

No 91.

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.

of Gordon, in virtue of his title to the fee of the said lands, brought a reduction of a tack of these lands set by the late Duke to John Gordon, a gentleman who had been very much about his person.

Their reasons of reduction were, That the tack had been set by the Duke, who had been educated abroad, immediately upon his coming of age, and returning to his own country, at a time when he could not know the value of his farms: That it was set not at half value: That it was set for thrice the term of years at which the Duke set his other farms, and extended over a great tract of country, containing many farms under it: That it was executed without the concurrence of the Duke's Commissioners, who concurred in every other tack which he set; and that John Gordon had imposed upon the Duke by the influence which his nearness to his person gave him over the Duke, and by fraud and circumvention in the transaction: And they craved a proof at large of all facts and circumstances tending to support their reasons of reduction.

John Gordon produced several letters from the Duke; from which it appeared, that his Grace and he had taken three years to finish the transaction together.

In these circumstances *pleaded* for the defender, The tack was set by the Duke, when *arbiter rei suæ*, and after three years consideration: That, allowing the lesion to have been ever so great, this of itself was not enough to reduce the tack, without the addition of fraud and circumvention: That the particular circumstances alleged might indeed show lesion; but the allegation of fraud and circumvention subjoined to them was too general; and therefore the pursuers must condescend more particularly upon the circumstances of fraud and circumvention before a proof can be allowed them.

Pleaded for the pursuers, It has hitherto been understood to be a rule, That, in an action for setting aside an agreement, on account of deceit or imposition used in some circumstances relating to it, the party injured is entitled to demand a proof upon a general allegation of fraud, without giving a circumstantial detail of the particulars. It is the interest of the public, as well as of the party injured, that, in every case, fraud should be detected; which can only be done by allowing a proof of all the circumstances attending the transaction. Before this proof is taken, every minute circumstance cannot be known; or, if known, ought not to be discovered; as the same art and address which brought about the agreement, might be employed to prevent a detection of the fraud.

'THE LORDS refused a proof at large, and assoilzied the defender.' See TACK.

Act. *A. Pringle, Advocatus.*

Alt. *Lockhart.*

ŷ. D.

Fol. Dic. v. 3. p. 311. Fac. Col. No 95. p. 171.

* * * This case was appealed:

THE HOUSE OF LORDS, 21st March 1759, ORDERED and ADJUDGED, That the appeal be dismissed, and that the interlocutors complained of be affirmed.