No 129. merchant in Edinburgh, the Lords sustained a decreet of transumpt of a bond proceeding upon citation against the debtor, to satisfy the production, albeit the citation was only given at the market-cross of Edinburgh, pier and shore of Leith, the debtor having his residence out of the country.

Sir P. Home, MS. v. 3.

1702. *July* 7. Sir Robert Home *against* Sir Patrick Home.

No 130.
In an improbation of a decree of the Court of Session, the defender must produce the warrants, and it is not sufficient to say they are in public custody.

Sir Robert Home of Renton, pursuing a reduction and improbation against Sir Patrick Home, Advocate, and Home of Kames, of a decreet they had obtained against his father; and the decreet itself being produced, but certification craved against the grounds and warrants of it, the question arose, Who ought to be burdened with the production of these? It was *contended*, The pursuer ought to search for them, and either produce them, or else produce a testificate from the clerks that they were not to be found among the records. On the other hand, it was *alleged*, That the defender being obliged to support his own decreet, he was more concerned to search for them than the pursuer, for his decreet would fall if they were amissing, and the pursuer would not then be anxious to recover them, but rather have out his certification against them; and therefore it was the defender's interest rather to take a diligence for seeking the warrants of his own decreet. And accordingly the Lords, in this case, burdened the defender with production of them, and granted him a diligence for recovery of the same. See Stair, Instit. lib. 4. tit 20. § 21. where he mentions the production, but does not tell by whom they should be produced, save that of writs registrate in the books of inferior courts, he thinks the defender ought to be burdened with the producing them. But that case differs from this in hand, of the grounds and warrants of a decreet of session; and it seems more equitable that he be at the expense of extracting the diligence, and the trouble of searching, rather than the pursuer.

Fol. Dic. v. 1. *p.* 448. *Fountainhall, v.* 2. *p.* 153.

1704. *December* 28. William Wilson *against* Lord Saline.

No 131.
The defender in an improbation produced an extract of a deed under the hand of the Lord Register. Certification was granted, be-

Wilson, as an appriser of some lands from Alexander Short in Stirling, pursues a reduction and improbation of a disposition of these lands made by Short to Lord Saline, dated in 1662, and registrate the year thereafter; and a condescendence being given in of the date of its registration, search is made for the same amongst the warrants in the lower Parliament house; and not being found, nor any vestige of it in either minute-book, register, *licet* book, or other record, the Lord Register gives a declaration, that, after a most diligent scrutiny

No 131.
cause the deed itself could not be found in the record, and it was not mentioned in the minute-book; but the Court declared that this case was not to be considered as a precedent.

and search, *non est inventum*; whereupon Wilson craves a certification. Saline produces an extract of it under Sir A. Primrose then clerk-register's hand in 1663, and contends, that this being an extract of a writ given in to the books of Session, which is the supreme ordinary judicature of the nation, it is authentic, and must make faith in all cases; the party after the ingiving being no farther concerned; and if it shall happen either to be lost or abstracted, or omitted to be recorded, that is not the party's fault; and no man ought to suffer for another's negligence or knavery; and when I have no longer the keeping of it, it were most unreasonable to make the hazard of its losing to lie upon me; but the clerks and their servants should either be answerable for their trust, or else the extract they gave me should be valid and probative in all events. *Alleged*, This doctrine subverts the fixed principles and foundations of our law; for it has been ever esteemed a fundamental, that writs *in publica custodia* called for and not found, certification passes against them as presumptively false; and if it were otherwise, then . door should be opened to all falsehood; for this were to tempt men to forge and counterfeit writs of the greatest importance, and give them in to the register, and after taking out an extract, the next hour to retire the principal forged paper, by corrupting the servants and keepers, and having destroyed it, where is the security of our lands and estates, if that extract shall be probative, though the principal cannot be produced, where the falsehood by the subscription and comparing of hand-writs would evidently appear: and this is not only the law of Scotland, but likewise a settled custom of France; as appears by the learned Duarenus his Commentary, *Ad tit. D. De fide instrum. Instrumentum registratum sine authentico valet ad fidem faciendam, nisi adversarius accusationem falsi instituere velit; nam tunc ipsum authenticum exhibendum est*; and Dirleton, *voce* REGISTRATION, is clear, that extracts do not satisfy the production in improbations, and gives a very pertinent advice for having another attested principal; and thus sundry cautious buyers, in considerable bargains, use now to take two principal copies of a disposition; the one to keep beside them, and the other to give in to the Register; and for this reason the English Judges, by their act of sederunt 2d December 1653, allowed the principals to be given back to the parties, with the extracts; which had been needless if the naked extract had stopped certification; and therefore in 1661, the LORDS rescinded that act, and revived the former custom of retaining the principals, but strictly enjoined the keeping and securing the Registers; and though there may be hazard and inconvenience by losing of principal writs given in to the the register, yet that is more than overbalanced, by giving the extract of a false writ once registrate, all the authority of a true one; and the giving in writs to a register is a kind of a depositation, and the rule is, writs depositated are upon the peril of the consigner; and an extract at best is but a relative writ, *et non creditur referenti nisi constet de relato*. *Answered*, Though sometimes the LORDS have granted certification against principal writs, when after search not found in the register; yet it has

No 131. suffered many exceptions, and been in sundry cases refused, as appears from 21st Dec. 1629, Cunningham, *voce* Reduction; Blackwood, No 119. p. 6693, and 2d Jan. 1675, Thoirs, No 122. p. 6694; where the Lords refused to reduce or grant certification, though the principal was not produced. *Replied*, There were specialities in all these cases; in the one, the verity of the writ was astructed and adminiculated by a homologation; and in the other, the registers of the years 1650 and 1651 were lost coming by sea from London, and it was in these years; and in Thoir's case, the Lords seemed to be of a different opinion on the 14th of January 1674, though they altered afterwards. The Lords found the danger and inconvenience great on both sides, and to give a general decision either way might draw consequences after it; *omnis generalis definitio in jure* being *periculosa*; and balancing both, they in this special circumstantiate case granted certification, seeing there was no vestige of it, not so much as in the minute-book; and were the rather moved to this, that my Lord Saline could relieve himself by a proving of the tenor, there being a sasine taken on this disposition, and sundry other adminicles to make it up; but not to make it a preparative, the Lords inserted in the interlocutor, that it was only granted in this special case.

As to the inconveniencies, it was remembered, that one Captain Waddel had a little before the Revolution procured a principal discharge by a little money out of the register, and was pursuing the debtor to pay it over again; but being providentially discovered, his ear was nailed to the Tron, which was too easy a censure for his villainy; on the other hand, it was also minded, that Lord Haddington, 23d January 1610, Meldrum, *voce* Process; and 6th of March 1612, Lochinvar, Ibidem, gives a remarkable instance of James Tarbet, who, in 1600, forged Richard Thomson's testament, and shewing it to sundry honest men who read it, he thereafter abstracted it, alleging it was tint, and raised a proving of the tenor by the oaths of those who saw and read it; but in the trial the falsehood was discovered, and he was hanged as appears by the criminal adjournal-books of that time; all which shew the evident danger there may be on both hands; and it may deserve an act of Parliament to obviate the hazard, and secure the registers, and declare who shall be liable in case principal writs be amissing; for a few papers may be of more value than a clerk-register or his depute's whole estate, if it come to reparation of damages by their loss, and would make these offices very dangerous to the possessors; whereas *officium nemini debet esse damnosum*, unless dole or negligence can be qualified against him.

Fol. Dic. v. 1. *p.* 449. *Fountainhall, v.* 2. *p.* 251.

*** Dalrymple reports this case :

No 131.

1704. *December* 27.—WILLIAM WILSON pursues a reduction and improbation of a disposition of certain lands made to the Lord Saline by Short his brother-in-law. An extract of the disposition being produced, the pursuer obtained a warrant to search the records for the principal, and, after search, found it not, nor mention of it in the minute-book, nor recorded in the book of registers; whereupon he insisted for certification.

It was *alleged* for the defender, That the disposition being in the public register of the Session, whereby he could not have the custody of it, he was not obliged to produce it, otherwise he and all the lieges would be in a great danger and uncertainty, if any misfortune, by negligence or villany, should befal to their writs in the register; 2*do*, It was not quarrelled *de recenti*, nor for very many years, being registrate on the 10th July 1663, now 41 years ago; 3*tio*, No presumption nor qualification of falsehood; 4*to*, Several subaltern rights and conveyances consequent to that disposition; and, 5*to*, Other adminicles to make out the verity of the deed, as sasine following upon it in February, the disposition being dated in January 1662.

It was *answered*, There are, doubtless, inconveniences on either hand, but far greater, if an extract could satisfy in improbation; for, 1*mo*, My Lord Register's hand being a single subscription, adhibited without any other formality, and known to the whole lieges, it might easily be forged, and there would be no place for the direct manner of improbation by writer and witnesses, and scarcely any possibility to redargue it *comparatione literarum*, or other circumstances. 2*do*, A false writ might truly be exhibited to the Register, and, by influence or fraud, withdrawn, and so the lieges be imposed upon without remeid. 3*tio*, Those who are trusted with the records are public depositaries, and all dispositations are in law on the peril of the consigner, which lawyers agree in at home and abroad; Duarenus upon the title *De fide instrumentorum*, and my Lord Dirleton on the word REGISTRATION. 4*to*, In this case the whole question does result on the date of the disposition; for the extract mentions the same to be on the 17th of January 1662; and Short the disponer was duly inhibited upon the pursuer's date, the 20th of the same month and year. 5*to*, No vestige of this registration to be found either in the minute or respond-book, which were ever most exactly kept; nor in the book of registers, though warrants are found regularly in the same month, both before and after. And as to the inconvenience to the lieges on the other hand, 1*mo*, There is a great regulation in the matter of registrations by the 38th act, Parliament 1685; since which time the registers have been most punctually kept, and now a fraud or embezzlement can hardly be practised; and as for the adminicles of the writs, those are only competent to be adduced in proving the tenor.

'THE LORDS granted certification *contra non producta*.'

Dalrymple, No 55. *p.* 70.