

*Answered*; The *jus quæsitum* so the King by the rebellion cannot be taken away by the transaction of parties; and the creditor being always master of the principal horning, the King or his donatar cannot be burdened with the production of it, as was observed by Haddington, Thomson against Ramsay, *voce* PERSONA STANDI; and found December 1676, betwixt William Veitch and Peter Pallat, No 91. p. 2784.

THE LORDS found the production satisfied by the extract, in respect the donatar's gift proceeded upon a third person's horning, and not upon his own, whereof he might be master.

*Harcarse*, (IMPROBATION AND REDUCTION.) No 564. p. 156.

No 128.

1688. June 20.

THOMAS LAWRIE *against* MARY AUSTIN.

THE PURSUER of an improbation craving certification against the writs called for, notwithstanding of a transumpt of them produced,

It was *alleged* for the defender; That transumps proceeding upon summons and citation of parties, and not by instrument, are sufficient to satisfy the production in improbations; for many of the securities of this kingdom are but transumps, the principal writs being lodged with the party having the greatest interest. And here parties are cited to hear the bonds transumed, because the principals were to be sent to Virginia, to pursue the debtors there; and being accordingly sent, as appears from the attorney's letters, they cannot be had, now that he is dead.

*Answered* for the pursuer; That transumps upon compearance of the parties, may indeed have effect of the principal writs; but here there was not only no compearance, (which makes the transumpt no better than an extract) but the debtor was out of the kingdom; and this specialty must be noticed to prevent falsehood, which the sustaining of transumps to satisfy the production in improbations, would encourage. Again, the stile of decreets of transumpt bear, that they are to have the effect of principals, except in the case of improbation.

*Replied*; The urged inconveniency is as strong against tenors as transumps; and without question this transumpt would be sufficient for proving the tenor; and the exception of improbation in decreets of transumpt is but exuberant stile.

THE LORDS sustained the transumpt to stop certification. It was *alleged*, but not instructed, that there was a judgment recovered upon the bonds at Virginia. *Fol. Dic. v. I. p. 450.* *Harcarse*, (IMPROBATION AND REDUCTION.) No 580. p. 161.

No 129.  
Transumps  
sufficient to  
stop certifi-  
cation.

\*.\* Sir P. Home reports the same case:

IN the action of reduction and improbation at the instance of Mary Austin, relict of the deceased Francis Herries of Lambholm against Thomas Lawrie

No 129. merchant in Edinburgh, the LORDS sustained a decret 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 Edinbrgh, 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 impro-  
bation of a  
decret of the  
Court of Ses-  
sion, the de-  
fender must  
produce the  
warrants, and  
it is not suf-  
ficient to say  
they are in  
public custo-  
dy.

SIR Robert Home of Renton, pursuing a reduction and improbation against Sir Patrick Home, Advocate, and Home of Kames, of a decret they had obtained against his father; and the decret 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 decret, he was more concerned to search for them than the pursuer, for his decret 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 decret. 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 decret 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. Fountainball, v. 2. p. 153.*

1704. December 28. WILLIAM WILSON *against* LORD SALINE.

No 131.

The defender  
in an impro-  
bation pro-  
duced an ex-  
tract of a  
deed under  
the hand of  
the Lord Re-  
gister. Certi-  
fication 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