

1747. June 20. CAMPBELL of Ottar against MACALISTER of Loup.

Hector Macalister of Loup was debtor by bond, 30th September, 1737, for 684 merks, and December 1641, for 1,000 merks Scots to George Campbell of Kinnochtry, who obtained a decret on the passive titles therefore, against Gory Macalister, his son and heir.

A process of proving the tenor was pursued, of an assignation of these debts to Colin Campbell, second son to the original creditor, and there were produced for adminicles, 1st, Letters of horning at his instance, 8th July, 1664, proceeding on the bonds and decret, and narrating the assignation of that and several other debts not particularly mentioned, "as the said assignation produced to the said Lords at more length proported; 2dly, Letters of special charge to enter heir, 21st September, 1664, against the said Gory Macalister; 3dly, Letters of apprising, 23d March, 1665, on the said assignation; 4thly, Decreet of apprising, 5th June, 1665; 5thly, Letters of arrestment in the hands of the tenants; 6thly, Letters of horning against the Earl of Argyle the superior; 7thly, Decreet of mails and duties before the Court of Session, 26th July, 1666; 8thly, Contract between Gory Macalister and Colin Campbell, 20th May, 1675, whereby, for a sum paid, and further payment to be made, Campbell became bound to make over to Macalister the apprising; 9thly, Contract between Alexander Campbell of Ottar, son and heir of Colin, on the one part, and Alexander Macalister of Loup, and Sir Duncan Campbell of Auchinbreck on the other, 10th July, 1690, bearing the former contract not to have been implemented, and obliging the said Alexander Macalister, and Sir Duncan Campbell, to pay each their equal share of the sum then due; and in respect Auchinbreck was owing the sum which he undertook, as tocher with his sister, whom Loup had married, containing a discharge by Loup to him, in so far as he should pay, and bearing to be in corroboration, and without prejudice of the apprising.

Loup paid his proportion, and thereupon got a disposition to the apprising, 27th October, 1711, in so far as concerned that half of the debt, narrating the whole papers above mentioned, particularly the assignation, as of date 30th June, 1664, and referring to it in these words, "As the assignation bears:" From whence the pursuer inferred, that the writer had the assignation before him; and this was the 10th adminicle produced after the first interlocutor.

Pleaded for the defender, That there neither was here any proof a *casus amissionis*, nor of any more of the tenor of the assignation, than that it once existed, without showing it to have been validly executed, by designing the writer and witnesses; that here a particular tenor with special clauses was libelled, which was not only not proved, but did not tally with the adminicles produced, viz. it reserved the assigner's life-rent, whereas the letters of horning following upon it

No. 58.

A tenor was libelled of an assignation by a father to a son reserving the life-rent and naming writer and witnesses, and the adminicles were diligences led upon it, by which it appeared the life-rent was not reserved, and there was no proof who were the writer and witnesses. It was craved to have the tenor found proved of a simple assignation, which was refused.

No 58. in the assignee's name, were for annual-rents fallen due during the cedent's life. It also mentioned a particular writer and witnesses, of whose being the persons there was no evidence; besides the mentioning these raised a suspicion that the libeller had seen some writ more than was mentioned, and perhaps the assignation itself, in which observing some defect, he had not chosen to make use of it, but rather depended on a proving the tenor.

Pleaded for the pursuer: That in this case the business was not, by proving a tenor, to establish a debt, but only, by making up the assignation, to settle the proper creditor; that he was now become heir to the cedent, and the only person, who could lay any claim to the executry, was his sister, who was called in this process and made no objection; that thus the title to the debt was clear, and the only use of the process was to support the diligence; that the retiring an assignation would not operate a discharge, and therefore there was the less need of a particular *casus amissionis*, that it was plain from the adminicles produced, there had been an assignation, which in all probability was granted in trust by the father to his son, in order to that diligence which followed so quick; and it must have been formal, or it would have been objected to, when so often produced; that it was not necessary to prove the particular clauses which the writer had inserted in the libel on supposition, it being an assignation by a father to a son, viz. of a reserved life-rent, and power to alter, as neither was it to prove that it contained the other small debts which he had seen, and supposed to be those referred to in the horning as comprehended in the assignation, but now it was alleged to be rather probable these clauses were not inserted, but it was simple and in trust; that he also libelled the writer and witnesses at random, knowing there had at that time been such persons, a noted writer at Inverary and his servant, but that it could only be necessary to prove the formality of the deed which could not be doubted, not the particular writer and witnesses.

Observed by some of the Lords, That this which was endeavoured was not the proving the tenor of a writ, but only that it had existed, which was quite new; but others thought the action was not to be so confined as to exact a particular proof of every phrase, or of the particular writer and witnesses; however, that the tenor here libelled was not proved, which ought to have been.

“The Lords, 11th June, found the tenor of the assignation libelled not proved.”

Condescended on in a reclaiming bill, a decision observed by President Dalrymple, 14th June, 1707, Doctor Trotter against the Creditors of Eccles, No. 48. p. 15811. where the tenor of a bond was made up, which had been produced in several processes, and been the ground of an adjudication, notwithstanding there was no proof of the writer and witnesses who were also specially libelled, and it was prayed the Lords would either find the tenor proved, or find there was sufficient evidence that an assignation, such as was described in the adminicles,

once existed, and that the pregnant circumstances of the case avoided all suspicions of its being kept out of the way, in order to hide defects; and therefore that the defender ought never to be allowed to object the want of it.

The Lords refused and adhered.

Act. *H. Home.*

Alt. *T. Hay.*

Clerk, *Gibson.*

D. Falconer, No. 189. p. 254.

No. 58.

1749. *November 21.*

A. against B.

Where a writ is of that nature, as not to be extinguishable by simple retiring, no *casus amissionis* is necessary in a proving of the tenor; and where a *casus amissionis* is proved, no adminicles in writing are necessary.

So the Lords thought in the proving of the tenor of the tailzie of Balledgarno of this date.

Kilkerran, No. 3. p. 563.

No. 59.

Writs not extinguishable by simple retiring.

1752. *February 23.* CHARLES GORDON, Petitioner.

Though tenors regularly require two ordinaries to take the depositions, yet the Lords have on some occasions given a commission to take the oaths of witnesses in a tenor; particularly in the year 1737, in the proving of the tenor of a testament made by Mr. Alexander Burnet, Minister of the Gospel at Dantzick; and more lately in the proving of the tenor of a bill at the instance of Robert Gray, factor to the Earl of Sutherland, against Coll. M'Donald of Barrisdale, a commission was granted to the Sheriff of Inverness for taking the proof in the country.

In the present case, in respect of these precedents, a commission was asked, for bringing a proof of the adminicles before the Sheriff of Aberdeen. The Lords demurred; but at last got over the difficulty by the two Lords who go this spring upon the Circuit to Aberdeen, agreeing to take the proof there; and the same was recommended to them accordingly.

Kilkerran, No. 4. p. 563.

No. 60.

If the proof can be taken on commission?

1753. *November 21.*

MODERATORS of the SYNOD of MERSE and TEVIOTDALE, and PRESBYTERY of SELKIRK, *against* SIR WILLIAM SCOT of Ancrum, and Others.

There appears to have been a decret of the Commissioners for plantation of kirks, &c. suppressing the kirk of Long Newton, and annexing the parish to the

No. 61.

In what cases an action for proving the tenor is necessary?