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.

No. 65.

In the year 1634, the representatives of the two families entered into a contract, whereby Sir Lauchlan M'Lean became bound to resign, in favour of Lord Lorn, certain estates; and, in particular, the lands of Broloss and the twenty four merk five shilling land of Arrois, for a feu right to be granted him by his Lordship.

In 1637, Lord Lorn obtained a charter from the Crown, containing a *de novo damus*, by which the whole lands specified in the contract, were erected into a barony, to be called, "the Barony of Arrois." In 1642, his Lordship, then Marquis of Argyle, granted Sir Lauchlan a feu-charter in terms of the above agreement; but, in the year 1672, his son, Archibald, Earl of Argyle, found it necessary (as was alledged) to raise an action of declarator of irritancy of said feu-right, *ob non solutum canonem*, in which he obtained decreet. This decreet, however, was amissing, and could not be discovered upon record. The Duke of Argyle, therefore, in order to complete the titles which were now called for, brought an action for proving the tenor of this decreet; and the matter being heard in presence, it was

Pleaded for the pursuer: The situation of the family of Argyle, about a century ago, is well known. In 1681, the Earl of Argyle was tried for his explanation of the test imposed that year; was found guilty, imprisoned, and forfeited. Having made his escape, he lived abroad for some years; but was afterwards taken, and beheaded at Edinburgh, in 1685. In the mean time, his papers had been carried off and concealed by some of his friends; but being disovered, as Lord Fountainhall observes, Vol. 1. p. 504. were afterwards removed to Edinburgh, by order of the privy council. It is probable, therefore, that the decree in question was lost about this period, and in consequence of some of these removals.

Nor is it at all improbable, that this decree should not be found upon record; because, the 1738, when an act of sederunt put matters upon a proper footing, it appears that the records were kept in a very slovenly and imperfect manner.

But the real existence of the decree in question is proved by various documents. *1mo*, The minute book of the Court of Session bears an entry of such a decree, of date 13th November 1672. *2do*, An old inventory book belonging to the family of Argyle, mentions a decree of precisely the same date, and describes it as being a "decree of reduction of M'Lean of Dowart's rights to the lands and barony of Arrois and Broloss, for not payment of the feu-duty." *3tio*, In a process of removing from the lands and Barony of Arrois and Broloss, in the year 1673, this decree *ob non solutum canonem* is specially founded on; as it is, *4to*, In another process of removing in the year 1674, and also in the executorial letters which followed at the Earl's instance. From these documents it is clear, that such a decree as that in question once existed; and the circumstances above mentioned seem sufficiently to account for the manner in which it came to be lost.

Answered: The production already made shows that the title deeds of the family of Argyle are in the best order; and, it is rather extraordinary that this supposed decree only should be amissing. But the proving the tenor of a decree

No. 65. of the Court of Session, is altogether new. The warrants of every such decree must necessarly be among the public records; and, where these do not appear, the legal presumption is that they never existed. It is even doubted, whether the present action is competent; for, when the records of the commission of teinds were destroyed by an accidental fire, it required a special act of Parliament to enable the Court to proceed in establishing the tenor of the lost deeds. At any rate, the pursuer has here proved no special *casus amissionis*; and, in the late case of Campbell of Shawfield, that was found to be an essential requisite. (No. 64.)

Observed on he bench: It would be dangerous to allow the tenor of bills and other simple obligations to be proved, unless where the *casus amissionis* is very special, because they are usually given up upon payment, and no separate discharge is granted. This was the case as to Mr. Campbell of Shawfield. But here, where the deed was of a permanent nature, there is no such danger; and it is unnecssary to prove a special *casus amissionis*, that circumstance being presumable from its non-appearance.

As therefore it was evident, that some such decree as that in question had once existed, the Court "allowed the action to proceed."

Act. *Ilay Campbell et Crosbie.* Alt *M'Laurin.*

Fac. Coll. No. 72. p. 100.

1784. *June* 16. HUGH FRASER *against* FRASER DAVIES.

No. 66. Proving of the tenor of holograph writings.

Hugh Fraser, to whom an estate in Scotland had been devised, upon the failure of heirs-male of Lady Erskine the mother of Fraser Davies, brought an action for declaring the illegitimacy of the latter, founded on an allegation, that Thomas Davies, husband to Lady Erskine, and father of Fraser Davies, had been antecedently married to Elisabeth Nugent.

In support of this action, Mr. Fraser, *inter alia*, referred to a certificate and two missive letters, said to be holograph of Thomas Davies, which contained an acknowledgement of his former marriage. Copies of these writings were preserved in a process of declarator of marriage, which had been instituted by Elisabeth Nugent before the Commissaries of Edinburgh; but the originals had been taken out of the process by her, and never restored.

Mr. Fraser Davies, the defender, brought an action of reduction-improbation, in which these writings were called for, under the usual certification; and Mr. Fraser, in order to obviate that action, insisted in another for proving their tenor.

The original action, which called in question the legitimacy of a person more than thirty years after his birth, was viewed in an unfavourable light. And some of the judges doubted how far the removal of the writings by the party principally concerned, could be sustained as a proper *casus amissionis*, in favour of one