

equivalent to saying, that the writs called for are already in the hands of the Clerks of Court, which, of course, must satisfy the production. **No 118.**

*Fol. Dic. v. 1. p. 448. Stair.*

\*\*\* This case is No 26. p. 5194.

1666. November 16.

BLACKWOOD *against* PURVES.

**No 119.**

CERTIFICATION was refused, for not production of a principal bond, an extract having been produced; because it was registered in the registers of Session, and the principal was lost by the disorder of the times.

*Fol. Dic. v. 1. p. 448. Dirleton. Stair.*

\*\*\* This case is No 5. p. 5167.

1668. December 17.

MR JOHN BAINE *against* BALFOUR.

**No 120.**

IN an improbation, pursued by Mr John Baine, writer, against Mr Robert Balfour of Denmiln, wherein certification was granted; it was *alleged*, That it could not be extracted, as to several lands condescended on, for any writs prior to those produced, because they had produced a full progress from the Abbots, or Lord of Lindores, before the pursuer's right. This allegiance was sustained, notwithstanding it was *answered*, That, if that progress were reduced, the pursuer would be forced to intent a new improbation, and so would be frustrated of the benefit of this action, which was intended to secure them from all further trouble. *2do*, It was *alleged*, That the certification could be extracted, as to such writs whereof they had produced extracts out of the register, either under the Clerk's hands of the Session, or the Clerk's of Stewartry of Falkland, or Sheriffdom of Fife, because of the confusion of the late troubles. This was repelled, as to such writs as were registered in private Court-books, but not as to those registered in the books of Session, for which they recommended to the Clerk Register to try, if the registers of those years, of which the extracts were produced, were lost with their warrants.

Extracts out of the registers of inferior courts cannot hinder certification in improbations.

*Fol. Dic. v. 1. p. 448. Gosford, MS. No 63. p. 24.*

1671. June 15.

DOCTOR HAY *against* MARJORY JAMESON.

IN an improbation of two bonds, pursued at the Doctor's instance against the relict and heir of Mr John Alexander, for stopping certification, there

**No 121.**  
Found in conformity with the above.

**No 121.** was produced a bond, registered in the Commissary books of Aberdeen, with an extract of a decret for payment of the sum contained in the other bond called for, with a declaration under the Commissary Clerk's hands, bearing, that he had the registers wherein the said bonds were inserted; but that he was informed the principals were burnt and destroyed, when the Marquis of Montrose and Marquis of Huntly took the town of Aberdeen, during the late troubles; and thereupon they did *allege*, that no certification could be extracted. It was *replied*, That the extract out of the registers of any inferior Court could not hinder certification, as it was found lately, in an improbation pursued against Mr Robert Balfour, No 120. p. 6693, where it was there offered to be proved, that, by the invasion of the English, the registers were carried away, and destroyed, where the LORDS did sustain, that that was only relevant where bonds or decreets were extracted out of the registers of the Lords of Session. THE LORDS did ordain the certification to be extracted, notwithstanding of the allegiance, and declared they would do so in all such cases.

*Fol. Dic. v. 1. p. 449. Gosford, MS. No 350. p. 169.*

\* \* The first part of the case following is to the same effect with the above.

**No 122.**

Certification passe, *contra non producta*, upon the presumption of falsehood, inferred from not production; but the following circumstances were found sufficient to take off this presumptive falsehood: The bond craved to be produced was proved to have been registered in an inferior Court; it had been homologated by the debtor; diligence had been done upon it in the debtor's lifetime; and it had been lost without the creditor's fault. Certification was therefore refused.

1674. January 14.

THOIRS against the LAIRD OF TOLQUHON.

MR DAVID THOIRS having pursued reduction and improbation of all rights pretended to by Tolquhon, of certain lands, and particularly of a bond, whereupon apprising followed, registered in the Sheriff Court books of Aberdeen, Tolquhon having produced an extract, and having used a diligence against the Sheriff Clerk, for production of the principal, and alleged he was obliged no further; it was *answered*, That the production of extracts out of the books of Session stops certification; but, when parties register in inferior Courts, it is on their own peril, and they must produce the principal, or otherways certification will be granted, though they should produce extracts, and they will get diligences by horning against the Clerks, as Tolquhon hath done, which hath been the Lords constant practice. It was *replied*, That the clause of registration being by consent of both parties, that the creditor might register either in the books of Session or Sheriff's books; the creditor having registered accordingly in the Sheriff's books, as to the hazard of the loss of the principal writ, both should be in equal condition, as if he had registered the same in the books of Session, both being the King's Courts, and both being *publica custodia*.

THE LORDS found, that the extract out of the Sheriff's Court books did not stop certification, and that the peril of the loss of the writ lay upon the creditor who registered there, in respect of the constant custom heretofore observed.