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produced, was not narrated in the production.

able or redeemable, and for proving thereof produced the decreet of declarator *in anno* 1637. Against which it was *objected*, That it was null, because albeit the libel was upon a clause irritant, whereby it is provided, if the money were required, and not paid within such a time, the reversion should expire; yet, at the compearance and production, there is no mention thereof, albeit at the conclusion, the decreet bears, because the libel was sufficiently proved by production of the writs aforesaid, which can be only understood of the writs in the production, and it is not enough that they were libelled upon, for in all decreets the whole production is specially inserted. It was *answered*, That the requisition was truly produced, and that the omission of the clerk to repeat it in the production cannot annul the decree, after so long a time without a reduction thereof. It was *answered*, That albeit *in favourabilibus*, the Lords may supply defects upon production, *ex post facto*; yet, *in odiosis*, such as clauses irritant of reversions, the Lords ought not to admit the same.

The Lords found the decreet of declarator null.

Fol. Dic. v. 2. *p.* 204. *Stair, v.* 1. *p.* 726.

1695. *December* 11. Catharine Brown *against* Walter Burnside.

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In a reduction of a certification in an improbation, this nullity was not sustained, that there were several petitions and deliverances on debate after the certification. Had there been new productions the result would have been different.

Phesdo reported Catharine Brown, and Dr William Lauder, her husband, against Mr Walter Burnside of Whitelaw. Crawfurd of Fergushill, as assignee to Elizabeth Hamilton, daughter to Samuelstown, adjudges these lands of Whitelaw for the behoof of umquhile Mr Arthur Hamilton, advocate, first husband to the said Catharine Brown; and thereon pursuing a reduction and improbation of Mr Walter Burnside's rights of these lands, obtained a certification; of which Mr Walter (having recovered new papers) raised a reduction on eight or nine nullities for opening the said decreet, which being reported this day, the Lords repelled the first, viz. That the Master of Stairs was marked as an advocate compearing in the decreet, whereas, at the time of pronouncing it, he was Justice-Clerk, and a Lord of the Session; for it was made appear, that he was an advocate compearing in the cause the time of the first debate, though he was advanced ere it came to a sentence. They also repelled the second nullity, that the certification bore date in June 1688, and yet there were several bills and deliverances on debate posterior thereto, till February 1690; for they considered that these only adhering to the former decreet, with some qualities or rectifications, it had been the practice of the clerks (though it might deserve some regulation) to extract it of the date whereon it was first pronounced; but found, if there had been any new production made after the first date, and debates, reports or avisandums with the same, then the wrong date would import a nullity. Yet this, by the new article of the regulations, ratified by the King in 1695, can extend no farther for opening this decreet of

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certification than to purge the prejudice arising to him by that nullity, which was the being made liable in two years rent of the lands by the interval between the antedate and the true time it was ordered to be extracted, which the LORDS might assoilzie him from, and then repel the nullity simply. As to the 3d, That the active title, being only an adjudication without an infeftment, was not sufficient to call for production of his rights who stood infeft; they repelled it, because it was only competent to have been proponed *in initio litis*. THE LORDS also repelled the 4th reason of reduction, that the certification made no mention of a second term assigned. THE LORDS remembered they had not sustained this as a nullity in the reduction pursued by Straiton of Lauriston against Alexander Arbuthnot of Knox, the last winter Session; and that here *in rei gestæ veritate*, there were two acts assigning two terms produced, *et plus valet quod agitur*, &c.; and if a clerk, through mistake, give out a wrong decreet, he may, conform to the true warrants, rectify it in a second extract. The 5th nullity was not regarded by the LORDS, that the certification granted ran in general terms against all writs granted to the defender, without bearing, "of or concerning these lands," and so was null, being *sententia lata sine certa designatione et quantitate;* for the LORDS thought it was sufficiently restricted *secundum subjectam materiam* by the title, the particular writs called for, and the preceding clauses, even as we proceed in the interpretation of all laws and statutes. The 6th reason of reduction was also repelled, That the defender had offered some papers to stop the certification, which were refused, for the LORDS found the instrument produced not probative against the clerk. THE LORDS demurred on the 7th nullity, That he had taken out a general certification, and yet, by a receipt under Mr Arthur Hamilton's hand, to Mr William Thomson, writer, it appeared that he had borrowed up some of the writs himself, and then had them in his own hand. For the LORDS found the certification could not militate nor take effect against any such writs as were then in his custody, but that it was yet entire to Mr Walter Burnside, the defender, to found what defences he pleased on these writs. The 8th objection was, that the pursuer's diligence proceeded on a bond granted by Elizabeth Hamilton *stante matrimonio*, without Captain Holm's her husband's consent, or proving he was dead, in prejudice of the defender who derives right from her said husband. This the LORDS repelled as competent and omitted, unless it was omitted to be proponed *debito tempore*; for it was *alleged*, That it was truly proponed, but had received no answer, being neither sustained nor repelled; whereas many allegeances receive no distinct interlocutor, being passed over as deserving no separate answer, and looked upon by the Lords as frivolous. The 9th point was, That however the certification might strike against the defender's rights he had from the Hamiltons of Samuelstown, from whom the pursuers derived their rights, yet it could never reach to cut off the defender's rights he had from the Whitelaws of that Ilk, or any other distinct authors. It was *contended*, That one having right to lands had interest

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to remove all impediments standing in his way of bruiking and possessing these lands, whoever be the author of the rights called for. The Lords, for their farther clearing, desired to hear this point more fully debated in presence, before they should proceed to a decision, because it was a general case; and certifications are reputed odious in law, *et rapienda est occasio* to repone parties leased against the same; though, on the other hand, it is the security and interest of the people, *ne lites fiant immortales*, and *l.* 13. *C. De judic.* sets a period both to civil and criminal actions; the first to be determined in three years, and the last in two; which pleads that certifications are both equitable and necessary.

Fol. Dic. v. 2. *p.* 203. *Fountainhall, v.* 1. *p.* 686.

1706. *January* 15. Loch *against* Home.

No 327.

Three several decrees of apprising, containing each of them a distinct Sheriff-fee, being extracted by the clerk in the apprising against three debtors bound all in one bond, were found null, in respect there was only one claim given in to the messenger, one letters of apprising, and one decree pronounced by the messenger.

Fol. Dic. v. 2. *p.* 205. *Fountainhall.*

*** This case is No 104. p. 3759. *voce* Execution.

1709. *February* 15.
James Forrest, Merchant in Edinburgh, *against* Mr John Craig, Writer there.

No 328.

In a competition betwixt Mr James Forrest and Mr John Craig, the Lords found a second extract of a decreet of adjudication at the instance of George Marshal, author to Forrest, null, albeit conform to the minutes; in respect a first extract in other terms, and disconform to the warrant, had been judicially produced; and the second was amended without application to the Lords for that effect.

Forbes, p. 324.

1713. *January* 20.
Robert Johnston of Keltoun, *against* George Houston, Son to the Deceased Patrick Houston, Merchant in Glasgow.

No 329.

In a process, at the instance of Robert Johnston against George Houston, for reducing a decreet *in foro*, holding the pursuer as confessed upon the verity of