

**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.

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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.

1675: January 2.—MR DAVID THORS having acquired right from John Forbes to certain lands, pursues reduction and improbation against the Laird of Tolquhon, of all rights competent to him of the said lands, who produced an apprising of the said lands, upon a bond granted by John Forbes, grandsire to John Forbes, who is Mr David's author, with an infestment following thereupon, together with the extract of the bond, out of the Sheriff Court books of Aberdeen, where it was registered; and, in respect that the extract was not sufficient, in case of improbation, without producing of the principal, certification was granted a long time ago, but still stopped for doing diligence against the keepers of that register, for obtaining the principal bond; and, upon examination of the Clerks and others, it was found that the bond was registered, and that the book in which it was registered was extant, but that the warrants and principal bonds, for many years, were miscarried and lost; and thereafter, Tolquhon having raised a probation of the tenor of this bond, the certification was stopped till the tenor might be discussed; but, in regard the principal bond had been put in the register in *anno* 1632, there could be no witnesses found alive that saw the same; and the certification being now craved to be extracted; it was *alleged* for Tolquhon, the defender, That, albeit extracts from inferior Courts do not ordinarily satisfy the production in improbations, without the principal, yet there are two grounds that may stop certification, *viz.* if the writ be admuniculated by other uncontroverted writs, acknowledging the being thereof by the debtor, or much more if it be ratified, homologated, or acknowledged by the debtor; or, if it hath remained registered and unquarrelled by the space of 40 years; for, albeit the act of prescription hath an exception of falsehood, which may be pursued upon inspection of the false writ, or other evidents, though it were never so old, yet that cannot be extended to presumptive falsehood, inferred by certification, bearing, that if the writ be not produced, it shall be holden and reputed as false, which hath no effect, but as to that process, and the writ is good thereafter, as to all other effects: *Ita est*, The writ in question was registered 40 years before intenting of this cause; and it is admuniculated by horning raised thereon, by caption, apprising, and infestment; and the apprising clears, that the debt was suspended, and yet that execution proceeded; so that, in all that time, there is nothing to shew that the debtor did ever raise or insist in an improbation. *3tio*, It is expressly homologated, in so far as the debtor, John Forbes, having only two daughters, disposed his estate to Patrick Forbes, his oye, by the eldest daughter, with the burden of all his debts; and the said Patrick entered into a transaction with Tolquhon in *anno* 1663, produced, whereby Tolquhon was obliged to dispoine the right of apprising led on this bond, and to warrant that the debt was resting undischarged, and the apprising legally deduced, which is a clear homo-

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logation and acknowledgment of the bond, without any exception of the verity of it, as was pretended ; and John Forbes, son to Patrick, hath also entered into a transaction with Tolquhon for the same debt, before any right made to Mr David Thoirs ; who was privy to the transaction, and advocate in the cause, the matter being litigious, he is in no better case than John Forbes, his author, who transacted. The pursuer *answered*, That certification ought to be granted, notwithstanding all these allegeances ; for, as to the prescription, it was interrupted by the minority of John Forbes, Mr David's author, which was acknowledged, and so there was no further debate as to that point. *2do*, As to the adminiculation, scarcely could the probation of a tenor stop certification, much less adminiculation ; neither can the diligences alleged upon be respected ; *imo*, Because the writ was registered in *anno* 1632, and there appears no diligence till the year 1643, so that, for eleven years, in which Mr William Forbes, the creditor, was alive, he suffered it to be latent, and did not, nor durst not own it ; and, albeit apprising was deduced thereafter, yet, for 40 years, neither he nor his successors attained possession of the land, nor incarcerated the debtor's person ; and, albeit a suspension be mentioned in the apprising, it is not produced, neither doth it appear whether improbation was alleged therein ; and all these grounds, and stronger, being alleged in the improbation, at the instance of Mr John Bain against the Vassals of Lindores, No 120. p. 6693. and though they alleged that the registers of Falkland were carried away, or the warrants destroyed by the English, yet the extract there did not stop the certification ; and though all diligence was used upon these rights, and possession attained thereby, which is not here ; and, as to the homologations by Patrick Forbes's transaction, *imo*, It is not relevant ; for, though an heir or successor should grant a bond of corroboration of a false bond, being ignorant of the forgery thereof, yet if thereafter he should come to the knowledge of the forgery, the ratification would not exclude him, much less a homologation, which is but an indirect ratification, and Patrick Forbes his transaction is only in *anno* 1663 ; *2do*, Whatever the ratification or homologation of the debtor might import, Patrick Forbes's transaction can operate nothing ; because, that, before that transaction, he was denuded of the lands in question, in favour of William Forbes, his son, to whom John Forbes, Mr David's author, is brother and heir, and cannot be prejudged by any acknowledgment by Patrick Forbes, his father, whom he represents not ; and, as to John Forbes his transaction, he was minor, and hath raised reduction ; and in the transaction it is provided, that if he, upon minority, should resile, his curators, who transacted with him, should not be bound. It was *replied* for the defender, That though, after so long a time, all the diligences upon this bond be not preserved, yet there is more than sufficient to take off the presumptive falsehood thereof, for not production, when it is instructed, that it was truly registered and booked, and lost without the creditor's fault, and so much diligence done thereon in the debtor's own life, who, having raised suspension, which being

his own writ, ought to be produced by this pursuer; and it would appear to bear nothing of improbation, which is not competent by way of suspension, without reduction and improbation, in respect it cannot be instantly verified; and it cannot be imagined that any person would suffer his land to be appraised, and infestment thereon, without using diligence for improving the same, in his own time; and this improbation was never raised till Mr David Thoirs got right; nor is there a vestige that ever the creditor, or his successors, pretended any thing against the verity of the bond; and what is done by Mr David is at random, for he could not give his oath of calumny of any ground of verity of the suspicion of the bond, which he never saw; and what is alleged in the case of Lindores, and of Hay, against Jameson, No 121. p 6693. where the extracts did not satisfy the production. It is not denied, that, by the common rule, extracts from inferior Courts satisfy not production; but, in these cases, there was nothing pleaded or proved, as to adminiculation, or homologation of the rights.

THE LORDS found, that this matter having been litigious before Mr David Thoir's right, and he stating himself in the same condition with John Forbes, his author, they found that the evidences produced for adminiculating the truth of this writ, and the homologation being also instructed, whereby it did appear that Patrick Forbes was infest by a disposition from John Forbes, the debtor in this bond, with the burden of all John's debts, except his cautionries; and in this bond John, and several others, were co-principals, which, being prior to Patrick's disposition to his son William, who became thereby lucrative successor to Patrick, who, by the acceptance from John of the disposition, is liable to his debt; that, therefore, upon the whole matter, there was sufficient grounds adduced to exclude certification against this bond, the extract whereof was produced, though the principal was not, being lost in manner foresaid.

*Fol. Dic. v. 1. p. 449. Stair, v. 2. p. 253. & 297.*

\* \* Dirleton reports the same case :

MR DAVID THOIRS, in an improbation at his instance against Tolquhon, of a bond, did crave certification, because the principal was not produced, but an extract out of the Commissaries books of Aberdeen.

THE LORDS, upon a report, having debated amongst themselves, what was fit to be done in the said case, seeing it appeared that the said pursuit was intended, not of design to question the bond, upon evident and probable grounds of falsehood, but only to have it produced; and it appeared by many presumptions, that the bond was a true deed, and never questioned by the granter *ex capite falsi*, though he had suspended upon other reasons, and there had been much diligence by decreets, horning, and comprising upon the same; and yet the bond being of an ancient date, beyond 40 years, there was no person living

No 122. that could prove the tenor thereof, and declare that they knew the same to be a true deed ; and, on the other part, the Lords could not refuse to grant certification, seeing an extract does not satisfy in an improbation, where the principal was not produced ;

It was moved by some of the LORDS, That if the pursuit was not intended within the years of prescription, that it should not be sustained ; seeing albeit *causa falsi* does not prescribe, where the paper or subject craved to be improved is produced, and the pursuer offers to improve, and make it appear, that the same is false ; yet, when the improbation is only to try the condition of the defender's right, and in order to a certification, if the principal cannot be exhibited, it is not properly *causa falsi* ; and the effect of the certification is only, that the writ for not production should be holden as false *præsumptive*, and *fictione juris* ; and, upon the matter, it is but a reduction for not production.

The said point being of great concernment, and the debate being upon a bill, and the process not produced, that it might appear whether it was intended within the 40 years or not, it was not decided.

1675. January 2.—Mr David Thoires having acquired from John Forbes the lands of Craighinty, did pursue an improbation against the Laird of Tolquhon of a bond and comprising deduced thereupon of the said lands, against John Forbes of Gask, the said John Mr David Thoires's author's great-grandfather ; and certification being granted, and being urged that it should be extracted, it was *alleged*, That it could not be extracted, but ought to be stopt ; because the said bond, whereupon the comprising was deduced, and whereunto, and to the comprising thereupon, Tolquhon has right by progress, was granted to the deceased Mr William Forbes advocate, and registrated in the Commissary books of Aberdeen in *anno* 1632 ; and the extract was now produced ; which, after so long time, and the time of troubles, the registers being all in such disorder, ought to satisfy the production, being not only adminiculated, but also homologated, in manner aftermentioned, by Patrick Forbes, grandchild and successor to the granter, and the said John Forbes, the said Patrick's son ; in so far as, the said bond was granted to the said Mr William Forbes, a person above all exception, and all possible diligence, both real and personal, had been used thereupon, by horning, comprising, and caption ; and that the granter had suspended the said bond upon divers reasons, and did never question the truth of the same ; and disponed his estate to Patrick Forbes his apparent heir, with the burden of his debts ; and it cannot be thought but that he understood the debt in question to have been comprehended under the general of debts, having been so much distressed for the same. And that the said Patrick did homologate the truth of the said bond, in so far as, by a minute of contract betwixt him and Tolquhon, he had taken a right from Tolquhon to the said bond and comprising, and was obliged to pay for the same the sum therein-mentioned ; and the said Patrick having disponed to his eldest son William his estate, the

said John was served heir to the said William his brother, and had homologated also the said bond by contract betwixt him and Tolquhon, whereby he disposes the lands comprised, of new again to Tolquhon, and ratifies the said apprising and grounds thereof; which contract, albeit when the said John was minor, was made with consent of his friends and lawyers most deliberately, the said Mr David Thoires being one of his lawyers; and, therefore, though it might be questioned upon minority, as to any prejudice or disadvantage the minor may pretend to have by the same, yet it will stand as an homologation of the said bond as to the truth of the same, unless it were offered to be improved by a positive qualification of falsehood.

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THE LORDS having considered the inconveniencies on either side, if certifications for not production of principals should be loosed, being the great surety of the people; and, on the other part, if they should be snares, and parties should pursue maliciously improbation, having *viis et modis* got the principal writs out of the register, or known they had miscarried; they found, in respect that Mr David Thoires having taken a right after the matter was litigious, by a charge and suspension of the minute, betwixt Tolquhon and the said John Forbes, the great grandchild, so that the said Mr David was in the same case as if the said John were pursuer, and was content to state himself in that case; and, in respect of the specialties of this cause, and adminicles and homologation foresaid, that therefore the said extract ought to satisfy the production, and the certification ought not to be extracted.

*Dirleton, No 196. p. 85. & No 210. p. 96.*

1675. June 30.

DUNMUIR *against* LUTFOOT.

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THE LORDS in an improbation found, (as they had done formerly in diverse cases), that an extract out of the books of an inferior court does not satisfy the production; the question being of a writ registrate in the books of the Canongate.

Reporter, *Newbyth.*

*Fol Dic v. 1. p. 449. Dirleton, No 285. p. 138.*

\* \* \* Gosford reports the same case :

IN an improbation of a disposition, made by Thomas Dunmuir to his wife, of a tenement of land in the Canongate, certification being craved for not production of the principal disposition, it was *alleged*, That not only they produced an extract under the clerk's hands of the court of the Canongate, but likewise the register itself, bearing, that the principal was given up to the party to be kept by him, who gave in the same, so that there could be no appearance