

The Lords refused this (4th February) and a second reclaiming petition, without answers.

No. 94.

Lord Ordinary, *Abercromby*. For the petitioner, *Cullen, Hagart*. Clerk, *Home*.
D. D. *Fol. Dic. v. 4. p. 316. Fac. Coll. No. 107. p. 238.*

SECT. XXII.

In Actions at the Superior's instance, who must be called?—CONCURSUS ACTIONEM at the Superior's instance.

1668. *February 22.* GAVIN COCHRAN *against* _____.

Gavin Cochran, as donatar to the recognition of certain lands, holden ward of my Lord Cochran, pursues the vassal, as having alienate the major part, and also the sub-vassal, to hear and see it found and declared, that the lands had recognosced by the alienation made by the vassal to the sub-vassal. It was alleged for the sub-vassal that he was minor, and therefore during his minority, *non tenetur placitare super hæreditate paterna*. It was answered, that that holds only in disputing the minor's rights, but is not sufficient against the obligation or the delinquency of the defunct. *2dly*, The party principally called in this process, is the vassal who is major, and whose fee falls to the superior by his alienation, and the sub-vassal's right falls only in consequence, so that no privilege of the sub-vassal can hinder the superior to declare the recognition of his immediate vassal.

The Lords repelled the defence, and sustained process.

Stair, v. 1. p. 531.

1715. *February 22.*

THOMAS SPENCE, Writer in Edinburgh, *against* Sir ADAM WHITEFOORD of Blairquhan.

Sir Adam being superior of some part of the estate of Dalvennan, raised reduction and improbation against Shaw of Keirs, from whom the said lands had been purchased by John Binning: In which summons he also calls the said John, as he who had been in the possession of the said lands; wherein he calls for production of all their predecessors' writs, &c. and at length, in February, 1707, obtains a decret of certification: But Thomas Spence having, after citation in this process, but before pronouncing decret, led an adjudication, he now charges Sir Adam,

No. 95.

Process sustained, notwithstanding the minority of a sub-vassal called in an action of recognition.

No. 96.

A superior, in an action of reduction and improbation, need not call adjudgers from his vassals.

No. 96. the superior, to receive him; which charge being suspended upon this reason, That John Binning's right being improved by the certification, Sir Adam was not obliged to enter the charger as an adjudger from him; and Thomas Spence having answered, That his adjudication being before the decret of certification, and Binning thereby denuded, he the adjudger ought to have been called in the improbation; which not being done, it was null as to him; so that the question turning upon this, viz. Whether the superior, when insisting in this process, be bound to take notice of an adjudger, whose adjudication was led prior to pronouncing decret, by after-citation?

It was alleged for the superior, That whatever may be said of third parties infest and holding of the vassal that they ought to be called, yet that was never extended to the vassals' creditors adjudging, who have done no diligence to obtain themselves infest holding of the superior; for this were a great hardship upon superiors, since adjudgers may possess within the legal, without taking notice of the superior. And though a superior, by positive statute, (contrary to common rules) be bound to receive an adjudger, yet he cannot be obliged to take notice of him, but when he charges him to infest; which, if done out of time after the superior's decret of certification, it is his own fault in not doing timeous diligence; but this cannot prevent the effect of the certification. *2do*, Albeit the calling an adjudger were necessary, yet it was impossible in this case, where the improbation was depending before the adjudication was led, yea before summons raised.

Answered for the adjudger, That a superior cannot pretend that a public diligence, such as an adjudication, which within a short time after pronouncing, is by our law put into the public records, is such a right as he is not bound to notice. Besides, that an adjudger differs in this point from a creditor by an heritable bond and an infestment, holding of the vassal; for that is only a subaltern right, and may be latent; but the very property of the subject is vested in an adjudger absolutely, if not redeemed within the legal, whereby he is immediately entitled to an action against the superior to receive him; so that an adjudication is not only a public right, but such an one as denudes the former vassal. *2do*, A decret of certification is not of the nature of declarators upon feudal delinquencies, whereby the vassal's right is made *retro* void; for it can never be understood to have any further effect than from the date of the certification: So that any inchoate diligence, much less a completed one, such as this is, can never be prejudged thereby.

The Lords "found, That the superior was only bound, in an action of reduction and improbation, to call his vassal or his representatives, and those in possession; but was not obliged to call an adjudger of the vassals or sub-vassals, whose adjudication was after the date of the citation in the improbation.

Act. *Sir Ja. Stuart.*

Alt. *Sir Jo. Ferguson.*

Clerk, *Robertson.*

Bruce, v. 1. No. 76. p. 103.