

sustaining of the comprising, albeit regularly the allegiance of life used to be preferred to the allegiance of death; but here it was admitted to maintain the comprising *ut actus valeat*. The *second* reason of reduction was, That the lands comprised were never denounced lawfully to be comprised; and if any such execution to that effect preceded the comprising, which, if it can be produced, the pursuer offered to improve the same, and therefore craved, that the same might be produced, or else that certification might be granted against the same. And the defender *alleging*, That, after so long a time, he cannot be holden to keep his executions, and the warrants of his comprising, and ought not to be compelled, *post tanti temporis intervallum*, to produce the same, seeing he produces the comprising, which ought to satisfy the production now, there being 28 years run since the date of his comprising, which was deduced in *anno* 1608, during the which whole space, it was never quarrelled, when the executions were all extant, which now are lost or neglected, and are not to be found;—and the pursuer *answering*, That there is no time of prescription, or law, or practice, that may excecme the defender from the necessity of keeping of these warrants; and seeing the compriser came never to seek the benefit thereof all this time, since the deducing thereof, his reason ought the more favourably to be received now, when he is pursued thereon, never being pursued while now; and the defender *answering*, That the reason wherefore he could not do any diligence upon his comprising, before this time, was, because there was a liferenter of the lands living, who had the right before his comprising, during whose lifetime his comprising could not take effect, and who has died but within this year or thereby;—THE LORDS found the allegiance relevant against this second reason, and in respect thereof, in this case, found the defender ought not to be compelled to produce these executions, which are called for as warrants of the comprising controverted; and therefore found, that no certification should be granted, for not production of the same, against the said comprising. The *third* reason of reduction was, That the compriser's self, upon his death-bed, granted the sum, for which the comprising was deduced, to be all paid to him, except L. 40, and desired that his heirs and executors should seek no more from the pursuer but L. 40, which he offered to prove by witnesses present at the time, persons without all suspicion.—THE LORDS assoilzied from this reason, because it was not found probable by witnesses.

Act. *Nicolson* younger.Alt. *Burnet*.Clerk, *Gibson*.*Fol. Dic. v. 1. p. 353. Durie, p. 810.*

1666. November 16. PURVES against BLACKWOOD.

ADAM PURVES having pursued reduction and improbation of a comprising, and the grounds and warrants thereof, against Blackwood,

No 5.
Certification
refused a-
gainst letters

No 5.
and execu-
tions of an
apprising
twenty-four
years old.

THE LORDS, in respect the comprising was deduced 24 years before, did refuse to grant certification against the letters and executions, and against one of the bonds being registrate when the principal bonds were given in to the Clerk Register to lie *in publica custodia*, in respect of the troubles of the time, and the loss and disorder of the register; and that the extract was produced, and the defender was content to abide at the truth thereof. See IMPROBATION.

Reporter, *Newbyth*.

Clerk, *Hay*.

Fol. Dic. v. I. p. 353. Dirleton, No 50. p. 20.

* * * Stair reports the same case :

ADAM PURVES pursues reduction and improbation of two bonds, alleged granted by him to Janet Baxter, and of an apprising led thereon, against certain tenements in Edinburgh belonging to him, and craved certification *contra non producta*. William Blackwood, to whom by progress the right is now come, produces the apprising, and the extract of one of the bonds whereupon it proceeded, and alleges no certification against the letters and executions of the apprising after so long time; the apprising being led in *anno 1621*, and no process of reduction raised till after the year 1650;

Which the LORDS found relevant.

Likeas, he further *alleged*, no certification for not production of any of the principal bonds, because they were registrate in the registers of Session, and the principals were lost. The pursuer *answered*, That there were pregnant points of falsehood, viz. Purves having gone and left the kingdom in *anno 1618*, and having been a soldier abroad till the year 1630; and these bonds, and the apprising thereon, both in one month; and the bonds granted to a woman who had no such estate, but the servant of a waiter, of an evil fame; and one Blair a witness who was hanged for falsehood.

THE LORDS refused certification for not production of the principal bonds, but prejudice to the pursuer to insist in his improbation, by these or other evidences, by the direct manner; but they admitted certification against that bond, the extract whereof was not produced; yet conditionally to a time, that the defender might, upon the adminicle of the apprising, insist to prove the tenor.

Stair, v. I. p. 406.

* * * This case is also reported by Newbyth :

ADAM PURVES having granted two bonds to umquhile Janet Baxter in *anno 1621*, whereupon the said Janet deduced an apprising against the said Adam's house in the Canongate, upon the 29th May 1621; and whereupon she was infeft in August thereafter by the superior; thereafter the said Adam, in *anno 1621*, did, in corroboration of the said apprising, dispone of new the saids lands

and tenements to the said Janet, conform whereunto the said Janet, and others having right from her, were in possession till the year 1657, by the space of 37 years. The said Adam raises a summons of improbation of the said whole writs; and compearance being made for William Blackwood, in whose person the right of the said apprising and disposition and infeftments are now come by progress, compearing and alleging that no certification ought to be granted against the writs libelled, albeit the same were not produced, viz. the letters of apprising, with the execution thereof, the principal bonds, the extracts being produced; the LORDS found, that the defender needed not to produce the letters of apprising, with the executions, the comprising being dated so long time ago; and found, that the defender producing the executions, needed not to produce the principals, in regard the registers are now lost; and where the extracts are not produced, they granted a time to the defender to prove the tenor of the bonds.

Newbyth, MS. p. 84.

No 5.

1669. February 19. SWAN against BURNET Tutor of Leyes.

In an improbation pursued at the instance of James Swan against the said tutor, the LORDS did refuse to grant certification for not production of the executions of a comprising led in anno 1641, in respect the several executions were repeated and set down in the decret of apprising, bearing the messenger and witnesses' names and designations; notwithstanding, it was *alleged*, that the comprising was to the behoof of the heir, there never having been any thing done thereupon since the date thereof; but, before extracting, ordained the tutor to give his oath if he had the principal executions; and, if not, to declare what way the same were lost.

Fol. Dic. v. 1. p. 354. Gosford, MS. No 121. p. 45.

No 6.

Post longum tempus the executions of a comprising need not be produced in an improbation, they being repeated in the decret. In this case almost 30 years had elapsed, before the improbation was raised.

1675. February 18. BROWN against HUME.

WILLIAM BROWN pursues reduction and improbation of a decret of the Sheriff of Berwick, and the whole grounds and warrants thereof, and insists for certification *contra non producta*.

Wherein the LORDS found, that the decret being pronounced 20 years ago, the defender was not obliged to produce that part of the warrants of the decret which useth to remain in the clerk's hands, viz. summons, executions, supplement, and executions thereof, and charge to enter heir, and therefore sustained only certification against the decret, and bond which was the ground thereof.

Fol. Dic. v. 1. p. 353. Stair, v. 2. p. 324.

No 7.