No 123. of any forgery of the said disposition, albeit the principal had miscarried, the same being registered in the year 1645, and the tenement possessed by the party ever since. It was *answered*, That certification ought to be granted notwithstanding, because no extract out of any inferior court could satisfy the production, and the clerk ought to have kept the same for his warrant; so that unless it were proved, that the principal papers were taken away during the troubles, an extract could never be sustained to satisfy an improbation; especially in this case, where the register did bear the same to be given up to the party.——The Lords did grant certification, specially seeing the giving up to the party was written upon the margin by another hand than what the register itself was written with, bearing the registration.

Gosford, MS. No 766. p. 476.

*** See Stair's report of this case, No 37. p. 1755.

1678. *July* 10. Ballandalloch *against* Dalvey.

No 124.

The Lords, on a bill, find this defence relevant to stop certification in an improbation of a bond, that the defender produced an extract out of the books of session, registrate when the principals were given back; and that the principal was thereafter seen and made use of at sundry trials, and produced in a process in the Sheriff-court of Elgin, which they found relevant to be proved by the procurators and members of court who had seen it and read it.

Fol. Dic. v. 1. p. 449. Fountainhall, MS.

No 125. 1679. *February* 13. Gordon of Park *against* Arthur Forbes.

The Lords found an extract satisfied in an improbation, where it was proved the registers of warrants of that year were lost; and this, albeit it was an interdiction, and its executions, whereof the parties got the principal back.

Fol. Dic. v. 1. p. 449. Fountainhall, MS.

No 126.

In a reduction and improbation, it is sufficient to stop certification of the writs called for, to allege,

1681. *January* 11. Monro *against* Gordon.

Sir George Monro having right to an apprising of the Lord Rae's estate, pursues reduction against Gordon of Gordonstoun, and other apprisers, who took terms to produce; and, after the terms run, and certification granted, do now allege no certification against the principal bonds, whereupon the apprising proceeded, because they are registrated in the books of Council and Ses-

sion, and the dates of registration condescended upon. 2*do*, No certification against an inhibition by the defender's author, because it is registrated, *et in publica custodia*; and because that author, nor none to represent him, is called. It was *answered*, That these allegeances are not now competent; because, by the act of regulation, they could only be sustained when proponed before terms are taken, in which case the pursuer would have been obliged to have searched the registers of session, and if he found the writs registrated at the time designed, he would have called for a warrant to the clerk register to have produced, but that being then omitted, it is not now receivable. Neither is the allegeance of the defender's authors not being called, which, if it had been proponed *in initio*, the pursuer would have called him; and the defender, upon the citation in the improbation, ought to have raised an incident, and executed the same to the day of compearance in the improbation, but cannot now delay the pursuer, upon calling the defender's author, or to recovering the inhibition; and as to the allegeance of the registration of the inhibition, it is neither competent nor relevant; for the register of inhibitions is not for conservation, but for publication, and does not retain the principal inhibition.

THE LORDS found, that the defenders not having, before terms were taken to produce, offered the dates of the registrated bonds, that it could not now oblige the pursuer to search the registers, but they allowed ten days to the defender to search and produce the clerk register's attestation, that these writs were in the register; in which case the LORDS would give warrant to the clerk register to produce the principals. And the LORDS repelled the defence upon the registration of the inhibition, in respect the principal is not kept in that register; and repelled the defence, in not calling the defender's author, in respect of the act of regulation, and state of the process; but superseded extract till the first day of February, and granted horning against any havers thereof *medio tempore*.

Fol. Dic. v. 1. *p.* 448. *Stair, v.* 2. *p.* 830.

No 126.
that they are *in publica custodia*, and to condescend upon the dates of the registration; but where the defender took terms to produce, and the terms were run, the Lords refused to sustain this condescendence, but they allowed the defender ten days to search the registers, and to produce the clerk register's attestation, that the writs were registered; in which case the Lords would grant warrant to the clerk register to produce the principals

*** Fountainhall reports the following additional particulars of the same cause. His Lordship does not observe the above point.

1680. *December* 24.—IN Sir George MONRO's improbation against Sir Robert Gordon of Gordonston, of his right on the estate of Lord Rae, it was *alleged*, Sir George's apprising was prescribed. *Replied*, He had charged the E. of Sutherland superior long within the 40 years to infeft him. *Duplied*, This was no sufficient interruption of the prescription of a comprising, being no document, nor intimation to the debtor, but only to a third party. *Triplied*, *Talis qualis insinuatio* though null and informal is sufficient against prescription to give *significationem contrariæ voluntatis*, and to take-off acquiescence that the party intends not to pass from his right, or *habere pro derelicto*; and that any interruption against odious prescription is favourable, though it be not used against the party against whom the apprising is led, but against a third party, and will import

No 126. a legal and valid interruption. This being reported, 'the Lords found the 'charge against the superior a sufficient interruption, because it was a part of 'the diligence of the comprising.' There was another point debated, but not decided, viz. Sir George produced an execution upon a summons for mails and duties within the 40 years. Gordonston offered to improve it, as antedated and not executed till after the 40 years. *Alleged*, This being *exceptio falsi et omnium ultima*, it must be proponed *peremptorie*, *quoad totam causam*. *Answered*, Gordonston hazarded on it *peremptorie* the defence of prescription; that he should be for ever secluded from that, but no more. See Prescription.

1681. *February* 26.—The mutual reductions betwixt Sir George Monro and Sir Ludowick Gordon (24th December 1680,) being reported, 'the Lords find 'Sir George's reason of reduction, viz. that the obligation is not so liquidated, 'but is satisfiable at any time by delivery of cows and mares, relevant *ad hunc* 'effectum to reduce the comprising as to the expiration of the legal; and sus- 'tain the same only as a security for the cows contained in the bond, which 'the Lords liquidate to 2,500 merks; and find the same redeemable by the 'payment of the said sum within ten years after this date. And find the rea- 'son that a part of the cows and mares were delivered before the leading of the 'apprising, relevant *prout de jure* to reduce the apprising *simpliciter*; for then 'the apprising was led for more than was justly due. And find the reason re- 'levant as to the bond of Scots money, that the said bond is condi- 'tional, and not purified before leading of the apprising, and therefore reduce 'the comprising *simpliciter* as to that sum; though they offered now to purge 'the condition thereto annexed, and obtain the said discharge. And repel the 'reason of reduction founded on the nullity of the bond, as being blank in the 'day and place, seeing the apprising by its date appears to be led after the 'year expressed in said bond. But seeing the apprising is restricted on the il- 'liquidity of the cows and mares, therefore sustain the comprising for the sums 'contained in this bond, in the same manner with the former. And as to the 'reduction pursued by Gordonston against Sir George Monro, refuse to examine 'witnesses *ex officio* anent the conveyance of the apprising, in respect of Man- 'son the depositar's death, and that it hath passed through several hands. And 'find the reason libelled of trust, and that it was paid with the debtor Lord 'Rae's own means, and the disposition taken blank, now only probable *scripto* 'et juramento. And as to that point, whether the apprising be redeemable 'from the apparent heir on the 62d act, Parliament 1661, Sir George's daugh- 'ter being married to the Master of Rae the apparent heir, reserve that point 'to the conclusion of the cause, it being *in apicibus juris*.'

As to the first part of this interlocutor, it would be considered *ubi conditio adjicitur non obligationi sed tantum solutioni, tunc obligatio non est ita conditionalis*, that it stands in need of a previous declarator to purify it. See 13th February 1671, Oxenford*. This interlocutor refusing to examine witnesses *ex officio* was

* Examine General List of Names.

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.