thought very hard, seeing in the case of the creditors of Fendraught against Morison of Bogny *, and in many other cases, the LORDS, for trying fraudulent conveyances, have allowed it, else fraud of apparent heirs should scarce ever be discovered. No 126.

1681. *July* 14.—IN Gordonston's reduction against Sir George Monro, (26th February 1681,) a comprising being quarrelled as come in the person of the apparent heir, in so far as the apparent heir his wife's father had bought it in for the behoof of the apparent heir's children, and so on the 62d act, Parliament 1661, it ought to be redeemable from him within ten years of his acquisition, for the sums he gave. *Answered*, The act of Parliament mentioned only the apparent heir, and so could not be extended to his wife's father; *statuta* being *stricti juris*. THE LORDS inquired if the comprising was expired, and finding it was, 'they, before answer, ordained Sir George Monro to depone 'what sums he gave for this comprising on Rae's estate to his immediate au-'thor;' This they did, because there were many presumptions that it had been a comprising long ago satisfied and retired by the common debtor's means, and a blank assignation taken thereto, and Sir George his author's name filled up therein, for the common debtor, Lord Rae, his own behoof. But thereafter, on the 19th July, this cause being heard again, 'the LORDS found Sir George 'his acquisition of this comprising, or the transmission of it to the Master of 'Rae his son-in-law, or his children, fell not under the act 1661, nor was re-'deemable, because he deponed it was a free donation.' Yet this was one of the onerous causes by which Sir George got his daughter elocate to the Master of Rae, and so it was not a mere donation.

Fountainhall, v. 2. *p.* 123, 133, & 147.

1682. *February.* A. *against* B. No 127.

AN extract of a contract of marriage, registrate in the public register in *anno* 1633, sustained to satisfy the production in a reduction and improbation, though after search it could not be found in the register, and the warrants of these years were not lost; but marriage having followed, and so notour, the defender was not put to prove the tenor.

Harcarse, (IMPROBATION AND REDUCTION.) *No* 528. *p.* 146.

No 128.
A donatar to an escheat on a horning at the instance of another man, is not bound to produce the principal.

1686. *January* 20. BAILLIE and STEWART *against* DUNBAR and DOUGLAS.

THE case of Mathew Baillie, Littlegill's brother, and Archibald Stewart *contra* Mr Alexander Dunbar and Samuel Douglas, husband to the Lady Hisle-

* Examine General List of Names.

No 128. side, was reported by Forret. The case was, if an extraneous donatar to an escheat, on a horning and denunciation, not at his own but another's instance, be obliged for satisfying the production in an improbation of the horning, to produce the said principal horning, or if the extract be sufficient; for if he be creditor and donatar on his own horning, then he is bound to produce it. *Alleged*, The principal must be produced, because, without production of the principal, it cannot be improven as false; seeing the messenger and witnesses cannot cognosce upon their own hand writs; nor will it appear by an extract if there be any erazure, interlining, or other vitiation in the execution, or if it be stamped; so a door shall be opened to forgery; and the confiscation of our moveables (a great penalty in law,) shall fall on the assertion of the keeper of a register, the extract being no more; that this is contrary to the 94th act of Parliament 1579, and will embolden falshood and villainy; for they may fabricate executions, and put them in the register, and then lose or burn them and the horning, and take a gift of escheat, and extract the horning; and if this be probative and sufficient against improbation, the forgery can never be discovered, nor the lieges secured; and we see the like case observed in Haddington's Decisions, 23d January 1610, between Meldrum and Howieson, *voce* Process.

On the other side, it was *alleged*, That if the King's donatar (who was not creditor in the horning) were obliged to produce the principal horning, then by collusion betwixt the debtor and the creditor denouncer, the principal might be put out of the way, and the King's casualty of escheat evacuated and defrauded. The Lords found this donatar not bound to produce the principal, but that the extract satisfied the production. The same was decided before, Thomson *contra* Ramsay, *voce* Persona Standi; and there is a parallel case in the King's favours in the 4th act of Parliament 1606. The like was also found Pallat *contra* Veitch, No 91. p. 2874. So it seems that *l.* 10. *D. De jure fisci, Quod in dubiis contra fiscum respondendum* is not law in Scotland. There was another defence proponed against this improbation, viz. that they had not called Lauder, the creditor in the horning, and there could be no process till he was cited. The Lords found he ought to be cited; but allowed him to be called *cum processu*. See Quod ab initio vitiosum.

Fol. Dic. v. 1. *p.* 448. *Fountainhall, v.* 1. *p.* 394.

*** Harcarse reports this case:

In the reduction of a horning against the King's donatar, the extract being produced to satisfy the production;

It was *alleged* for the pursuer; That extracts cannot satisfy the production in an improbation, because then he could not impugn the messenger's subscription *comparatione literarum*. And so jealous is our law of the verity of hornings, that the tenor thereof cannot be proved by witnesses.

Answered; The *jus quæsitum* so the King by the rebellion cannot be taken away by the transaction of parties; and the creditor being always master of the principal horning, the King or his donatar cannot be burdened with the production of it, as was observed by Haddington, Thomson against Ramsay, *voce* PERSONA STANDI; and found December 1676, betwixt William Veitch and Peter Pallat, No 91. p. 2784. No 128.

THE LORDS found the production satisfied by the extract, in respect the donatar's gift proceeded upon a third person's horning, and not upon his own, whereof he might be master.

Harcarse, (IMPROBATION AND REDUCTION.) *No* 564. *p.* 156.

1688. *June* 20. THOMAS LAWRIE *against* MARY AUSTIN.

No 129.
Transumpts sufficient to stop certification.

THE pursuer of an improbation craving certification against the writs called for, notwithstanding of a transumpt of them produced,

It was *alleged* for the defender; That transumpts proceeding upon summons and citation of parties, and not by instrument, are sufficient to satisfy the production in improbations; for many of the securities of this kingdom are but transumpts, the principal writs being lodged with the party having the greatest interest. And here parties are cited to hear the bonds transumed, because the principals were to be sent to Virginia, to pursue the debtors there; and being accordingly sent, as appears from the attorney's letters, they cannot be had, now that he is dead.

Answered for the pursuer; That transumpts upon compearance of the parties, may indeed have effect of the principal writs; but here there was not only no compearance, (which makes the transumpt no better than an extract) but the debtor was out of the kingdom; and this specialty must be noticed to prevent falsehood, which the sustaining of transumpts to satisfy the production in improbations, would encourage. Again, the stile of decreets of transumpt bear, that they are to have the effect of principals, except in the case of improbation.

Replied; The urged inconveniency is as strong against tenors as transumpts; and without question this transumpt would be sufficient for proving the tenor; and the exception of improbation in decreets of transumpt is but exuberant stile.

THE LORDS sustained the transumpt to stop certification. It was *alleged*, but not instructed, that there was a judgment recovered upon the bonds at Virginia. *Fol. Dic. v.* 1. *p.* 450. *Harcarse*, (IMPROBATION and REDUCTION.) *No* 580. *p.* 161.

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

IN the action of reduction and improbation at the instance of Mary Austin, relict of the deceased Francis Herries of Lambholm against Thomas Lawrie