

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

Hornings, is a particular statute in that case, which cannot be extended, but affords a great argument for admitting of tenors in other cases ; for, by that act it is clear that tenors, even of executions of hornings, were then allowed ; and seeing the law was not extended to decreets, or other executions, there is no place to argue from it. And as to Dirleton's opinion, it is in the case of a comprising, which depends upon great variety of formalities and executions, and is also a decret. Yet, upon the 29th of June, 1675, in the case of Birny against Montgomery, No. 25. p. 15796. a pursuit for proving the tenor of a comprising was sustained upon pregnant adminicles, the executions of comprising being extant and entire ; and in this case the adminicles are most plain, especially the decret of plat contains a great augmentation, and burden upon the tacksman, and mentions a recompence given ; and the proper and only recompence allowed in law is a prorogation, which proceeds as a consequence of the augmentation, without any separate summons, execution, or process ; so that the heritors recovering that decret of plat, there can be no question of sustaining the tenor.

“ The Lords admitted the adminicles and tenor to probation.”

Dalrymple, No. 53. p. 68.

1707. June 14.

TROTTER *against* HOME of Eccles.

Mr. Robert Trotter, doctor of medicine, being creditor in two bonds to Home of Eccles, he pursues his heir, and on his renunciation obtaining a decret of constitution, he adjudges ; but, in the great fire in the meal-market, the 3d of February, 1700, these rights among his other papers are burnt ; whereupon he raises a proving of the tenor, wherein sundry pregnant adminicles being adduced, the Lords were clear enough anent the truth and reality of the debts, but it stuck with them that none of the witnesses had deponed, who were the writer and witnesses in the bonds, nor what were their designations. It appeared from the extract of the decret, that one of them was holograph, but that the other was libelled as signed before witnesses, and no vestige nor evidence of probation who were the writer and witnesses therein ; and if this were once dispensed with, then other false or null bonds might be lost, and then made up, and so the nullity palliated and concealed, which is of dangerous consequence. Answered, *1mo*, The common debtor had renounced, which he would not have done if they had laboured under such intrinsic nullities ; and his objecting thereof would no more have brought him under the hazard of incurring a passive title, than if he should object that it was not signed by the defunct. *2do*, The witnesses clearly depone that they read the bonds, and that they appeared to be formal complete writs, without any defect ; and it is impossible that they, on a single transient reading, can remember the writer's name, with the witnesses and their designations ; yea, there is not a creditor of twenty, that, on losing his bonds, can tell who were the

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Where the names and designations of the witnesses were not proved, yet the *casus amissionis* being not-tour, the bond old, and its verity not questioned, the tenor was found to be proved.