

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.

No. 58.

The Lords refused and adhered.

Act. *H. Home.*Alt. *T. Hay.*Clerk, *Gibson.**D. Falconer, No. 189. p. 254.*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.

No. 59.  
Writs not  
extinguish-  
able by sim-  
ple retiring.

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

*Kilkerran, No. 3. p. 563.*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.

No. 60.  
If the proof  
can be taken  
on commis-  
sion?

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.*1753. *November 21.*

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

No. 61.  
In what cases  
an action for  
proving the  
tenor is  
necessary?

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. parish of Ancrum; and decerning 500 merks of the stipend to be paid yearly to the Bishop of Brechin and his successors. This decret bears date 6th February, 1684, as appears by a copy preserved; for the principal decret was destroyed, with the other records of that Court. But the decret took effect; for from that time downwards the parish of Long Newton has had no separate Minister; and the 500 merks were regularly paid to the Bishop of Brechin, proved by receipts granted by the Bishop, the first dated 21st October, 1685, recently after the annexation.

The loss of this decret furnished a handle for a process at the instance of the Moderators of the Synod of Merse and Teviotdale, and Presbytery of Selkirk, within whose bounds the parish of Long Newton lies, against the heritors of that parish; concluding, that this parish being subsisting ought to be provided with its own pastor, and a sufficient stipend to be modified to him. The defence was laid upon the foresaid decret of annexation, of which many adminicles and documents were produced, to show that there really had been such a decret, and that the same was extracted and had taken effect. The pursuers, in their answer, acknowledged that there had been a process of annexation; affecting a doubt, at the same time, whether it had been brought to a final issue. But they rested their answer principally upon a point of law, that the defenders could not be allowed to found upon this decret, without proving the tenor of it.

In this shape the cause was reported to the Court. It occurred to me, that a proof of the tenor is only necessary to found an action, not to found a defence, in which case it is sufficient to prove the fact which founds the defence; that, in this view, the fact is sufficiently verified by the documents produced in process; chiefly by the discharges granted by the Bishop of Brechin to Sir Patrick Scot, who paid the bulk of the stipend; which show not only that there was a decret of annexation, but that the same took effect. *2do*, By a fact acknowledged, that the parish of Long Newton from that period never had a separate Minister. And, upon the whole, I observed, that if a proof of the tenor were necessary in this case, it must follow, that though an annexation had subsisted for centuries, yet that all must go for nothing unless the decret of annexation be preserved. Elchies said, that where a grant of peerage is lost, a proof of the tenor is not necessary, if the man be in possession of his peerage. All parishes have originally been divided by some writing; yet the boundaries of a parish may be ascertained by possession, without necessity of producing the original writing, or to prove the tenor of it. The only case where the proof of the tenor is necessary to found a defence, is with regard to land property. Possession alone is not a sufficient title to land, and therefore, if a process of eviction be brought, founded upon a good title, the possessor cannot defend himself but by producing a better title, or at least the proving the tenor of it.

“The Lords unanimously assoilzied upon the medium above suggested, that, in this case, a proof of the tenor was not necessary.”