1770.

EARL OF LAUDERDALE v. MACKAY.

tic's father's powers, or in fraud, or in contravention of the deed of 1706.

Pleaded by the Respondents.—The deed of entail 1706, under which the appellant, Sir Peter's father, made up his titles, and possessed the estate, disabled him from altering the order of succession thereby settled, and declared any such act was null and void: he was farther bound by his own contract of marriage 1738 to preserve that order, and as the deed of 1751 alters the order chalked out by the deeds of 1706 and 1738 the same is inept, in consequence of the granter being disabled from granting any deed of that nature.

After hearing counsel, it was

Ordered and adjudged that the interlocutors complained of be reversed, and that the defender be assoilzied.

For Appellants, *Ja. Montgomery.*

For Respondents, *Al. Forrester.*

Note.—Not reported in Court of Session Reports.

EARL OF LAUDERDALE, - - *Appellant;*

GEORGE MACKAY of Skibo, - *Respondent.*

House of Lords, 21*st March* 1770.

CASUS AMISSIONIS—EXTRACT.—Where a bond was challenged as false and forged, and on production being called for in the improbation, and an extract produced to satisfy production: On its being urged that the original bond ought to be produced, it was stated that it was lost in the hands of the Keeper of the Records; a proving of the tenor being made necessary: Held, that a special *casus amissionis* was unnecessary where, in these circumstances, the proof that the original existed was established—both by the extract, and by the decreets in other processes, and where the Keeper of the Record deponed that such bonds had gone amissing in the Register Office on former occasions.

Action of mails and duties was raised by the respondent, founded on a bond granted by the appellant's ancestor about 70 years before; and a counter action of reduction improbation of the said bond raised by the Earl.

In the course of the inquiry, the bond was called to be produced, but an extract only being produced, which, when compared with the bond, was found to be different in date, and in the witnesses names; the date being 23d instead of 22d February, and Mr. Shaw as witness, in place of Sharp. It was objected that an extract of the bond was not a sufficient satisfaction of the production, more especially in an action of reduction improbation, where the writ in question is impugned, as being false and forged. To this it was answered, that an extract was sufficient where the bond itself was lost; but the respondent fearing the effect of certification for nonproduction of the bond itself, resorted to a proving the tenor; which action being conjoined, the Lords, of this date, allowed a proof of the tenor and *casus amissionis* July 6, 1765. of the bond libelled. When the proof was reported, the whole question resolved itself into the effect of that proof; 1st, Whether, in this suspicious case, there was such proof of the tenor, and of the *casus amissionis* as was sufficient to establish the same, and supply the want of the bond itself? and, 2d, Upon the supposition of the proof being sufficient, whether the tenor ought to be established agreeably to the record, or according to the extract, though it differed from the record?

Upon the first of these points, it was pleaded for the repondent, that Sharp, the respondent's cedent, was factor to the Earl of Lauderdale, and after Kirkwood's death, to whom the late Earl of Lauderdale had granted this bond, Sharp became trustee and executor for Kirkwood. That there was sufficient proof of the tenor from the fact of the bond itself having been the foundation of so many judicial proceedings. 1st, In the confirmation of Kirkwood's testament; 2d, In the commissary decret 1688, and in the other two decrets 1693 and 1694; 3dly, In the various processes at the instance of Kirkwood's executors for exhibition and delivery of said bond, there was no just cause to doubt either the reality of the bond, or the justice of the debt; and in aid of these, there was an unsigned memorial dated 1st March 1688. That the embarrassed state of the affairs of the family of Lauderdale sufficiently accounted for the delay or neglect in attempting to recover the debt; and as the bond appeared to have been delivered over to the Register for custody and preservation, there was sufficient evidence of the tenor, and the law must presume, from such circumtances, that it had been lost by some fatality, or by fault or

1770.

EARL OF LAUDERDALE v. MACKAY.

neglect of the keeper of the Record, and that, in these circumstances, no proof of the special *casus amissionis* was necessary: Upon the second point, namely, the apparent discrepancies between the record and the extract, in the date and in the name of one of the witnesses, these were so obviously clerical errors, which had occurred in copying from the original bond, that no effect was due to them.

In answer, it was maintained by the appellant, that as processes for proving the tenor of deeds said to be lost by accident, or destroyed by fatality, is an extraordinary remedy, in which the Court exercise their *nobile officium*, this ought not to be interposed except on weighty occasions, and rarely if ever to be allowed; whereas, in this instance, there were strong presumptive proofs that the deed had been fraudulently abstracted or put aside, in order to conceal some intrinsic and fatal objections pleadable against it: That in such cases, the policy of the law was, to entertain a just jealousy, seeing that the originals, of which the tenor was wished to be proved, might be purposely concealed, in order to furnish an opportunity of proving them to be different from what they were, or to hide nullities pleadable against them: That in case of bonds inferring a personal obligation only, and liable to be extinguished in a short period, a *special casus amissionis* was by uniform practice essentially requisite to support the proof of the tenor. This more especially in an action of reduction improbation, where the writ is challenged as false, fabricated, and forged, where an extract from the Register could not supply the want of the writ itself, and where, from the whole circumstances, there arose the strongest possible suspicion that the bond had been abstracted and put out of the way: And that the three decrees above founded could *not* be evidence of the existence of the original writ, while, on the other hand, the neglect to make any claim upon it for so long a time, raises the strongest possible suspicion also.

Dec. 11, 1766. The Lords of Session, of this date, pronounced this interlocutor: "Having advised the state of the process, testi-
"monies of the witnesses adduced, writs produced, with
"the memorials given *hinc inde*, and heard parties procura-
"tors; find the *casus amissionis* of the bond, and tenor
"thereof as libelled proven, and decern and declare ac-
"cordingly."

Mar. 11, 1767. On reclaiming petition the Lords, of this date, adhered.

Against these interlocutors the present appeal was brought.

Pleaded for the Appellant.—From the whole circumstances of the case, there arises the strongest presumption that this bond was, from the beginning, either an absolute forgery, or did labour under such nullities and defects, apparent from the face thereof, as has led to its concealment. That, in these circumstances, no proof of the tenor ought to be held as admissible, without proof also of a special *casus amissionis*, especially with reference to a personal obligation of this nature. *Separatim*, That it was settled law, an extract of the deed, where the deed itself is challenged as false and forged, was not sufficient production. That the interlocutor was therefore erroneous, in so far as it sustained the tenor, agreeably to the extract produced, when it was so clear that the tenor of the extract and the record were essentially different. Moreover, a claim of this sort, brought at a lapse of nearly 100 years, was to be more strictly judged of, where there were so many presumptions of its extinction.

Pleaded for the Respondent.—The presumptions referred to by the appellant, will have all due weight given them in the discussion on the merits in the action for payment of the bond. Meantime it is premature to allow them to enter into the consideration of this preliminary discussion.

The *casus amissionis* of the bond was fully proved by the keeper of the Records, who speaks to the loss of four other principal deeds in a similar way, namely, by going amissing though copies of them stood entered on the record. A more special *casus amissionis* than this was therefore unnecessary. As, from the nature of the thing, this bond could never return to the parties, because the act of Parliament 1685, c. 38, prohibits all such writs put on record to be returned, so the proof of the tenor of the bond, by the extract, was perfectly satisfactory and complete; and the other objection about the extract copy being different from the record copy was quite immaterial, and apparently a clerical error.

After hearing counsel, it was

Ordered and adjudged that the appeal be dismissed, and that the interlocutors therein complained of be affirmed, with £80 costs.

For Appellant, *David Rae, Tho. Lockhart.*
For Respondent, *Ja. Montgomery, Al. Forrester.*

Note.—Unreported in Court of Session Reports.