1676. *February* 24. ANENT SEASINES WITHIN BURGH.

THE Lords found it no ground of nullity or reduction whereupon to quarrel or impugn a seasine of lands within Aberdeen, being a burgh royal, that it was not found recorded in the town's books; for the Lords found no necessity of such recording, since it is not enjoined by the 16th act in 1617, that excepts burgh seasines from registration; for since none can give such seasines but the town-clerk, they will be found in their protocol-books, as to which they are at least obliged to be exact.

Advocates' MS. No. 466, *folio* 240.

ANENT REPETITION AND INDEBITI SOLUTIO.

WHERE a person obtains a sentence in his favour, if it appear another hath a pretence to that thing which is decerned to be given up, the law rationally secures the defender, by ordaining the victor to find sufficient caution to refund the thing, with its profits, in case the other competitor prevail, and be found to have best right, at least better right than the other. So appoints *L.* 57 *in duobus unam hæreditatem petentibus; L.* 57, *D. de rei vindicatione in duobus unum fundum vindicantibus; L.* 5, *p.* 19, *D. de Tributoria;* where an equal distribution is made of the goods, yet with caution to refund if other creditors emerge. And that which comes nearest of all to our practice, is *lex. ult, C. de Jure Deliberandi;* where, if legacies be paid and creditors afterwards appear, what was paid to the legatees may be condicted and repeated from them as *indebiti solutum:* only it is somewhat dubious, if the executors shall be liable, referring them to their relief of the legatars, or if the creditors must betake themselves to the legatars; and if they have been long silent, I think they should. See Dury, *25th July*, 1634, *Crawford* and *Mathisone; 6th March*, 1627, *Scot* and *Cockburne; 13th March*, 1627, *Ker* contra *Lady Covinton. Vide supra, 2d December*, 1675, (*Kello* against *Kello,*) *numero* 453, *in fine.*

Advocates' MS. No. 467, *folio* 241.

1676. *February.* MORISONES and SMALL *contra* ROBERT PATERSON, Writer in Edinburgh;

WHOSE author having apprised the lands of Dykes, and served an inhibition, did intent a reduction of some feus granted by Forsyth of Dykes to Morisones' and Small's predecessors: in which having obtained a certification for not production, they raised a summons of reduction of that certification: in which being reponed, and after production, it evidently appearing that the feu-rights were long prior to the inhibition, and thereupon craving to be assoilyied;

It was ALLEGED for Paterson, That he was content the absolvitor should take

effect, *pro futuro*, but as to the intermediate fruits and maills and duties of the land, they had uplifted and intromitted with, between the time of the certification that past against their rights and their intenting this summons *reductivè* to be reponed, they belonged to him, since all that time they had no right. He, as compriser, had the only effectual right upon the lands standing unreduced for the time.

This dipped upon a very pretty question, If a certification in a simple reduction gave him right to the rents of the lands in the meantime, aye till it were reduced. Paterson's advocates contended it did. For taking off which allegeance I offered, first, to demonstrate, that a certification in a simple reduction, can import no such thing of its own nature. 2*d*, That the decreet of certification now founded upon and obtruded is so groundless and so null, in so far as concerns thir defenders, that it can never make them liable for bygones, or warrant so unreasonable a desire. As to the first, the true effect of a certification in a single reduction for not production is mainly this, that *medio tempore*, the writs against which it is granted, have no use either to defend or pursue upon, till the certification reducing them be rescinded by production; and till then, they cannot be obtruded against that right whereupon they were reduced: and which salves the just interest of a certification in a naked reduction, and makes it both useful and abundantly effectual, and there is neither law nor reason for making it operate farther; and it were strange to attribute so much to a decreet of certification, as either a *jus in re* or *ad rem* to all the maills and duties of the lands whereof the writs are reduced, where the reducer and obtainer of the certification neither attains the possession, nor does diligence for many years to get it, as in this present case. So that it is evident we do not elide and evacuate the force of thir certifications, or make them insignificant and useless, as is pretended, though we deny them the power the pursuer ascribes to them; for the certification decerns the writs shall be reputed null by a presumptive and illative nullity, aye and while it be produced; now the design is only, by this summary and equivalent manner, to force production: and which will attain its end very effectually, seeing none can be admitted, *ad agendum vel defendendum* on these writs, till they be produced in a new summons, craving the certification against them to be rescinded; which takes off the former decreet if it was given upon mistake, (as here it was,) as absolutely as if it had never been *in rerum natura*, and places the party in the same very state and condition he was in before the giving of the said decreet of certification against him, as is expressly provided by the 47th act of Parliament 6, James III. Which leads me in to the next point, that this individual certification is so groundless and null, that this pursuer can found no interest upon it, to acclaim the intermediate maills and duties from the defender, and which will easily appear to any who will be pleased to consider the following grounds against it.

I.—It is an undoubted maxim in law, that *bonæ fidei possessor facit fructus perceptos et consumptos irrevocabiliter suos, nec tenetur ad restitutionem*, l. 15. C. *de Rei Vindicatione*; for he is reputed to possess *bona fide, qui cum opinione et existimatione dominii possidet, animumque dominantis habens et effectum*; which thir defenders not only had but were truly proprietors, had a clear undubitable right preferable to this pursuer, and nowise obnoxious to his inhibition, being long prior; neither is there anything can be condescended upon to put them in *mala fide*, which the lawyers infer *a denunciatione eis facta super jure alterius.* O! but they will say, the decreet of certification obtained against his author's right puts him *in mala fide.* They cannot be heard, 1*mo*, Because no heritable rights can be reduced for not production, except such as the reason of reduction will militate against if produced;

but, *ita est*, their reason of reduction upon the inhibition could not have reached the defender's author's right, because long anterior to the inhibition: *Ergo*, 2*do*, The certification is still null, because the apparent heir of the party inhibited is not called in it, for his interest, as ought to be done. 3*tio*, The said decreet of certification nowise meets the defender's interest; because the writ reduced for not production in that decreet of certification is allenarly a disposition of thir lands, alleged granted by old Forsyth of Dykes to one Ja. Muirhead; whereas, there neither is, nor ever was such a writ *in rerum natura:* and, from the defender's production in the clerk's hands, it will appear, that any right he has is from John Muirhead, and which John derived his right from Forsyth of Dykes younger; so that neither the person granter of the disposition, nor the party receiver, nor the writs called for, do quadrate; and the defender is content certification stand against the disposition mentioned in the decreet of certification; he is not concerned, nor are his rights reduced. 4*to*, No certification could have been granted against the defender's author's right, because, before the date thereof, he was denuded of his right in favours of this defender, and so cannot prejudge him, a singular successor, acquiring it *bona fide*, and not being called. And whereas negligence is alleged, that by the space of twenty-one years no reduction has been intented of that certification; they cannot be heard, because we needed not, it being intrinsically null for the causes foresaid.

II.—He can never object the defender's being *in mora*, because he is *in pari casu* himself, in so far as, through his cessation and supine negligence for the same tract of time, he had never done any diligence, either by action for maills and duties or removing, to clothe his right with possession: and the defender thought himself *in tuto* and in *bona fide* to continue his possession, so long as the pursuer did not stir; yea, till then he knew not of the certification, but so soon as he heard of it he intented reduction, which is seen, returned, and enrolled, and near ready for calling. In respect of all which, the said certification ought to be reduced, and the defenders assoilyied from the pursuer's action for maills and duties, *hoc maxime attento*, that the pursuer being a member of the College of Justice has taken an assignation to this plea.

Upon this debate the Lords FOUND, The decreet of certification did not meet the defender's right, and therefore reduced the said certification, and assoilyied therefrom, *tam pro præterito quam futuro;* so that they had no need to determine the general case, if a certification gives right to the duties aye till it be reduced, for they were not straitened here. As to the question, From what time possessors are obliged to restore the fruits; if from the date of the citation, or litis-contestation, or sentence in a reduction; see the various rules in M'Kenzie's Observations on the Act of Parliament 1621, anent Bankrupts, p. 137.

Advocates' MS. No. 468. *folio* 241.

1676. *February.* The WRIGHTS and MASONS of Edinburgh *against* the BOWARS, SLATERS, COOPERS, &c.

THE wrights and masons of Edinburgh raise a declarator against the bowars, slaters, coopers, painters, glaziers, sieve-wrights, plumbers, and upholsterers,—two