

1675. *January 28.*DR HAY *against* JAMIESON and ALEXANDER.

GEORGE STEWART, advocate, having comprised from —— Con, the lands of Artrochie and others, did dispone the said lands, and his right of comprising, to —— Neilson ; and thereafter the said Neilson failing in payment of the price, the said George Stewart did comprise back, from the said Neilson, the said lands, and Andrew Alexander did also comprise from the said Neilson the said lands, and his right foresaid.

Dr Hay having also comprised from —— Con the foresaid lands, pursued an improbation of the said first comprising, at George Stewart's instance ; and having called thereto the said George Stewart and Neilson, and Marjory Jamieson, who pretended right to the said lands, he did obtain a certification against two bonds, which were the ground of the said comprising, upon compearance, and a long dependence, and long terms assigned for producing the said bonds ; and thereafter the Doctor pursued a removing from the said lands, against the said Andrew Alexander and others ; and it was *alleged* for the said Alexander, That he had right to the said lands, and was in possession upon a right from George Stewart, who had right thereto, as said is, by a comprising against —— Con, the common debtor. Whereunto it was *answered*, That the defenders could not found a defence upon George Stewart's comprising, because the said bonds, being the grounds thereof, were false and improved. To which it was *duplicated*, That the certification against the said bonds was only granted against George Stewart ; and that the said Andrew Alexander was not called ; and that now there is produced the foresaid bonds ; and that the extracts of the same out of the register of the commissariat of Aberdeen had been formerly produced, but the principals, which were *in publica custodia*, as the warrants of the same, could not be then found, by reason of the disorder of that and many other registers, upon occasion of the late troubles ; and the same being now found, ought to be received and sustained as the grounds of the said comprising, seeing they are not improved and found false by a decret of improbation upon trial of the falsehood, but a certification is only given against the same for not production, which, at the most, does amount only to a presumptive falsehood, which is now taken away, as said is, by production of the said bonds, seeing *præsumptio cedit veritati*.

It was *answered* for the pursuer ; That all persons, whom he was obliged to take notice of, and to call to the improbation of the first apprising, were called, viz. the said George Stewart, at whose instance the said comprising was deduced, and who had also comprised from Neilson the right thereof, as said is, and Neilson himself ; and that he needed not call the said Alexander, who had only a subaltern right, and was not iafest ; and albeit he had comprised from Neilson, yet, by that comprising, he had not such an interest as the pursuer was obliged to know ; in so far as, the right of the lands in question was settled in

No 161.
Although in conformity with the principle of the decision in the case, Forbes against Blair, No 59. p. 6734. the Court refused, here, likewise, to repon a party against a certification in an improbation, however good his excuse ; yet they found an expedient to remedy the consequence.

No 161. the person of the said George Stewart, by the comprising against Neilson, after which Neilson had only a reversion; and the said Neilson was called himself, as said is; and the said Alexander's right, by his comprising against Neilson, being only a right of the legal of George Stewart's comprising against Neilson, the pursuer was not holden to take notice of the said right; and the said reversion is not only now expired, but was expired the time of the obtaining of the said certification, no order being used thereupon; and albeit the said Andrew Alexander was not called, yet he did compear in the said improbation; and albeit he pretends that his right was reserved, the said pretence is of no weight, seeing it was reserved only as accords; and certifications being the great security of the people, and specially where the same are obtained upon compearance, and after divers terms are assigned, and after certification granted, the same stopt for a long time, upon expectation that the writs may be got, as in this case, the same cannot be cancelled and loosed, *prætextu instrumentorum noviter repertorum*.

THE LORDS, for the reason foresaid, thought hard to loose the said certification; but specially in this case, seeing the said Alexander will have and take the advantage of Stewart's expired comprising, and exclude the Doctor, who was a true and real creditor, to whose prejudice the said George Stewart, and the other defenders, had patched up, not only the said comprising for small sums, but other rights, which the donatar had been forced, after he had comprised, to question by a reduction, and had prevailed, after a long dependence, and after they had possess the lands for a long time; and, on the other hand, the said principal bonds being now produced, they thought it hard that the Doctor should take advantage of the same to exclude the defenders altogether; and therefore they proposed to the Doctor, that he should grant a reversion to the said Alexander, upon payment of what was justly due to him, within the space of two years; and the Doctor acquiescing, they decerned in the removing, with the quality foresaid.

1676. February 17.—Dr Hay's case resumed and taken into consideration this day; and though some of the LORDS considered, that it was hard to cancel certifications in pursuits of improbation, after a long dependence, and diverse terms given to produce, and delays of extracting, after circumduction of the said terms; and that such certifications are not only the great surety of those who obtain the same, but of those who obtain right from them, conceiving themselves to be secured with such certifications; yet the President, and others of the Lords, inclined to repone Alexander against the certification, the writs being produced; though it was urged, that beside the security and interest of people, as said is, it was to be considered, that, in this case, there were advantages pretended to on both hands, viz. by Alexander of an expired comprising, and by the Doctor of the said certification; and that Alexander and his authors, by virtue of their comprising, had been many years in possession,

though there was probability the comprising was satisfied; and it seemed to be equitable, that the Doctor should have a decret of removing, and should give a reversion to Alexander, limited to such a time as the Lords should find just; upon payment of what should be resting and unsatisfied by his and his author's intromission, if there were any part of the debt yet resting; but this point was not decided, the Lords having recommended to some of their number to endeavour an accommodation betwixt the parties.

No 161.

Lord Reporter, *Glendock.* Act. *Chalmers.* Alt. *Thoirs.* Clerk, *Gibson.*
Fol. Dic. v. 1. p. 453. Dirleton, No 230. p. 108. and No 339. p. 162.

* * * Stair reports the same case :

1675. *January 27.*—DR HAY having apprised the lands of Artrochie from one Con, for L. 1000 due to his father; George Stewart having, long before, apprised the said lands from Con the common debtor, he disposed the same to ——— Neilson, and for a part of the price apprised the same again from Neilson; and during the legal, Andrew Alexander did also apprise from Neilson. The Doctor did therefore raise reduction and improbation against George Stewart and Neilson, and against Marjory Jamieson, who had a later right from George Stewart. In which process, compearance being made for George Stewart and Marjory Jamieson, and terms being taken to produce; after all the terms, certification was granted against all the bonds granted by Con to George Stewart, and in that process Andrew Alexander was not called, but did compear for his interest, and therefore in the certification his interest was reserved. Dr Hay doth now pursue a removing against Andrew Alexander from the lands, who *alleged* absolvitor, because he deriveth right by progress from George Stewart, who had the first apprising against Con the common debtor, which right George Stewart disposed to Neilson, from whom Alexander did apprise; and albeit the certification takes away George Stewart's right, and Neilson's right, yet Andrew Alexander's right being reserved as accords, he hath raised reduction of the certification, and thereupon allegeth, *1mo*, That the executions of the summons, whereupon it proceeded, were false, and thereby the decret of certification falls in consequence; and albeit the Lords have found, that parties compearing, and not objecting against the executions, cannot quarrel the decret in the second instance on that ground, yet that must be understood where the falsehood is either obvious or known; but the pursuer offers to depone, that it is only come to his knowledge, that the executions were false, after the sentence. *2do*, Albeit George Stewart and Neilson, who were compearing, and were the persons necessary to be called, cannot quarrel the decret of certification, yet Andrew Alexander may well quarrel the same; and allegeth, that the negligence or collusion of his authors cannot take away his right, and therefore he now produceth the principal bonds out of the register, whereupon George Stewart

No 161. art's apprising against Con proceeded, and the not production of which did annul the apprising, and, in consequence, the whole rights following thereon; so that the Doctor's certification being most odious, for a sum of L. 1000, carrying the whole right of these lands, worth ten times more, seeing the Doctor's apprising is now near expired, the pursuer hath both law and favour on his part; and there is nothing more ordinary, than in improbations of lands holden of the King, to call only the King's immediate vassals, and if their subvassals should compear, and allege that all parties having interest are not called, it would be repelled; yet, if their superior be negligent, or collude, the subvassals may in the second instance compear and produce, and so preserve the subaltern rights; so here, Andrew Alexander having a subaltern right, depending upon George Stewart's right, though he had been absent and inscient of the certification, may very well, in the second instance, produce the bonds, and crave, that, as to his subaltern right, the certification may be reduced; much more when he did appear, and his right expressly reserved. It was *answered*, That Andrew Alexander neither now hath, nor had when he compeared in the certification, any title or interest in the lands of Artrochie; and so neither could nor can quarrel the certification, because all he pretends is, that he apprised the lands of Artrochie from Nielson, which apprising hath no effect, because George Stewart having apprised from Nielson before, albeit Andrew Alexander apprised during George Stewart's legal, yet his apprising becomes extinct, unless he had redeemed, or used an order or process within the legal; which being now expired, Andrew Alexander's interest is clearly extinct, and the certification is not only against George Stewart, but against Neilson also.

THE LORDS found, that Andrew Alexander had no title or interest, in respect George Stewart's legal was expired, and that he had used no order or diligence within the legal; and therefore found, that he could not quarrel the certification, and so had no occasion to determine, whether the falsehood of the executions, coming to knowledge after the certification, might be a ground to reduce the certification, upon the falsehood of the citations.

Stair, v. 2. p. 311.

No 162.

After a decree of certification had been extracted, the defender was reponed on production of the deed called for, in respect his advocate was sick at the time of the certification.

1675. February 17. BANNATYNE *against* The CREDITORS of JOHN ROME.

JOHN BANNATYNE having pursued a reduction, *ex capite inhibitionis*, of all rights granted by John Rome, after he was inhibited; one of the creditors produced a registrated bond and inhibition anterior to the pursuer's inhibition. The pursuer *replied*, That he had extracted a decret of certification upon the 10th day of December 1673, upon this process, containing both improbation and reduction, whereby this bond and inhibition are improved. It was *duplied*, That the certification was obtained, and taken out, when Mr Robert Dickson,