1759. *February* 8. M'DONELL *against* KING'S ADVOCATE.

No. 62.

The subsistence of a right of wadset found proved in favour of the Crown by producing the extract of a sasine, in favour of the wadsetter, who was under forfeiture

Fac. Coll.

*** This case is No. 339. p. 11673. *vace* PRESUMPTION.

1771. *July* 26.

ELISABETH and MARGARET MARY NIMMO *against* ANDREW SINCLAIR.

No. 63.
What is sufficient evidence?

James Nimmo, the pursuers' father, in the year 1743, entered into a second marriage, with Lady Janet Hume, daughter of the Earl of Marchmont. Her portion was £.1000, secured to her by a bond of provision from her father, corroborated by her brother.

About the year 1749, there being then no prospect of children, Lady Jane had agreed to settle the greatest part of her portion upon the pursuers, James Nimmo's children by his first marriage; and she accordingly executed an assignation in their favour, which was immediately delivered to her husband. She afterwards changed her mind; and having got possession of the deed, destroyed it.

Mr. Nimmo died in the year 1758, in bankrupt circumstances; so that none of the provisions in Lady Jane's favours, made at entering into the marriage, were fulfilled. The contents of her bond of provision were uplifted from Lord Marchmont, to which the pursuers consented; but as they had always maintained their right to this sum, in virtue of the assignation in their favour in the year 1749, that consent was qualified with a reservation of all action against Lady Jane, her heirs, &c. upon the said assignation. The money was uplifted, and sunk. In 1761, Lady Jane drew £.1800 from the executry of her brother, the Lord Register; and in 1770 she died, having, by a will, bequeathed all she had to the defender, her relation.

The pursuers brought an action for proving the tenor of the assignation mentioned; and, in their summons, set forth, what they conceived to have been the terms of it, viz. that it had been an absolute assignation to Lady Jane and her husband in life-rent, and to the pursuers in fee; that it contained no reserved power to alter; and bore, as was the fact, to have been instantly delivered to James Nimmo, to be kept for the benefit of all concerned.

There was no collateral writing of any kind exhibited or referred to, as affording a *talis qualis* proof of the precise terms of the deed; but, in support of the action, the pursuers founded on the following facts, circumstances, and presumptions, as sufficient evidence

No. 63.

1*mo*, There was recovered from Lady Jane's repositories, a memorial, in her name, for the opinion of counsel as to the state of her affairs upon her husband's death; in which she sated, that upon the occasion of the pursuer Elisabeth's marriage to Mr. Pringle, she had signed a paper, which she understood was a conveyance of her money to Mr. Nimmo's daughter, in the usual form, but did not remember whether it contained a power of revocation or not; and that it was taken by Mr. Nimmo into his own custody; that, some time thereafter, she acquainted her husband she meant to destroy this deed; and accordingly, in his presence, put it into the fire; and acquainted two of his daughters of what she had done.

2*do*, Upon the occasion of the pursuer Elisabeth's marriage, there was a deed of translation granted by her to her husband; in which she made over a third part of the sum of 17,000 merks contained in Lady Jane's bond of provision, " and an assignation of the premises, granted by the said Lady Jane Nimmo, to my said sisters and me, equally amongst us, of this date." From this it was inferred, that the assignation by Lady Jane had been irrevocable, as the above conveyance would not otherwise have been accepted of by Mr. Pringle in part of his wife's portion.

3*tio*, The manner in which Lady Jane admitted she had destroyed this deed indicated a consciousness of her having done something wrong. From her destroying it altogether, it was to be inferred that it had been truly out of her power either to alter or revoke it; as that, had it been otherwise, might have been accomplished in the easiest and simplest manner.

4*to*, There was produced a letter from Mr. Nimmo to Mr. Pringle, dated 4th December, 1753, in which he acknowledged that Lady Jane, with his consent, granted an irrevocable assignation of the sum contained in her bond of provision in favour of his daughters, dated 15th December, 1749, executed in presence of the Earl of Marchmont, and instantly delivered up to him, Mr. Nimmo, to be kept for the benefit of all concerned.

5*to*, The facts and circumstances stated were confirmed by the deposition of the Earl of Marchmont; who, in substance, stated, That, upon the occasion of the pursuer's marriage, Lady Jane had shown him an assignation of her money to Mr. Nimmo's daughters: That he observed it was revocable, and suggested to her the propriety of making it without that reserved power: Lady Jane immediately consented; and an irrevocable deed was made out, and signed by her, in his presence, to which he also subscribed as a witness, and which was instantly delivered over to Mr. Nimmo. And the deed, set forth in the summons, having been read over to him, appeared to be an exact copy of the deed executed upon the above occasion. His Lordship further deponed, That, about three years after this, Mr. Nimmo, with much concern, had informed him, that Lady Jane having, on some pretence, got his keys from him, had taken out the above assignation, and had destroyed it; and, in consequence of this conversation, he believed Mr. Nimmo had written a letter to Mr. Pringle upon the subject.

The defender pleaded:

Though it was admitted that a deed had once existed, and had been destroyed, yet there was no legal evidence as to the import and tenor of that deed. In a proving of the tenor, it was necessary that some written adminicle, shewing the nature of the deed, and reciting, or at least in substance expressing, the clauses sought to be restored, should be produced. Though this rule might admit of some relaxation in cases where the deed was of a simple nature, such as a bill or ordinary bond, which might perhaps be sufficiently instructed by witnesses, the case was very different as to deeds of conveyance, which might be of a complex nature, and where the variation of a few words might entirely alter the sense. The rule was more particularly applicable to cases such as the present, where the deed was admitted and presumed to have been of an unusual conception, containing extraordinary clauses, and, according to the circumstances of the parties, irrational in the extreme.—Erskine, B. 4. T. 1. § 54. *et seq.*; Stair, B. 4. T. 32. § 5. No. 63.

The writings founded on, in the present instance, did not amount to evidence. The deed of translation by the pursuer Elisabeth, upon the occasion of her marriage, could be no evidence against Lady Jane, or those in her right, as she was no party to that agreement,—had no concern with the transaction, which appeared to have been the result merely of a private communing betwixt Mr. Pringle and Mr. Nimmo himself. Mr. Nimmo's letter to Mr. Pringle was still more deficient. The deed, according to his account, was substantially in his own favour. It not only gave him the life-rent, but, in effect, the fee, as it enabled him in part to fulfil the obligation he was under to provide his daughter; so that it really amounted to nothing more than a private *ex parte* declaration, to establish a supposed fact in which he was materially interested.

From the presumptions resorted to, nothing could be inferred. The conclusion drawn from the supposed tortious act of destroying the deed, proceeded upon a *petitio principii* that the deed was really out of Lady Jane's power; which was the very point in dispute: while, *e contrario*, it was more natural to presume, that, by her having done so, it really was in her power, that being the easiest and most usual manner in which deeds of that kind were cancelled.

The parole testimony, as to the tenor or irrevocability of the deed, was that merely of a single witness, and did not in law amount to evidence. That witness also did not say that he had read the deed himself; and although he had deponed that he conceived it to be irrevocable, his testimony imported only his belief of a fact, not his remembrance of a tenor; or, more properly, his opinion in point of law, that the deed was conceived in terms to that effect. Upon former occasions, the Court had been very scrupulous in rearing up the tenor of assignations, particularly in the case, 20th June, 1747, Campbell of Ottar *contra* Macalister of Loup, No. 58. p. 15822. though the evidence was not there so defective as in the present instance.

The following interlocutor was pronounced: "Find the *casus amissionis* of the assignation libelled sufficiently proved; and find the tenor of the said deed suffi-

No. 63. ciently proved." To which, upon advising a petition and answers, the Court adhered.

Lord Ordinary, *Pitfour.* For Nimmos, *Sol. H. Dundas.*
Clerk, *Gibson.* For Sinclair, *Ilay Campbell.*

R. H. *Fac. Coll. No.* 98. *p.* 292.

1780. *February* 22.

WALTER CAMPBELL *against* The CREDITORS of The YORK-BUILDINGS COMPANY.

No. 64.
Special *casus amissionis* requisite in proving the tenor of bills of exchange.

Mr. Campbell insisted in an action for proving the tenor of a bill of exchange for £.200, drawn by Bishop, one of the York-Buildings Company's overseers in Scotland, upon Mildmay, cashier to the Company. That such a bill once existed, did not admit of doubt, nor was there any evidence of its having been retired; but the pursuer not being able to condescend on any circumstance accounting for its disappearance, it was

Pleaded for the Creditors of the Company: In all actions of this kind, a special *casus amissionis* must be established by the pursuer; otherwise, documents might be reared up of a nature and appearance totally different from those which are said to be lost; Bankton, B. 1. Tit. 24. § 12. & B. 4. Tit. 29. § 2.; Erskine, B. 4. Tit. 1. § 54.; February 19, 1679, Swinton *contra* The Laird of Tofts, *voce* WRIT. This is especially requisite in the case of bills, where partial payments are generally marked on the back of the voucher of debt, and where the debtor, relying for his acquittance on the delivery or cancellation of the bill itself, does not think it necessary to demand a formal discharge.

The Lords found, "That the pursuer must condescend farther before he is allowed a proof of the tenor and *casus amissionis* of the bill libelled."

Act. *Ilay Campbell, Maclaurin.* Alt. *Elphinston.* Clerk, *Campbell.*

C. *Fac. Coll. No.* 106. *p.* 200.

1781. *June* 29. DUKE of ARGYLE, *against* SIR ALLAN M'LEAN.

No. 65.
Proving the tenor of a decree of Court.

The family of Argyle had, for more than a century, been in possession of considerable estates formerly belonging to the M'Leans of Dowart, when, in 1717, Sir Allan M'Lean made an attempt to recover the antient patrimony of his house, by a process of reduction and improbation, raised in the name of M'Lean of Drimnin, as his trustee.

In this process, the Duke of Argyle produced writs, and proved possession sufficient to exclude the pursuer's title, as to most of the estates in question; but was found obliged to satisfy the production, as to certain parts of the lands of Broloss, then possessed by Sir Allan, under lease from his Grace.