

No. 65. of the Court of Session, is altogether new. The warrants of every such decree must necessarily 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 the 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 unnecessary 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.*

Att. *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.

who had only a collateral interest. But the chief ground of the decision seemed to be the peculiar nature of the proof requisite in the action of proving the tenor; with regard to which it was

Observed on the Bench: A proving of the tenor is a useful, but at the same time a dangerous remedy; since without due attention, it may give an opportunity of raising up valid and effectual documents, in the place of informal or of forged deeds. It has therefore been wisely provided, that the evidence to be adduced by the pursuer shall not be confined to the *tenor* of the writings, but shall at the same time establish their *authenticity*; Stair, B. 4. T. 32. § 5, 9. Thus, with regard to holograph deeds, it is not enough for the pursuer to prove, that writings of the purport libelled had once existed. Had they been extant, it would have been incumbent on him to have likewise shewn, that they were the genuine hand-writing of the party, and subscribed of the dates which they are said to have borne. Erskine, Book 3. Tit. 2. § 22.; PROOF, Div. 4. § 4. Here then the present action must be for ever ineffectual, because from the disappearance of the writings themselves, such a proof cannot now be obtained.

The judgment of the Court was in these words:

“The Lords, having considered the whole circumstances of the case, dismiss the action.”

Lord Ordinary, *Eskgrove*.

Act. *Maclaurin, A. Ferguson*.

Alt. *Henry Erskine*.

Geo. Ferguson.

Clerk, *Robertson*.

J.

Fac. Coll. No. 157. p. 245.

* * * Notwithstanding this decision, the Judges who spoke expressed their opinion, that even after decree obtained in the action of reduction-inprobation, Mr. Fraser would be intitled to found on the letters in question, though not as holograph deeds, yet as a circumstance of evidence.

1787. July 21. DAVID DONALD against ANNE KIRKALDY.

James Donald, apothecary in Edinburgh, by his marriage-contract, settled on Anne Kirkaldy, his wife, a jointure of £.50. One duplicate of the contract was retained by himself, another was delivered to her father.

During the marriage, Mr. Donald's funds greatly increased; and, when he died, he left heritage to the amount of £.2000, and moveables equal to £.5000 more. At this period, neither of the duplicates of the contract of marriage could be found. The one delivered to his wife's father had been destroyed by him, at the desire, as he said, of Mr. Donald; and of the other no account was given.

As there was no issue of the marriage, Mrs. Donald, on the disappearance of the contract, became entitled to a half of the moveable estate, besides her in-

No. 67.
Special *casu-*
amissionis re-
quired, of a
marriage-co-
tract.