1673. *June* 26. MURRAY *alias* CRICHTON *against* MURRAY.

No 160.
A decree in Ireland, finding a deed a true deed, not sufficient to repone the defender against a certification obtained in an improbation of the same deed in Scotland, but the deed itself must be produced.

SIR ROBERT MURRAY having pursued improbation of a deed of lease and release, bearing date in Scotland, whereby the Earl of Annandale conveys his estate in Ireland to Burghton; he did obtain certification for not production, and now pursues damage and interest, that by that false deed, he was damnified in the value of that Irish estate. It was *alleged* by the defender, That he hath a reduction of the certification depending, and craves to be reponed; because, he having proponed a defence *rei judicatæ*, that the falsehood or verity of the deeds were most solemnly tried in Ireland, before the King's Bench, by two several trials and juries, and were found true deeds, and that upon a pursuit moved by the pursuer himself, so that the matter having been judged by a Sovereign court in Ireland, after thirteen years dependence, it could not be again called in question here; which being proponed in the improbation to stop certification, the LORDS found, that that defence was proponed *dilatorie*, and so behoved to be instantly verified; and, therefore, seeing these sentences were not produced, they granted certification, upon the sixth day of February, conditionally, that if the sentences were not produced before the end of the Session, they would take the same in consideration; and there being produced a paper the last day of the Session, which the LORDS found not to satisfy the condition of the certification, did therefore ordain it to be extracted; whereas, in that short time, it was impossible to get writs brought from Ireland; and the defender had advice of lawyers, both in Ireland and Scotland, that he would get a term to prove that defence, and so was in an excusable ignorance, and was in his Majesty's service, being High Sheriff of a county; and, upon application to the Lord Lieutenant to come over, was refused; and did immediately, upon the first notice, use all possible diligence to bring over the sentences, which he now produces, and therefore ought to be reponed. It was *answered*, That a certification in an improbation is the great security of the lieges for all their rights, and if it be orderly extracted, is never reduced, even though it were in absence; otherways no party could be secure, and purchasers, who bought and rested upon such certifications, would be ruined; but much more in this case, where the certification is granted upon compearance; so that there is conjoined two of the strongest securities, viz. a certification in an improbation, and a decreet *in foro*. It was *replied*, That albeit certification be a very great security, yet there is great odds when it is quarrelled recently after the pronouncing or extracting thereof; for there is nothing more frequent than for the Lords to recall it after it is in the parties hands, if any writs be produced; but when there are any intervals, certifications use not to be easily recalled; but, in this case, it is all one as if the certification had been quarrelled the next day after it was extracted, for it was ordered to be extracted the last day of February, and the 1st day of June it was quarrelled, which is the next day, setting aside the vacancy; and

albeit decreets *in foro* are very hardly recalled; yet no decreet is counted *in foro*, except where litiscontestation is made; but where a defence is only proponed *dilatorie*, and repelled, because not instantly verified, it is never counted a decreet *in foro*. It was *duplied* for the pursuer, That certifications have seldom been recalled, but never but upon production of the writs called for; and if the defender will produce the deed of lease and release, and submit it to a trial here, the pursuer is content to repone him. It was *triplied* for the defender, That the ordinary order of recalling certifications, is upon production of the writs called for, because it is a rare case that reposition is craved upon a former absolvitor from the forgery, as is in this case; but there is as good reason to repone upon production of an absolvitor, as on the production of the writs questioned. No 160.

THE LORDS refused to repone the defender against the certification, unless he produce the deeds of lease and release; but if the defender will undertake to produce them, they declared they would repone him; and did not burden him to pass from the sentence of the judges in Ireland; but reponed him simply that he might propone his defence *rei judicatæ peremptorie* after the sentence.

Fol. Dic. v. 1. p. 453. Stair, v. 2. p. 194.

*** Gosford reports the same case:

IN a reduction of a decreet at Sir Robert's instance, in an action of improbation, wherein certification was granted against Broughton, for not production of a deed of lease and release of certain lands in Ireland, made to him by the deceased Earl of Annandale, upon this reason, that he did propone a dilator defence, viz. that no improbation could be pursued here, because it was *res hactenus judicata* in Ireland; in so far as, the said falsehood being tried before the King's Bench two several times, he had obtained two verdicts upon the trial of the deed, and probation of the verity thereof by two sworn inquests, finding the said deed to be a true deed, and lawful; and in respect this exception was proponed *dilatorie*, and not instantly verified, the LORDS did repel the same, and granted certification, to be extracted within 20 days, which was the latter end of the winter session, unless the said judgments were produced; but so it is, that it being impossible to extract the same out of the records, and Broughton himself, being then a Sheriff, to come from Ireland, and now, at the sitting down of the summer session, having produced the same, with his summons of reduction, he ought to be reponed against the certification; and his defence being unanswerable in law, and verified, ought to be received. It was *answered* for the defender, That he having a certification extracted in an improbation, which is the greatest security in this kingdom from all pretence of trouble and plea, whereby he hath *jus acquisitum* as to all interest which can be quarrelled by virtue of these deeds, for not production whereof the certifi-

No 160.

cation was granted, the same cannot be taken from him, nor the pursuer reponed to a dilatory defence, because now he offers to instruct the same, being against all law and form; especially seeing the summons of improbation was executed against Broughton, personally apprehended, being then in Scotland, and was consulted with his lawyers; so that he cannot pretend that he could not send the same from Ireland, during so many years after the citation and dependence; and yet, notwithstanding, the defenders declared, that they were content to repone him to the defence, if, with the verifications thereof, he could yet produce that deed of lease and release, which was quarrelled as false and feigned, that it might abide a legal trial here, it being *locus delicti*, and so in law, notwithstanding of any trial in Ireland, which was occasioned by a pursuit for attaining to the possession of the lands therein contained, yet either Sir Robert, upon the account of damage and interest, to be satisfied in Scotland, or the King's Advocate may pursue for his Majesty's interest an improbation here. It was *replied*, That all certifications for not production being most unfavourable, and the defence proponed being only a dilator, which the very first day of the sisting down of the session is offered to be verified, it were most rigorous, and contrary to the Lords daily practice, upon any probable cause, to repone defenders against severity of such a certification; neither ought the pursuer to produce the deed of lease and release, seeing he being reponed to a defence of *res judicata*, which is instantly verified, and put in that condition as if there were no decreet extracted, it would be a peremptor of that instance, and defend against all procedure in the improbation——THE LORDS did sustain the answer, and refused to repone the pursuer, unless he would produce the deed of lease and release against which certification was granted, as false and feigned; upon these grounds, that certifications upon improbation were the great security of the lieges, and that it was a convincing presumption of the falsehood of that deed, that Broughton refused to produce the same, to abide a lawful trial, where he might have full probation to approve the said deed if it true; and that in law *materia falsi* is so odious that *nunquam concluditur in falso*, and the proper trial thereof ought to be *in loco delicti*, especially that crime being capital here, and is not so punished in Ireland, where the trial would not be so exact; and parties may adventure more easily to make use of forgeries, where the life was not in hazard; so that he being reponed conditionally, if he would produce that deed quarrelled, could have no reason to complain of rigour, it being in his own power to take off the force of a standing decreet, which, if he refused to do, he did merit no favour.

Gosford, MS. No 601. *p.* 344.