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tion ; seeing a rebel's factor, or his assignee, may carry on a process from which the constituent or cedent is debarred, by not having *personam standi*;

*Answered*; No man can insist in his own right and name in a process of reduction and improbation, unless he be infeft, or have charged the superior.

“ THE LORDS found the answer relevant.”

1685. *January 8.*—THE LORDS, *supra*, having found that Mr Charles Hume, who had comprised his brother the Earl of Hume's right, could not insist without being infeft in his own name, in a reduction and improbation raised by the Earl, who was at the horn ;

It was afterwards *alleged* for Mr Charles ; That he was within year and day of another adjudger who stood infeft, which infeftment by the act of Parliament is to be reputed his.

*Answered*; Though Mr Charles's diligence without infeftment could carry the real right that was in the Earl's person, it could not give him an interest in the action raised in the Earl's name, more than an appriser could insist in an action of mails and duties commenced by his debtor, without any voluntary right or assignation thereto.

*Replied*; A comprising, which is a legal assignation, must operate as much as a conventional.

“ THE LORDS sustained the allegiance and reply, and allowed Mr Charles to insist in the action.”

*Fol. Dic. v. I. p. 445. Harcarse, (IMPROBATION AND REDUCTION.) No 543. p. 151. & No 552. p. 153.*

\* \* The like was found, Viscount of Kenmure *contra* Jolly, January 1687.  
*Harcarse, p. 153.*

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A trustee had appraised for behoof of a party, whose creditor again appraised this trust interest. This found no title to the creditor, not infeft, to improve other appraisings of the same property, until a declarator of the trust should be discussed.

1684. *Febrnary.*BRODIE *against* ELPHINGSTON and SCOT.

BRODIE of Miltoun having appraised Johnston his debtor's lands, and also a back-bond granted to his debtor by a trustee, who had appraised for the debtor's behoof a piece of land belonging to Provost Gray ; Miltoun raised an improbation against the other adjudgers of Gray's estate ;

For whom it was *alleged*, That there could be no such process sustained at the pursuer's instance, unless he derived a right from Gray ; otherwise people might be put to propale their rights to persons having no interest, upon improbations raised at random, whereby any weakness in men's securities might be exposed to such as would take advantage of them.

*Answered* for the pursuer ; That any person infeft in lands, has good interest to call all whom he knows or suspects to have a right thereto, to the effect he may understand the strength of his own right, and purge it from in-

cumbrances; and if the defenders be persuaded that the pursuer has no real interest in the lands, they may suffer a certification to pass at his instance against them; besides, the pursuer having apprised the back-bond of the trustee who apprised Gray's land, Gray may be properly called the pursuer's author.

*Replied*; Though the back-bond was a ground to declare the trust upon, yet the pursuer could not insist in the improbation, which is the effect and consequence of the real right in the trustee's person, till once the trustee be denuded thereof.

THE LORDS did not oblige the defender to take a term in the improbation; but ordained the declarator of trust to be previously discussed.

*Harcarse*, (IMPROBATION AND REDUCTION.) No 546. p. 151.

\* \* \* Sir P. Home reports the same case:

FRANCIS BRODIE of Milnetoun having right to a comprising against Mr William Johnston, and having charged the superior, pursues a reduction and improbation against Mr Francis Elphingston writer to the signet, Mr Robert Scot minister at the Abbey, and others, for reducing of all rights granted to them of the lands contained in the comprising; *alleged* for the defender, That he could not be obliged to take a term to produce any rights, but such as flowed from the pursuer's predecessors and author, and not of rights flowing from third parties, seeing the pursuer was not infeft. *Answered*, That the comprising and charge against the superior was a sufficient title in the reduction and improbation to force the defender to produce not only the rights flowing from the pursuer's authors and predecessors, but all rights of the lands flowing from third parties, a charge against the superior being equivalent to an infeftment; for by that same reason, that a comprising with a charge is preferable to any person that has obtained a posterior infeftment, either upon an apprising or voluntary right; and as those who had obtained a posterior infeftment might pursue a reduction and improbation; so might the pursuer upon a charge against the superior. THE LORDS sustained the defence, and found the defenders liable to produce rights flowing from the pursuer's authors and predecessors, and not the rights flowing from third parties, in respect the pursuer was not infeft.

It was farther *urged* for the pursuer, That, notwithstanding the defenders ought to produce the rights flowing from third parties, because there being prior apprisers of the lands, who were infeft, and the pursuer being within year and day of them, and so coming in *pari passu*, it is declared by the act of Parliament, that the benefit of that infeftment upon the prior apprising doth access to the posterior apprisings, in the same way and manner as if one comprising were led for both sums; so that seeing the first appriser who is infeft, may pursue a reduction and improbation, so may the pursuer, as having the benefit of his infeftments. *Answered*, That the benefit of an infeftment upon the first

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apprising does only accresse to the other auprisers that comes in *pari passu*, to give them a proportionable share of the mails and duties of the land, as if one comprising had been led for all the sums ; but none can pursue reduction and improbation but he that is infest ; and albeit the defenders were obliged to produce, yet they are not obliged to exhibit the comprising led by the defenders upon assignations to debts by Mr William Johnston the common debtor, in respect these being only personal assignations to moveable sums, and the comprising being led by the defenders after they had obtained the assignation from Mr William Johnston, the pursuer's apprising cannot be sustained as a ground or title to force the defenders to produce these apprisings, albeit of these same lands. *Replied*, That these apprisings being of the same subject, and the rights of the grounds of the debt flowing from Mr William Johnston the common debtor, the defender ought to produce the same, and then he will be heard upon the validity and invalidity of the rights ; as also the debts were assigned by Mr William Johnston to Mr James Elphingston, one of the defenders, upon trust for leading of an apprising to his behoof, at least there was a back-bond granted by Mr James Elphingston after the leading of the apprising, and the benefit of the back-bond and trust will fall under the pursuer's apprising, and there is a conclusion of declarator in the pursuer's summons for declaring the same. *Duplied*, That the deceased Gilbert Gray Provost of Aberdeen, having disposed a part of his estate in favours of Mr William Johnston, whereupon Mr William is infest, and Brodie of Milntoun being a creditor to Mr William, he apprises in Watson's name, both Mr William's own estate, and that part of the Provost Gray's estate which was disposed to Mr William in the apprising ; he includes several other lands belonging to Provost Gray, which were not disposed to Mr William Johnston ; and thereafter Mr William acquires several debts due to Provost Gray, which he assigned to Mr James Elphingston, and thereupon deduces an apprising against the remainder of Provost Gray's estate, which was not disposed to Mr William Johnston ; which apprising deduced at the instance of Mr James Elphingston, was adjudged by Walter Reid, and disposed to Mr Robert Scot and to Burnet of Lethinty, who are in possession of that part of Provost Gray's estate, that was disposed to Mr William Johnston ; so that seeing he had no right to the subject, the defenders cannot be obliged to exhibit the rights of these lands ; and albeit Mr James Elphingston's apprising had been deduced to Mr William Johnston's behoof, yet Watson's comprising, to which the pursuer had right, being deduced against Mr William Johnston before Mr James Elphingston's apprising, Watson's comprising could not carry the right of Mr James Elphingston's apprising, which was not then in being, and cannot be extended to posterior acquisitions in relation to different subjects. THE LORDS ordained Mr Robert Scot, and the other defender, to produce, upon oath, the apprising led at the instance of Mr James Elphingston against Mr William Johnston and Gilbert Gray of the back bond of trust granted by Mr James Elphingston, with the grounds and warrants thereof, as

also the adjudications at Walter Reid's instance, led for the behoof of the said Mr James, for evacuating his trust for defrauding of other creditors, with the hail grounds and warrants thereof, that the LORDS may know the trust and fraudulent conveyance used by the defenders; with certification, that if they did not produce the said writs, betwixt and a certain day, would grant a term in the improbation conform to the pursuer's libel.

*Sir P. Home, MS. v. r. No 500.*

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1684. *March.* SECRETARIES OF STATE *against* ANDREW CRAWFORD.

IN a reduction at the instance of the Secretaries of State, of a gift of the office of Sheriff clerk granted by the Duke of Lauderdale, (then Secretary) to Andrew Crawford, upon this ground, that it did not contain the *modus vacandi* by Mr Andrew Ker the former clerk's death, demission, or deprivation, but adjoined Crawford to Ker, giving him the right of survivance after Ker's death, without any title to the profits *medio tempore*.

*Answered*; The reason of reduction is not relevant, in respect Ker and his son being conjunct in the office, with a clause of substitution, the father upon the son's death, made a demission of the half of the office *in favorem*, upon which the Duke's gift proceeded; and old Ker having died some years before the Duke, to whom the casualty fell if it had vaked by Ker's death, since the Duke did not quarrel the same, nobody else could; nor is it unusual to grant gifts to two persons with a clause of substitution and survivance, as was formerly found in the case of Commissaries and their clerks, and lately in the case of Alexander Maitland and his son Charles.

*Replied*; The granting of offices by way of conjunction and substitution, is very prejudicial; and if they may name two conjunct, they may, by the same reason name six.

THE LORDS assolizied from the reduction.

*Harcarse, (IMPROBATION AND REDUCTION.) No 548. p. 152.*

1685. *January 8.*

SIR PATRICK HOME *against* The VASSALS OF COLDINGHAME.

SIR ALEXANDER HOME having disposed some lands of Coldinghame he stood infest in, to Sir Patrick his brother, who did not infest himself, a reduction and improbation was raised in both their names, against his vassals of Coldinghame, and terms taken; and Sir Alexander having afterwards, upon some incident differences with his brother, disclaimed the process, Sir Patrick craved certification in his own name.

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The Secretaries of State were refused reduction of a gift of an office granted by a former Secretary, in a manner, which, if irregular, he only would have been entitled to challenge.

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Action was sustained, where the disponent infest, and the disponent uninfest were joint pursuers, although during the