

1632. *March 24.*RUSSEL *against* DICK.

No 3.

In an im-
probation of a
comprising,
the defender
was obliged
to produce
the execu-
tions and
warrants of
it, though it
was twenty
years since its
date; because
the person, in
whose hands
it was, was a
private per-
son named by
himself.

IN an improbation of a comprising, wherein the executions and warrants of the comprising were called for, to be produced and improven; and the defender having produced the principal comprising, which was deduced 20 years since, he *alleged*, That no certification ought to be granted for not production of the executions and warrants thereof, which remain with the clerk of the comprising, and come not again to the party, and the clerk is not called for to produce the same in this process, so the party cannot be holden to produce the same. This allegiance was repelled, and no necessity found to call the clerk to this improbation, who was but a private person, and could not be reputed a public officer or clerk, who could be known to the pursuer, whereby he had no necessity to call him, seeing the compriser might take at his pleasure any ordinary notary to be his clerk, and that the party ought to take up all the warrants of his comprising, and to keep the same upon his own peril, and that they remain not with the clerk, albeit the comprising was deduced 20 years since; and if the party had omitted to take his warrants from the clerk, he ought to have recovered the same by his travels, or some other lawful diligence against the clerk, and produced the same in this process, that the LORDS might have considered if it should have staid the certification or not; but that not being done, he was ordained to produce, without necessity to cite the clerk in this process. In the action E. Kinghorn against George Strang, No 2. p. 5165. the LORDS found the party not holden to produce the warrants of a comprising, but it was an old deed.

Act. Russel & Burnet.

Alt. Stuart & Gibson.

Clerk, Hay.

Fol. Dic. v. I. p. 353. Durie, p. 632.

1636. *July 7.*NICOLSON *against* BURNET.

No 4.

The want of
the execution
of denuncia-
tion of a com-
prising, found
not to annul
the compris-
ing after
twenty-eight
years.

ONE Nicolson being charged by ——— Burnet to enter heir to his umquhile father, to the effect that the said Nicolson might pay the debt owing by his said umquhile father to Burnet, and as use is, comprising being thereafter deduced by the said Burnet of certain lands against him, as lawfully charged, &c.; which comprising being desired to be reduced at the said Nicolson's instance, against the heir of the compriser, upon these three reasons, viz. that the pursuer, the time when he was charged to enter heir to his father, had an elder brother then living, so that the charge could not be executed against him; and consequently, the comprising following thereon, behoved to fall. Against which it was *excepted*, That the defender offered to prove, in fortification of his charge, that his elder brother was then dead; which allegiance the LORDS admitted for

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