

1632. March 24.

RUSSEL against DICK.

No 3.

In an improbation of a comprising, the defender was obliged to produce the executions and warrants of it, though it was twenty years since its date; because the person, in whose hands it was, was a private person 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 denunciation of a comprising, found not to annul the comprising 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