in a matter so ancient as a decret eight score of years since, during which time scarcely could paper endure, and after so many wars and troubles, and the loss of private writs, and even of the public registers.—THE LORDS found, That the defender's predecessor's charter produced upon the apprising, which proceeded upon the decret of spuilzie, was sufficient to exclude a certification against the said decret and apprising; the defender having produced also his father and goodsir's infestments and his own, containing the lands in question *per expressum*, with long possession thereupon. The pursuer craved certification against all the evidents of the lands of Auchleck, which are expressed in the pursuer's infestment of the barony of Strowan, and are not expressed in the defender's charter upon the apprising. The defender then produced his predecessor's charter of the earldom of Athol, bearing expressly Auchleck, and did declare that he claimed only right by virtue thereof, and all other rights of Auchleck should fall in consequence therewith, if the pursuer prevail in his reduction and improbation of the rights produced.

Which the LORDS sustained so as to exclude certification as to Auchleck, for though both had it expressly in their infestments, yet the most ancient and peaceable possession would be preferred to constitute it part and pertinent of either barony, which is only proper to be debated at the discussing of the reasons of reduction.

*Fol. Dic. v. 1. p. 355. Stain. v. 2. p. 794.*

No 27.

Before the year 1626, apprisings were left at the Great Seal as the warrants of infestments following on them; and therefore charter and sasine on an apprising, prior to 1626, were sustained, and certification refused to be granted for not production of the apprising.