solemn writs are made, so much as condescend upon or remember writer's name or witnesses, whereby it would be impossible to make up the tenor of lost writs; which would be a very great inconvenience, especially in such a general calamity as happened in the late fire at Edinburgh. And though there be difficulty in this, and may be in other cases, by making up the tenor even as to writer and witnesses without a clear document and probation; yet, 1*mo*, The prejudice is much more upon the other hand. 2*do*, In this case the writ was advised, and deliberately considered, in order to found a process, and appeared to those employed who have deponed to be a legal formal writ. 3*tio*, There can be no fear of the affected losing of suspected writs and making them better by a tenor, because tenors are made up by documents and adminicles, whereof the Lords are judges; and where there lies the least ground of suspicion against the writ lost either as to the formality, much more as to the quality, or even as to the existence of that writ unextinguished, in such cases the Lords would weigh the whole, and would not make up the tenor if there remained any suspicion against the debt; but where there remains no question, either as to the reality, or formality of the debt, it were hard there should be no remedy.

No. 48.

"The Lords found the tenor proved."

Dalrymple, No. 79. *p.* 100.

1707. *May* 13.

The LADY AIRTH, and GEORGE DUNDAS, her Husband, *against* JAMES BLACKWOOD.

No. 49.
Whether the tenor of an adjudication may competently be proved? This not here decided, but the adminicles offered found not sufficient.

John Telfer, and other creditors of Hamilton of Grange, in a competition amongst Grange's creditors, the Lady Airth produces a charter and sasine, on an adjudication led by her mother against Grange for her by-gone jointures; and it being objected, That the adjudication was not produced, she repeated a proving of the tenor, in regard it was burnt in Sir Robert Miln her tutor's house at Leith; and, for documents and adminicles, besides the charter and sasine, she produces the summons of adjudication extracted from the signet, with the contract of marriage, being the ground of the debt, and a decreet of constitution, an extract of the allowances, an executed horning against the superior, the keeper of the minute-book his attest that it is put up there, and the respondee-book, bearing, That the clerk's dues are paid for it; all which evidently prove the existence, being, and substance of this decreet of adjudication, and which is only craved to subsist for the sum, without accumulations, or an expired legal. Answered, Though our law has allowed the tenor of lost voluntary rights to be made up, yet it has looked upon the proving a tenor of judicial deeds, as dangerous and impracticable, they depending upon the observing of so many rules, solemnities, and forms, that the most accurate witness in the world cannot mind them all; and what encouragement might this give to falsehood? for if the deed were either

No. 49. null or forged, one had no more ado but lose it, after he had shewn it to persons, and then make up its tenor on their testimonies, which might cloke and cover all villainy; and therefore, as our acts of Parliament have prohibited the making up the tenors of charges of horning; so our decisions have refused to make up decreets of apprising when lost; as Dirleton, *voce* TENOR, shews; and was denied by the Lords, in the cases of the Duchess of Lauderdale against the Earl; Lord Salme against Wilson; Doctor Lauder against Mr. Walter Burnside; and Lord Alexander Hay against Mr. James Inglis; and many other like cases. And as it is of a dangerous consequence in the general, so it is impossible to sustain this tenor on the adminicles adduced; for there is not one syllable adduced, either to make up the execution of the summons of adjudication, and of the special charge, without which we know the decreet would be intrinsically null; and the documents founded on are contradictory and inconsistent in themselves; for the minute-book says, Charles Oliphant was clerk to it, and yet the extract of the allowance bears John Hay to be clerk. The respondee-book bears, this decreet was extracted in July 1678, and yet the allowance of it is in April before. Replied, Not only the Roman law, but the practice of all the judicatories in the Christian world, allow probation of lost writs; as appears from *L.* 5. and 11. *De fide instrum. L.* 18. *C. De testib.* and the principles of common reason lay down these positions, That men may lose their writs either by negligence, or without their own fault, by casualities and fatal accidents, of fire, war, devastations, inundations, children or beasts tearing them, &c. and that it were iniquity in a debtor, or concreditor, to take advantage of such fatalities, or to plead thence either liberation from his debt, or performance of his obligement; therefore law must supply and make up the defect; and that fraud may be prevented and excluded, law has required these two cautions, 1*mo*, That some evidence be given of the *casus amissionis*, how it was lost; 2*do*, That writs be made up by homogeneous writs of the same kind and nature. Thus the Lords, in proving the tenor of heritable rights, require writs, such a charter and sasine, as well as witnesses who saw and read them; but no judge can expect a precise and peremptory probation of every circumstance, nor regard small variations and discrepancies in a cumulative presumptive probation, as this is, but must follow the general rules of law in such cases, viz. quod inesse debet id facile inesse praesumitur; omnia praesumuntur solenniter acta; interpretatio sumenda ut actus potius valeat quam pereat; negotium unumquodque rite atque ordine praesumitur gestum, ac si solennitates omnes, tam internæ quam externæ essent adhibitae. Vid. § 8. Institut. De Fidejuss.; et probatis extremis probantur media; and it is known that the Lords, in 1691, made up the tenor of a decreet of apprising betwixt Murray of Glendoick, and Brodie of Asliek. The Lords shunned to determine the general point, how far decreets, or other judicial acts may be proved; but advising the special case lying before them, found the adminicles adduced not sufficient; and therefore assoilzied from the tenor.

Fountainhall, v. 2. p. 359.

*** Forbes reports this case:

No. 49.

In the competition of the creditors of Grange for the mails and duties of that estate, the Laird and Lady Airth having insisted for preference upon a charter of adjudication and infeftment; and because they could not produce the adjudication itself, which is lost, they repeated *incidenter* a proving of the tenor thereof; condescending upon this *casus amissionis*, that the Lady and her brother being left pupils, under the tutory of Sir Robert Miln, whose house was burnt at Leith, therein probably the adjudication perished; and that the warrants and records thereof were probably lost though a double disorder that happened in the Clerk's office, occasioned first by a fire in the neighbourhood, and then by the great fire in the Parliament close; and adduced the following adminicles; 1*mo*, The contract of marriage betwixt Grange and Jean Bruce his spouse, which is the ground of the debt, and a decreet of constitution against Grange's heir, with these words indorsed, "Given out to Dundas to see summons, 4 executions, special charge and execution of this decreet;" 2*do*, The letters of special charge extracted from the signet; 3*tio*, The summons of adjudication from the signet; 4*to*, A certificate from the keeper of the minute-book, bearing a decreet to be put up of the date libelled; 5*to*, The adjudication is found in the minute-book of extracted decreets; 6*to*, An extract of the allowance of the adjudication was produced; 7*do*, Horning thereon raised and executed against the superiors; 8*vo*, The existence of the decreet was offered to be proved by witnesses beyond exception who saw the same.

Alleged for Telfer the competing creditor; 1*mo*, It were dangerous to allow a proving of the tenor of decreets, or judicial acts or instruments; because that were to prove by witnesses what is law, and what dates these were of, which it is impossible any witness can depone upon. Besides, nullities, and defects, and even falsehood in judicial acts might be covered by a proving of the tenor; for which reason the tenor of apprisings or executions of horning cannot be made up. 2*do*, The *casus amissionis* is not real, but feigned; for Sir Robert Miln's house was burnt much about the time of the Lady Airth's father's death, before he could have leisure to get up his pupil's papers, and that house was more his office than his lodging. Again, though papers were mislaid in the Clerk's office through the disorder occasioned by a fire in the neighbourhood, none were lost. And the said disorder having happened six years after the pretended decreet, the said decreet would have been booked with others in the register of decreets, and the warrants put up, with other warrants of that date; neither of which is done. 3*tio*, As to the adminicles condescended on, they are of no import. For 1*mo*, The original contract and decreet of constitution do not necessarily infer that adjudication followed thereon, more than personal diligence which was equally competent: And if the out-giving upon the decreet of constitution (which should have been marked upon the back of the summons) relate to the summons of adjudica-

No. 49. tion, no decree of adjudication could yet have been obtained; because, that summons is not yet seen and returned by Dundas, which behoved to have been done since there was no former adjudication. *2do*, The extract of the letters of special charge from the signet are obviously null through the want of a warrant to cite the tutors and curators of Grange, who continued under pupillarity for many years thereafter, as appears from the charter of adjudication which bears the adjudication to have been led against him and his tutors and curators: Nor is there any execution upon this special charge. *3tio*, The extract of the summons of adjudication is of as little moment, for that doth pass of course, and probably never came the length of a decreet. *4to*, There are many decreets put up in the minute-book that never were extracted. Again, the keeper's certificate and the extract of the allowance cannot be applied to the same decreet; for by the certificate Charles Oliphant is clerk thereto, and John Hay is made clerk by the extract. Besides, this allowance has been recorded upon trust, and never signed by the ordinaries; for though the pretended decreet bears date the 20th February 1678, and the allowance is in April thereafter, yet the decreet is not extracted till July, as appears from the respondee-book; and it is not to be supposed that the ordinaries would sign an allowance of a quarter of a year's antedate. *5to*, Nor is the decreet adminiculated by the horning against the superiors, which passeth of course upon the credit of the allowance; nor yet by the charter, because decreets of adjudication are seldom or never produced in the treasury, in respect the charter bears the reddendo of the former vassal, against whom the adjudication is led, and passes of course. And the sasine which depends upon the charter as its warrant, and is but the assertion of a notary, is a yet less sufficient adminicle. And, *6to*, Witnesses though never so habile or of the greatest integrity, cannot supply all the executions wanting, the signatures of process, the nullity of the special charge, &c.

Answered for the Laird and Lady Airth: There can be no reason assigned for allowing to prove the tenor of extrajudicial deeds that doth not equally take place in the case of judicial acts; seeing the former doth consist as much in form and solemnity as the latter, and both are equally exposed to fatalities, or the hazard of loss. Yea, there is not so much ground to fear that false or null judicial acts may be suppressed for the benefit of making up the tenor, as that extrajudicial instruments of that kind may be so made up; because, private instruments are drawn by persons for whom there is only the general presumption of probity; whereas in judicial deeds public persons intervene *ex officio*, whom law presumes to do every thing legally and formally. Now Airth is in a much stronger case; for the decreet he craves to be made up is adminiculated with judicial acts of the same nature and authority with itself; whereas instruments of notaries are made up commonly by relative writs and the testimonies of witnesses, a kind of dissimilar probation, where every part is of less authority than the attest of the notary, &c. to be proved. Again, the Lords do not simply reject the proving of the tenor of apprisings, though harder to be made up than any of their decreets, but on the

contrary sustained it in the case of Glendoick *contra* Brodie of Asliek, 25th February 1691, (See APPENDIX.) And the proving of the tenor of a decreet of prorogation was sustained in December 1704, Douglas *contra* Heritors of Birse, No. 47. p. 15810; observed by Mr. Forbes in his Treatise of Church-lands and Tithes, page 446. *et seq.* So the Parliament have often in their judicative capacity made up whole progresses of writs both judicial and extrajudicial. And the act of Parliament, discharging the making up the tenor of executions of horning presumes, That *de jure communi* the tenor of all lost writs may be made up; seeing an exeception required a particular statute. *2do*, Where writs that of their own nature use not to be retired (as the adjudication in question) cannot be produced, a *casus amissionis* is not so strictly required; and no law requires that the extraordinary accidents of fire, or sword, or tempest, should be proved, but the common and probable occasion of such losses is sufficient. *3tio*, The adminicles produced do forcibly attest the existence and substance of the deed; law supplies the solemnities, and the Lords' authority and records presume that every thing was orderly done. Again, the specialities objected against these adminicles are very inconsiderable, and easily reconcileable to them. For the decreet has been put in the minute-book by Charles Oliphant the under-clerk, and been brought to the bill-chamber after it was signed by Mr. John Hay the principal clerk. Nor can the charge to enter heir be said to want a warrant to cite tutors and curators, since that is implied under a warrant lawfully to charge a minor. As to the seeming difference betwixt the respondee-book and the register of allowances, the former as of no authority must cede to the latter, which is a public record. Besides, the respondee-book concerns only the time of payment of dues, which is reconcileable to the decreet's being signed some months before; for the extracter might have prevailed with the clerk to sign the decreet, and let it lie in his hands till the dues were paid. No. 49.

Replied for Telfer and Blackwood: Here there are no principal letters of special charge, nor principal summons, nor executions of either, nor any signatures at all, nor so much as a copy of the adjudication: Whereas in the proving of the tenor betwixt the Lord Glendoick and Brodie, all these were extant with a decreet of transumpt before the Lords, which was equivalent to a tenor.

The Lords waved to enter into the consideration of the general point, Whether the tenor of judicial writs can be proved; but found, That the adminicles adduced did not prove the tenor.

Thereafter, July 4, 1707, the Laird and Lady Airth craved, That since they were over-ruled in the proving of the tenor of their decreet of adjudication, the Lords would at least sustain the same upon the aforesaid adminicles as a real security for the principal sum due to them, without any accumulation, or else stop decreet in the mails and duties for such a time as they might establish a real right in their persons by leading a new adjudication.

Answered: The adjudication being a *non ens*, it can have no *accidentia*, and therefore cannot be sustained as a security, which were to transubstantiate a per-

No. 49. sonal into a real right. Nor ought any stop to be put to the decreet of mails and duties upon pretence of diligence to be done, which is uncertain both as to effect and time.

The Lords ordained the decreet of certification to be extracted, but stopped the preference in the mails and duties till the first of December; betwixt and which time the Laird and Lady Airth might adjudge and be in a capacity to compete with real creditors.

Forbes, p. 171.

1707. *November* 21. WADDEL *against* WADDEL and Her HUSBAND.

No. 50.

In the proving the tenor of a contract of marriage, which was raised only *incidenter*, to satisfy the production in an improbation of an apprising, whereof that contract was the ground, the adminicles produced being a decreet *in foro*, mentioning the production of the extract of the contract, with the apprising, charter, and sasine thereon; and the pursuer having adduced witnesses, who saw and read the said contract, and proved also, That the relict, by that apprising, possessed the lands for many years;—the Lords thought, that there was a difference betwixt the making up of a writ to be the ground of a future action, and a tenor craved, only to shun certification on a presumptive falsehood; and therefore found, That there being no presumptions of real falsehood against this contract, and the adminicles being so pregnant, though neither all the clauses, nor date, were fully proved, yet that there was sufficiency to exclude the certification, and so assoilzied from the reduction.

Fol. Dic. v. 2. *p.* 448. *Fountainhall. Forbes.*

*** This case is No. 480. p. 12593. *voce* PROOF.

1709. *July* 2. INGLIS *against* HAY.

No. 51. The pursuer of a reduction not allowed to repeat *incidenter* a proving of the tenor of a writ necessary to make up his active title.

Forbes.

*** This case is No. 66. p. 13293. *voce* QUOD AB INITIO VITIOSUM.