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ANNANDALE
v.
HOPE.

GEORGE, MARQUIS of ANNANDALE, *Appellant*; JOHN, LORD HOPE, *Respondent.*

28th May, 1733.

TENOR.—Found that the *casus amissionis* must be proved. A charter and sasine proceeding on the procuratory of resignation contained in a bond of tailzie, found not sufficient to prove the tenor of the bond.

No. 24. WILLIAM, Marquis of Annandale, in terms of his contract of marriage with Sophia, daughter of Mr. Fairholm of Craigiehall, executed a bond of tailzie,
1690. by which he settled his estates on his son James in fee, and himself in liferent, whom failing, the other heirs male of the marriage; whom failing, the heirs male of his body; whom failing, the heirs female of the marriage, &c. The deed contained prohibitions against selling contracting debts, &c. but from all these James, the institute, was exempted and free. Upon the procuratory in this deed, a crown charter was obtained, and infeftment duly taken thereon.

The Marquis by a second marriage had issue, the appellant and another son. He was succeeded by his son Marquis James, who made up no other title to the estate, but possessed on the charter and
1726. sasine above mentioned. James executed a voluntary settlement of the estates in favour of the respondent, son of his sister the Countess of Hope-

ton; but, upon his death, the appellant, after being served heir to him, raised a reduction of this settlement, on the ground of its being a contravention of the entail.

Production of the entail being ordered, and it not being to be found, the appellant then founded on his title as heir of his father, and insisted that the settlement 1726 should be reduced, as executed by one having no complete title, the charter and sasine being inept as without a warrant. In order to meet this plea, the respondent raised an action of proving the tenor, in the course of which he produced the foresaid charter and sasine, bearing to be in terms of the procuratory, and several other deeds executed by Marquis William, which proceeded on a recital of the bond of tailzie. In defence, it was pleaded that the *casus amissionis* ought to be proved; that the deed had been in the hands of Marquis James after his father's death; and that it contained other and different clauses than what appeared upon the charter and sasine.

The Lords "found the *casus amissionis* not ne- February 16, 1733.
"cessary to be proven in this process, and found
"the deed by William, Marquis of Annandale,
"which is the warrant of the charter under the
"great seal, in the year 1690, proven to be of the
"tenor libelled by the Lord Hope, and decerned
"in the tenor, and declared accordingly."

The appeal was brought from several interlocutors of 18th and 26th January, and 16th February. Entered February 22, 1733.

Pleaded for the Appellant:—1. The respondent has not proved the *casus amissionis*, which by the law of Scotland, is necessary in an action of proving

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the tenor, in all cases where it can be supposed that the party who brings the action may have any advantage in concealing the original deed. The deed has been proved to have been in the possession of Marchioness Sophia for behoof of her son James, and its not being found now, renders it extremely probable that it was destroyed or concealed, as containing clauses which disabled him from making a voluntary conveyance to disinherit his brother, and separate the estate of the family from the honors.

2. The respondent has, at most, proved the tenor only of one part of the deed, viz. the procuratory of resignation, which is all that is or can be inserted in a charter; and the force of this evidence depends entirely on the judgment and care of the writer to the signet, being the officer who prepares the signature, and from that the charter for passing the seals. But it no way appears what were the narrative or dispositive parts of the deed, which may have been, (and, according to the circumstances of the case, most probably were,) such as entirely disabled Marquis James from altering the succession of the heirs male of the body of Marquis William.

3. The respondent has not proved that the deed of entail was duly signed by Marquis William, in the presence of two witnesses thereto subscribing; or that the names and designations of the writer and witnesses to the deed were inserted; any of which circumstances being omitted, the deed itself, if it were produced, would be of no effect.

Pleaded for the Respondent:—1. In proving the tenor of title-deeds to land estates, it is not neces-

sary to prove the *casus amissionis*, though it may be required in the proof of the tenor of bonds, which are extinguished by being retired into the hands of the obliger; and this distinction has been confirmed by repeated decisions.

When procuratories are lost, stolen, or destroyed, the proof of the *casus amissionis* is generally not only difficult but impracticable; and if it were necessary to prove the same, many proprietors, as well heirs of entail as others, must be reduced to a state of beggary.

It is not sufficient to suggest that clauses and limitations might have been contained in the procuratory, and omitted out of the charter, but he who makes such an averment must support his allegation by evidence; and in this case, it would be unreasonable to suppose that Marquis William would have passed a charter in terms less advantageous to himself than were contained in the procuratory, which was his own deed, or that he would have possessed the estate for thirty years under this charter, without perceiving the difference, if there was any, between it and its warrant.

2. The honesty and accuracy of all employed in public offices is still to be presumed. This charter passed the Court of Exchequer, and must therefore be presumed to have been accurately drawn. Constant experience proves that charters are agreeable to the procuratories upon which they follow, which operates a presumption, which has been founded on by all lawyers and judges, that the tenor of writings lost may be found proved from charters and sasines passed upon them, particularly when

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there are extant deeds under the hand of the granter which relate to the writing lost.

3. In most cases where the deed is not extant, it is impossible to know, much more to prove, the names of the writer of, and witnesses to the deed, but where the contracts are proved, they are presumed to have been regularly executed. So the House of Lords found, in the case of Blackwood *v.* Hamilton of Grange.* Besides, in the present case, Marquis William, by repeated deeds acknowledging that he executed the bond of tailzie, proves that it wanted none of the solemnities of law.

Judgment May 28, 1733.

After hearing counsel, "it is ordered and adjudged, &c. that the said interlocutor of the 16th "February, whereby the Lords of Session found "the *casus amissionis* not necessary to be proven "in this process; and also found the deed by Wil- "liam Marquis of Annandale, which is the warrant "of the charter under the great seal, in the year "1690, proven to be of the tenor libelled by the "said Lord Hope, and decern in the tenor, and "declare accordingly, be, and the same are here- "by reversed; And it is hereby further ordered, "that the defender be assoilzied from the action "of proving the tenor."

For Appellant, *P. Yorke, Dun. Forbes, Ro. Dundas,* and *Will. Grant.*
For Respondent, *C. Talbot, Ch. Areskine,* and *N. Fazakerley.*

* Robertson's Appeal Cases, No. 48, p. 211. (Forbes, 704. Mor. Dict. p. 15819.)