

## No 59.

not sufficient title in the pursuer, to cause the defender to produce real rights, *quoad* the reduction, but only in the improbation. The pursuer having, after that interlocutor, procured infestment, the Lords received the title, though posterior to the summons.

probation, because any having interest may propone "false and feigned;" but that he could not insist in the reduction of real rights perfected by infestment, unless he were also infest, no more than he could pursue a removing.

1695. December 3.—MERSINGTON reported Alexander Keith writer in Edinburgh against Mr James Cathcart of Carbiston. The Lords, 24th January last, had found his title of an adjudication, with a charge against the superior, not sufficient to cause the defender produce his real right *quoad* the reduction, but only in the improbation. Since that time Mr Keith procures himself infest, and now insists that he may take a term in the reduction also. *Alleged*, His title to pursue the reduction being formerly cast as null, and now made up, not only since the citation on the summons, but posterior to the Lords' interlocutor, the former instance perishes, and he must raise a new summons, especially in such an unfavourable pursuit, else it should be *filius ante patrem*. *Answered*, That he had a title, only the Lords found it defective and incomplete; and he having now perfected it, *actiones non sunt multiplicandæ sine necessitate*; and the Lords have oft permitted a part of a title to be produced *cum processu*. See 21st July 1676, Drumelzier, No 52. p. 13282.; and lately, John Jolly against the Viscount Kenmuir, and the Duke of Gordon against his Vassals, see APPENDIX.; and in a pursuit for executry, the Lords have allowed to confirm before extract. THE LORDS received the title *hoc ordine*, though posterior to the summons, and found that there was no necessity of raising a new process. See TITLE TO PURSUE.

*Fol. Dic. v. 2. p. 305. Fountainhall, v. 1. p. 662. & 682.*

1702. January 22.

DAVID GRANT, Wright, against DANIEL SIMPSON, Writer to the Signet.

## No 60.

A purchaser of a tenement having, upon his disposition, raised a declarator of immunity from a servitude, process was sustained, though he was not infest till after the date of the summons.

EACH of them having a tenement at the Netherbow, Daniel claimed a passage or entry through David's land to his own, and stopped a syvor for carrying off the water; whereupon David raises a reduction, and a negatory action of declarator of his immunity and freedom from any such servitudes, and that the close is his own, and the little shop therein, and so cannot be made a common entry by Daniel, &c. *Alleged*, No process, because your sasine is posterior to the date of the summons and day of compareance, and so is *filius ante patrem*, and he must raise a new summons; and that it has been oft so decided, 20th March 1623, Lord Yester's Heirs, No 15. p. 6618. where the process was cast, because the sasine was posterior to the summons; and 1st December 1630, Ramsay of Cockpen, No 40. p. 6634.; 20th June 1627, Laird of Touch, No 4. p. 10430.; and 20th January 1665, Little, No 26. p. 5194. *Answered*, That his sasine, though posterior to his summons, was given out therewith, and

seen and returned *in communi forma* by the defender; and his disposition was prior to his intending the process, and sufficient to sustain it, especially it resolving only into a molestation, and declarator of exemption from a servitude, which do not require infeftment; and in a late case reported by Mersington, Alexander Keith *contra* Cathcart of Carbiston, *supra*, the Lords allowed the pursuer of a reduction and improbation to infeft himself *cum processu*; and Stair, lib. 2. tit. 9. observes, that a removing was sustained at an appriser's instance, where the comprising was before the warning, but the sasine after it; and sick-like, where an apparent heir warned, if his retour and infeftment, though posterior to the warning, were before the term to which the tenant was warned to remove. THE LORDS drew back the sasine, and sustained process thereon, though posterior to the summons, and appointed a visitation of the ground controverted.

1703. November 9.—THE LORDS advised the probation led in the mutual declarators raised by David Grant wright in Edinburgh, and Daniel Simpson writer to the signet, about the property of a shop built on the north side of the fore-street near to the Netherbow, which David alleged to belong to him, as falling within his bounding, he being heritor of the tenement to which it is adjoined, and likewise of the cellar under it; and Daniel contended to be a part of his tenement, which had a fore-stair projected over it, and it was situated directly under that projection. Where lands front to the High Street, the question arose, Who has right to the void space of ground betwixt their wall and the gutter of the High Street, and if the bounding of such tenements extended that length? It appeared by the probation, that these void pieces of ground under the fore-stairs, and below the easing-drop, are reputed a part of the High Street, and so belong to the King, as all public ways do, and that there was once a gift of them procured; but the town, by their charters, and as the King's commissioners within burgh, have the right of disposing thereon; but that they are never in use to dispoine them to any but the heritors of the adjacent fronting tenements; and that the ordinary contest arises betwixt the heritors of the upper stories and those of the lower ones, and particularly of the cellars, and that story which enters off the ground; and that these lower heritors are commonly preferred by the town, as having the best claim, but cannot do it without a jedge and warrant from the Dean of Guild. THE LORDS, on advising the probation, found the shop in controversy belonged to David Grant, and decerned in his declarator of property; as also, that the close was within his bounding; but they burdened it with a servitude of free ish and entry to the said Daniel and his tenants; and as to the straitening of the syvor, so as to make it regorge, restagnate, and overflow, the LORDS remitted it to the Dean of Guild, to place it so as might be least inconvenient to either of the parties or their tenements.

*Fol. Dic. v. 2. p. 305. Fountainhall, v. 2. p. 140. & 188.*