and here there intervened only six days betwixt the extract and production of the bond, which was the warrant of the apprising; and the defender is willing to refund the expense and damage, *cum omni causa.* No 165.

It was *duplied*, Certifications, after taking terms, are decreets *in foro*, which cannot be reduced, neither can they be recalled, if they be fairly and regularly extracted, without undue precipitation; and there is no distinction in law, whether recently quarrelled or not; because, *eo momento* that they are extracted, they are the party's evidents, and there is no more latitude or privilege to recall them *ex recenti* than *ex intervallo;* for, if they might be recalled at any time, it were not possible to fix a period of time at which they could not be recalled; and the Lords would be altogether arbitrary in that matter; and the rigour of certifications, with the importunity of parties, would often prevail; therefore, the legal extracting of such decreets is the period fixed by law.

"THE LORDS found, that the certification being fairly and regularly extracted, could not be recalled, though the writs called for were recently offered to be produced."

Fol. Dic. v. 1. *p.* 454. *Dalrymple, No* 9. *p.* 12.

1709. *November* 4. JOHN MURRAY *against* JAMES WOOD.

No 166.
The defender in an improbation, who took terms to produce, was reponed against an extracted certification, for not production, pronounced in the hurry of the end of a Session, upon application made for redress, in the beginning of the next, and payment of the pursuer's expenses, modified by his oath.

JOHN MURRAY, adjudger of the estate of Farquharson of Balloch, having pursued a reduction and improbation against James Wood, another adjudger, wherein all diligence at his instance, and grounds thereof, affecting the common debtor's estate, were called for, and terms taken by the defender to produce; and having, the 22d of July last, obtained a decreet of certification for not production, which was extracted the 8th of August thereafter, James Wood now represents by bill, That his writs were in town, in order to have been produced when the certification was pronounced, but his doers had not adverted to it, business being hurried in the end of a Session; and craved the Lords would recall the decreet, and allow his interest yet to be produced, in regard, however tender they are in reponing against certifications in improbations that have stood long unquarrelled, yet such may be got rectified, if quarrelled *de recenti*, Stair, Instit. lib. 4. tit. 20. sect. 11. Murray and Crichton against Murray, No 160. p. 6736. Bannantine against Rome, No 162. p. 6742. For no forms, if recently complained of, should be rigidly observed against equity.

Answered for John Murray, Decreets of certification in improbations having been always considered as the best and strongest securities in our law, so as they can hardly be overturned, though pronounced in absence; and the certification in question being orderly extracted, after compearance, and taking of terms, it can never be brought back. The cited decisions relate to cases where the production of rights was hindered, through accidents that human

No 166. power could not foresee, or prevent: But the Lords never reponed against a decreet of certification, upon any other ground than that of a recent application. Law must not be turned out of its channel and common course, to meet a particular case, though there may be equity in it; it being a maxim among the Doctors, that equity ought to be the rule in making laws, but not in judging, when inconsistent with the law made: So that one should rather have the benefit of the established form, than that another should be relieved of an inconveniency incurred through neglect thereof; according to the rule, *Jura subveniunt vigilantibus*, &c. And, therefore, from the very time Mr Murray obtained his decreet, it became a good and sufficient right to him, which cannot be made less such, by the defender's applying for redress in a short time thereafter; because, when once the legal time allowed for producing rights is expired, law makes no difference as to times of application, which otherwise were necessarily to be determined, that persons might not be at the trouble or expense of extracting, till the same are elapsed.

The Lords reponed James Wood against the decreet of certification, and allowed his writs yet to be received; he paying John Murray's expenses according as he shall depone that he expended in procuring the said decreet.

Fol. Dic. v. 1. *p.* 454. *Forbes, p.* 351.

*** Fountainhall reports this case:

Murray of Arthurstane, and James Wood in Killymuir, being both creditors of Farquharson of Balloch, and adjudgers of his estate, Murray pursues a reduction and improbation against Wood; and after all the terms are run, he procures a decreet of certification against him for not production of his writs, dated the 22d of July last, and extracts it on the 8th of August. Wood finding his right *funditus* cut off by a mere omission of his agent, who had his writs in his hands, gives in a summary petition to the Lords the first day of their down sitting, alleging that advantage was taken of him by surprise, for his right was clearly preferable to Murray's, and he was only in possession of some houses, which was not the sixth part of the subject adjudged, and the rest lay all open to Murray's diligence; and that his writs were in Hugh Somervell the writer's hands, ready to be produced; but he was rendered secure, because it was put up in the roll of the acts thus, "Murray against Lunday of Glasswell, (who was likewise called in the process) and others;" and then he had no room to apply; and he now produced his writs, and was willing to debate *instanter* without delaying the pursuer, as also to pay him the expenses of extracting the decreet, so that he had neither damage nor prejudice. And though certifications in improbations are a strong fence and security, yet they must not be a snare and gin to the lieges; and Stair, lib. 4. tit. 20. § 11. acknowledges they will be recalled on the least informality, where they are quarrelled *de recenti*, and the writs called for are produced, as Wood does now, and repeats his reduction.

Answered for Murray, That the hurry and end of a session can never be a relevant cause of reduction; for this would militate against all done upon the last eight days, wherein much business is dispatched; and the thing was fairly done, and he had seven session days to have applied, and did not; and that it was put up in the roll against Glasswell only is denied, and cannot now be proved, they being now cancelled and torn; and this was not a certification in absence, for he had compeared, and taken terms, and yet kept up his writs, and had a competent time to have applied, either to the Ordinary who pronounced it, or to the whole Lords, but neglected both; and to overturn such decreets, is to shake the security of the lieges, many of their rights depending thereon; and the preparative were of more value ten times than the import of this cause; and they never repone against them, unless there be precipitation, or some informality in the extracting, which cannot be pretended here. THE LORDS were much straitened in this conflict betwixt strict law and equity. Some were for refusing this summary application, and remitting him to go on in his reduction as accords. Others were for trying, before answer, how it was inrolled, and if there was any legerdemain or generality used here. Some again remembered two cases, where their predecessors had loosed such certifications, and reponed against them, on the 26th June 1673, Sir R. Murray *alias* Crichton, against Murray of Broughton, No 160. p. 6736.; and 17th February 1675, Bannantine *contra* Rome, No 163. p. 6742. But it was alleged, in the first case, the defender was at the time in Ireland, and was in the end of the session; and the complaint was made the very first day of the next sesion; and, in the second case, his advocate was lying sick at the time; and Murray contended that Wood had no material prejudice, for his debt was more than satisfied, and extinct by his intromissions. Yet the LORDS, by a plurality of seven against six, reponed him against the certification, he paying him every farthing of the expense he should give up upon oath, and what further he had put him to by answering this bill, and debating *instanter in causa*, without putting him to any more delay. Some thought this a great exercise of the Lords *officium nobile*, for when certifications are fairly extracted, they should be irreversible. But equity inclined the Lords, to the more favourable side, according to Craig's words, 'In dubiis casibus mitioria nobis semper placuerunt;' and in the application and interpretation of laws, the doctors bid us reprobate *nimias argutias*, mere subtilties and scrupulosities unsupported by equity. No 166.

Fountainhall, *v.* 2. *p.* 522.

1710. *November* 24.

Colonel GEORGE PRESTON *against* Colonel JOHN ERSKINE.

No 167.

IN a reduction and improbation at the instance of Colonel Preston against Colonel Erskine, the LORDS refused to allow writs to be received in, against