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that the Lords found it to be false and feigned. But the LORDS considered, that certifications in improbations, sweeping away men's rights in absence, and for not production, were not so favourable as to be extended and supplied, where they were not expressly contained in the decret, and therefore they reponed the parties, albeit now after 27 years.

*Fol. Dic. v. 1. p. 447. Fountainball, v. 1. p. 595.*

No 90.

1733. July 24. GARDEN of Bellamore *against* EARL of ABOYNE.

IT was *objected* against a decree of certification, following upon an action of reduction and improbation, *imo*, That there is no reason of reduction contained in the decree, or so much as libelled; *2do*, The decerniture, 'reduces, rescinds, and annuls,' &c. but wants the additional words necessary in an improbation, viz. 'and improves.'—THE LORDS found the certification to be only a certification in a common reduction, in respect it bore not the word 'improves.' See APPENDIX.

*Fol. Dic. v. 1. p. 447.*

1756. March 4.

EARL of BUCHAN *against* CAMPBELL of Shawfield, and other Real Creditors upon the Estate of Strathbrock.

No 91.

Certification cannot reach writings that never were in the hands of the defender.

BY the death of Sir William Stewart without issue male, the entailed estate of Strathbrock descended to Katharine Stewart his sister, wife to Henry Lord Cardross. This estate was burdened with many debts good against the entail; and when the creditors made a demand for payment, Lord Cardross, who had no interest but his *jus mariti*, took assignations in name of George Thomson his trustee; and in his name led an adjudication of the entailed estate, for debts extending to L. 30,000 Scots. This adjudication, being Lord Cardross's proper estate, descendible to his heirs of line, was parcelled out among his proper creditors; and by the conveyances granted to them, 'they are obliged upon payment to dispoise either to David, Master of Cardross, the rights granted to them, or to renounce and discharge the same in the option of the said David.' And by Thomson the trustee's conveyances in favour of the creditors, it is declared, 'That the said David, Master of Cardross, had not only right to the greatest part of the said adjudication and sums therein contained, but that he had right to redeem the conveyances to the creditors, which are granted in corroboration of Lord Cardross's debt.' And it is also declared, 'That the

‘ hail bonds and other grounds and warrants of the foresaid adjudication at  
 ‘ George Thomson’s instance, were delivered by him to, and in the custody of  
 ‘ Henry Lord Cardross, for the use and behoof of David, Master of Cardross,  
 ‘ his son, and for the use and behoof of the creditors to whom Thomson had  
 ‘ made partial conveyances of the said adjudication; and that he was not to be  
 ‘ troubled or pursued for exhibition of the same.’ This adjudication, pursuant  
 to Lord Cardross’s direction, was conveyed to the said David, Master of Card-  
 ross, afterward Earl of Buchan, and his heirs and assignees; and by the disposition  
 in his favour it is declared, ‘ That the bonds and other grounds and warrants of  
 ‘ the adjudication were delivered to Mr Thomas Rigg for behoof of the said  
 ‘ David;’ and the partial conveyances are excepted from the total conveyance  
 in David’s favour.

The said David, afterward Earl of Buchan, having right to Thomson’s ad-  
 judication as aforesaid, succeeded also to the entailed estate of Strathbrock after  
 his mother’s death; and in the 1731 his credit beginning to fail, there was a se-  
 questration of the estate of Strathbrock, which continued till his death in 1745.  
 In the ranking of the creditors which followed that sequestration, the real credi-  
 tors claiming under Thomson’s adjudication were preferred; and some of them  
 obtained warrants for payment of the principal sums and annualrents due to  
 them.

The present Earl of Buchan, having now right to the estate of Strathbrock,  
 brought a process of reduction and improbation, calling for production of all  
 writs and evidents, decreets of adjudication, and other rights and diligences af-  
 fecting the estate of Strathbrock, in order to be declared null and void. And  
 this step was taken with a view to cut down such parts of Thomson’s adjudica-  
 tion as the defenders had right to; because he well knew they could not pro-  
 duce the grounds and warrants of the said adjudication, which had been deli-  
 vered to his father as aforesaid.

When this process came to be called, the defenders obtained a diligence for  
 recovery of the grounds and warrants of Thomson’s adjudication, which they  
 caused execute against the pursuer himself, as well as against others, but with-  
 out success; the consequence of which was, that certification was granted in  
 common form by the Lord Ordinary.

When this matter was brought to the Inner-house by a petition, the Court  
 was a good deal puzzled what course to steer. The creditors had been long in  
 possession upon the title of Thomson’s adjudication. It would be iniquitous to  
 cut them down for not producing writings which were never in their custody.  
 On the other hand, how could the Court refuse to pronounce certification against  
 writings which were legally called for and not produced. The cause was delay-  
 ed from time to time, through hopes that the writings might be recovered. At  
 last a judgment was given upon the following grounds.

This singular process of reduction and improbation is peculiar to the law of  
 Scotland. It is established upon the following foundation: If a man entertains

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a suspicion that any right affecting his land or his person is informal or null, he brings a process before the Court of Session, challenging the right upon every nullity he can imagine, and offers to prove the nullities by documents which are or ought to be in the defender's own custody. If the documents be produced, the reduction goes on. If not produced, the pursuer's allegations are held true upon this legal presumption, That the defender declines to produce the documents called for, because he is conscious that they verify the pursuer's allegations. A certification accordingly is granted *contra non producta*; which, in effect, is a sentence reducing the right challenged upon every ground of law that is set forth in the libel. Such being the nature of the process, it clearly follows, that certification can never be pronounced for not producing of documents that are not presumed to be in the defender's custody; and still less where there is legal evidence that these documents have all along been in the custody of a third party. To apply this to the present case, in the disposition of Thomson's adjudication to the late Earl of Buchan, it is declared, that the grounds and warrants were put into the hands of Mr Thomas Rigg, for behoof of the Earl, who had the chief interest in this adjudication. The Earl, of consequence, was bound to make these grounds and warrants furthcoming to the creditors, who have a partial interest in the adjudication. Perhaps the present Earl does not represent his father. But then the creditors cannot be bound to produce documents which never were delivered to them; nor can there arise any presumption of falsehood from the not production. It is competent, no doubt, to the Earl, as proprietor of Strathbrock, to challenge the rights of the creditors affecting that estate; and if he libel relevantly, he may call for writings in the hands of the defenders to verify his allegations. If the writings called for, *per modum probationis*, are or ought to be in the defenders hands, they must be produced, otherwise will be held as verifying the pursuer's allegations; but if the pursuer offer to prove his allegations by writings which are not presumed to be in the defenders hands, or which are proved never to have been in their hands, it is incumbent upon him to produce these writings himself. The rule here is applicable, *quod actori incumbit probatio*; and if he does not produce these writings to verify his allegations, the defenders must be assolizied.

‘THE LORDS accordingly reponed the defenders against the certification.’

*Sel. Dec. No 104. p. 145.*

No 92.

In a reduction of a tack, general allegations of circumvention were not found relevant to go to proof.

1758. February 8.

KATHARINE, Dutchess-Dowager of GORDON, and DUKE of GORDON, against  
JOHN GORDON.

KATHARINE, Dutchess-Dowager of Gordon, in virtue of a right of locality provided to her by the late Duke, over the lands of Auchanachy, and the Duke.