

This is to prove *obscurum per obscurius, infirmum per infirmius*; and though the possession gives a presumption, yet that has not been sustained *per se* as appears from many decisions; 12th December 1672, Brodie, No.22. p.15795.; 21st June 1672, Mitchel, No. 399. p. 12520.; 15th July 1675, Fumarton, No. 37. p. 1755.; where the adminicles were stronger, and yet the tenors were rejected. The Lords demurred in this case, in respect of the hazard of taking away a man's just right, though lost by fatality, on the one hand; or of making up writs with clauses which never had a being, on the other; therefore there were some named to endeavour a settlement, and to give Robert Craw something.

Fountainhall, v. 2. p. 42.

1701. November 18.

JAMES DOUGLAS *against* WILLIAM SOMERVELL of KENNOX.

William Douglas, son to Samuel Douglas of Hissleside, gave in a bill to the Lords, representing, that Mr William Somervell, *in anno* 1670, granted a disposition of the lands of Kennox to Stuart of Hissleside in liferent, and to James his son in fee, whereupon infestment followed; and that he was apparent heir to James, the fiar, being his mother's brother; and the disposition being lost, but the sasine found in the register, he had raised an action for proving the tenor of the said disposition; and finding that one John Guthrie was not only notary to the said sasine, but also writer of the disposition, and being informed that the said John had removed his family and residence to Holland, but was at present on some business in Edinburgh, and was quickly to depart, and being a necessary witness in making up the tenor, and who cannot be examined on commission, but only by the Lords themselves; therefore craved a warrant to cite him to compare and depone, that his oath may lie *in retentis*, least his mean of probation perish before the cause come in to be debated by the ordinary course of the roll. It was answered for William Somervell of Kennox, son to the said William, *1mo*, That depositions to lie *in retentis*, before litiscontestation or an act in the cause, was a *remedium extraordinarium*, not to be recurred to but in extremities; but this case was not so favourable as to go out of the common road of law for it. *2do*, That disposition ought not to be made up; for it is *res his transacta*, in so far as James Stuart of Hissleside, the father, did discharge the said disposition, and obligations thereof, and reponed Mr. William Somervell to his own place against it; and the son being an infant, and the fee purchased by his father's means, the father might validly discharge it. *3tio*, Samuel Douglas having married Hissleside's only daughter and apparent heir, she served herself general heir to her brother James, the fiar, and upon that title renounced and discharged of new, with consent of her husband, for the sum of 3000 merks then paid them; and therefore a disposition so solemnly transacted and taken away ought not to be made up. Replied, That instances can be given, where witnesses have been

No. 45.

No. 46.

What adminicles relevant to admit the libel to further probation?

No. 46. examined in tenors before litiscontestation, and that here the necessity for taking this witness was urgent ; seeing he was going out of the kingdom, and could not be examined by any but the Lords themselves. And as to the *2d*, It dipped *in causa*, and was not competent *hoc loco* ; yet neither of the discharges could militate against the pursuer ; not the first, because it was only granted by a liferenter, who could neither evacuate nor renounce the fiar's right ; not the second, because his mother being only served heir in general, could not carry the right of the infestment, which stood in her brother's person ; whereas he is to serve heir in special ; and his father and mother were over-reached in all that affair, and his being infest, was concealed from them. The Lords having weighed all the circumstances, refused to examine the witness in this state of the process, but prejudice to him to insist in his action of tenor ; and when it comes in by the course of the roll, and is debated, then to crave it.

1702. December 15.—By minute of contract betwixt Mr. William Somervell father to Kennox, and Stewart then of Hissleside, his son-in-law, Mr. William was obliged to dispone his lands of Kennox to the said William in liferent, and to James Stewart his son, and Mr. William's grandchild in fee. It is alleged, There was a disposition extended on this minute, whereby these lands were disposed to the said Stewarts, and whereon they were accordingly infest ; but one Guthrie, writer of the disposition, and notary to the sasine, having removed his family to Holland, the disposition thereby came to miscarry ; and young Hissleside dying, and his sister Grizel succeeding to him, she was married to Samuel Douglas, who knowing nothing of the disposition, and seeing a discharge of the minute under Stewart his father-in-law's hand, did serve his wife heir to James her brother ; and for a sum of money, both he and she renounced of new any right or pretension they had to the lands of Kennox : But Samuel Douglas having afterwards some occasion to search the registers, he fell upon the sasine taken on the disposition made by Mr. William Somervell in implement of the minute to the said James Stewart of Hissleside, narrating expressly the disposition, and the precept of sasine ingrossed ; and conceiving himself and his wife over-reached, he raises a proving of the tenor of the said disposition against Mr. William's son ; and for the *casus amissionis* libels the writer's removal foresaid ; and for adminicles, produced, *1mo*, The foresaid minute of contract, containing an obligation to dispone, *2do*, The extract of the sasine following on the said disposition, and expressly relative, and craves the notary and witnesses may be examined thereupon. Alleged for the defender, the *casus amissionis* is neither sufficiently condescended, relevantly libelled, nor proved. *2do*, The minute can be no adminicle, for such must be necessarily posterior to the deed, whereas this is prior ; and the sasine signifies as little, for how easy is it, where they have forged a disposition, to take sasine thereupon, and having cancelled the warrant for fear of discovery and punishment, to obtrude the sasine as a probative adminicle : And both Stair and Dirleton observe, on the 14th of June 1667,

Harroway against Hairly, No. 20. p. 15791. a naked sasine was no sufficient writ to adminiculate a disposition, it being no deed under the party's hand, and that the like had been found before between Corsar and Durie; see also 15th July 1675, Fumarton, No. 37. p. 1755. and, in February 1699, Craw against Brown, No. 45. p. 15806. For the Lords being guardians of property, are very cautious and tender to let in made up tenors upon long and peaceable rights, by which many inheritances might come to be at the discretion of the Knights of the post. *2do*, Though this tenor were made up, yet *fraustra probatur quod probatum non relevat*; for it is twice renounced and discharged; and the sasine following upon a precept to be holden *a me*, it is *ipso jure* void and null, never having been confirmed by the superior; so Grizel's service and renunciation takes it *funditus* away without her being infeft, it being no better than a personal right. Answered, Both the *casus amissionis* and adminicles are sufficiently pregnant, which are not urged to this effect presently to find the disposition thereby made up, but only to be a ground for a farther probation and trial; and then the pursuer will debate the import of the discharge and renunciation, and make it appear they were fraudulently obtained, *per dolum malum, celata veritate*. The Lords, by plurality, found the documents produced sufficient to admit the tenor to farther probation, reserving to Kennox to debate against the validity and effect of the tenor when made up. See 4th and 5th December 1623, Paton and Stewart, about the nullity of infeftments *a me*, though confirmed, if posterior to an intervening right, *voce* SUPERIOR and VASSAL.

1703. February 1.—In the action mentioned 15th December 1702, between Douglas of Hissleside and Somervell of Kennox, the parties being farther heard on the reason of reduction of the discharge and renunciation, as if the disposition were made up and lying in the field; that they were impetrate and procured by circumvention, it not being then known to Hissleside that James Stewart was infeft: It was answered, That deliberate and solemn transactions are not to be called in question on such frivolous allegances; the public good of sopiting pleas requiring that the binding force of transactions should be very great, so that neither sentences nor transactions should be renversed nor recalled, on the pretence of writs and evidents newly discovered or found out, else there shall never be *fnis litium*. Replied, Transactions are certainly most favourable, and not to be easily overturned and redargued; but it is an essential of all agreements *ut absit dolus* that they be free of all over-reaching dole, *qui causum dedit contractui*; and here the transactions proceeded, not only *celatis*, but even *abstractis instrumentis*, it being offered to be proved, that when Guthrie the notary removed to Holland, his lettron was broken up, and the disposition now craved to be made up taken out of it. It is true, *sub praetextu instrumenti postea reperti, transactionem bona fide initam et finitam rescindi jura non patiuntur*; but then it must be *bona fide* entered into; but if it be otherwise, then L. 19. C. De transact. tells us, *Sane si per se vel alium subtractis instrumentis quibus veritas*

- No. 46. argui poterat decisio litis extorta fuisse probetur, tunc exceptione doli mali removetur; and the transaction must fall; which is exactly Hissleside's case, the disposition being concealed and abstracted. Duplied; That it were a very dangerous preparative to allow witnesses to be examined against dead persons, that they abstracted writs more than twenty years ago. The Lords remembered, that witnesses are frequently examined anent their seeing apprisings, discharges, or other writs, lying in the charter-chest after a party's decease, though they be not there now, but are made use of as standing debts, and as if they had never been paid, nor retired in the defunct's lifetime; therefore the Lords, by plurality allowed Hissleside yet to prove that the said disposition was abstracted, and by whom, before answer to the relevancy of the reason founded on the fraudulent concealment and circumvention.

Fountainhall v. 2. p. 166. and p. 177.

1704. December 26.

MY LORD REGISTER and Mr. GEORGE DOUGLAS *against* The HERITORS of BIRSE.

No. 47.
Pregnant adminicles of a decree of prorogation of a tack of teinds sustained.

My Lord Register, and Mr. George Douglas his factor, pursue a reduction and improbation of the heritors of Birse their rights and titles to their teinds.

The defenders produce a three nineteen years tack to Gordon of Clunie, in the year 1585, which they allege was prorogated for six nineteen years in the year 1618, and the first extract having miscarried by reason of the tacksman's selling a great part of his lands to several heritors, they raise and repeat a proving of the tenor of the prorogation, and insist upon several pregnant adminicles; as, *1mo*, The original tack; *2do*, A copy of a decret of augmentation in the year 1618, imposing a considerable burden upon the tacksman, and bearing that a recompence was granted in consideration of that burden; *3tio*, The minute-book, expressing the recompence to be a prorogation of six nineteen years; *4to*, A sub-tack relative to the principal tack and prorogation, and sub-setting a part of the teinds for the same years to which the prorogation extended; *5to*, Possession conform; *6to*, Offered to prove by witnesses, who saw the prorogation amongst the records shortly before the late fire.

To all which it was answered: That the tenor of a decret cannot be proved, because the validity of it depends upon several formalities, which witnesses are not presumed to know, nor allowed to prove; and by express act of Parliament, the tenor of horning and executions thereof cannot be proved; and there is *par ratio*, and stronger in the case of decreets, which are judicial acts. Lawyers have been for many years of that opinion; and so my Lord Dirleton does fully express himself upon the word *tenor*.

It was replied: There is no law against proving the tenor of decreets, nor any reason nor uniform practice in the contrary; and the 94th act James VI. anent