

1636. July 19. LO. FRENDRUGHT *against* L. BAMFF.

No. 14.

In what cases relevant to libel a proof by witness without adminicles?

In an action for proving the tenor of a back-bond, granted by the L. Bamff to the Lo Frendraught, whereby L. Bamff granted, that albeit the Lo. Frendraught was obliged as principal, and Bamff only as cautioner for Frendraught, in a bond of 3,000 merks, borrowed from Alexander Forbes; yet that sum was truly a debt owing by Bamff, and that therefore he should relieve him thereof; and which back-bond being libelled to have been burnt, when the House of Frendraught was burnt, and therefore the tenor thereof being desired to be proved, it was alleged, that there was no adminicle in writ libelled to sustain the back-bond and summons, and that it were of a dangerous preparative and consequence, to sustain this or the like actions, to prove tenors of bonds, or back-bonds, for payment of sums of money; and might disturb greatly the lieges, and tended to a dangerous example, seeing it is the universal case of the whole nation, and inviolable custom, that when parties pay sums owing by bond, only to destroy the bond, and there is no other record thereof made; and it were great iniquity in such cases, (the question libelled not being of a different nature) to admit parties to prove the tenor of such bonds, and so to restore the same against the debtor; especially in this case, where there is no adminicle in writ extant to sustain this action: And the pursuer replying, that he offered to prove, that the L. of Bamff was before debtor to Alexander Forbes in the like sum, for payment whereof he being charged, the L. Bamff dealt with the Lo. Frendraught to borrow that sum, and which he did, and became principally bound, as is libelled, the Lord Frendraught being of before under oath not to be caution for any person, whereby he was moved to be principal debtor, at which time the back-bond libelled was made to him: Likeas, he thereafter having paid the sum to Alexander Forbes, Alexander Forbes made the L. Bamff assignee to the first bond made by Bamff and the Sheriff of Cromarty, for satisfaction whereof Frendraught became debtor, as said is; upon which assignation the L. of Bamff recovered payment of a great part of the sum from Cromarty his co-cautioner; all which he offered to prove by the L. Bamff's own oath, in fortification of his summons, the tenor whereof, viz. of the back-bond, he offered to prove by the witnesses inserted, and writer, and these he alleged to be sufficient adminicles: The Lords, although they found that it was of dangerous consequence to sustain such actions for proving the tenor of the bond for sums of money, and that they would not regularly allow the same, but upon necessary and good considerations, which might have moved them; yet in this case the Lords sustained this action, in respect of the reply, and circumstances therein contained, which they found relevant to be proved by the defender's oath, and as sufficient as any other adminicle in law required to concur in an action for proving the tenor; for albeit there must be libelled adminicles in proving of tenors of real rights, such as charters, &c.; yet to prove the tenor of a bond for a sum of money, there is no likelihood that there can be any other adminicle in writ; and

in this case the circumstances contained in the reply were sustained, as sufficient to be proved by the parties' oath, as said is.

No. 14.

Act. *Advocatus & Mowat.**Durie, p. 817.*

1662. July 26. LADY MILNTOUN against LAIRD MILNTOUN.

Lady Milntoun pursues probation of the tenor of a bond of interdiction granted by her husband, young Calderwood, interdicting himself to her. It was alleged, No process, because there was no sufficient adminicle in writ produced, there being no writ relative to the interdiction subscribed by the party, but only the extract of letters of inhibition.

The Lords sustained this as a sufficient adminicle, in respect the question was not about a writ that used to be retired, such as bonds. In this case, also, the Lords examined some witnesses, *ex officio*, before litiscontestation, being old and valetudinary.

No. 15.

The tenor of an interdiction being pursued, the production of the letters of publication was found a sufficient adminicle.

Stair, v. 1. p. 371.

1663. January 21. MEIN against NIDDRIE.

Elizabeth Anderson, daughter and executrix to Mr. David, her father, makes an assignation to Robert Mein, merchant, of certain debts; whereupon the said Robert raised process before the Commissaries; and the assignation was thereafter lost. This assignation was made by Elizabeth, with consent of Allan Keith, her husband; and the tenor thereof is, by a summons, craved to be proved and made up; the pursuer having produced divers adminicles. It was alleged for the Laird of Niddrie, who had right from John Anderson, brother to Elizabeth, and who had right from her, That *casus amissionis* must not only be libelled, but specially condescended on, and made probable; because it is offered to be proved, that there was a factory granted by the said Elizabeth to this pursuer, and upon which factory he did pursue, and obtain payment from some of the debtors, to the said Elizabeth's behoof, and upon trust; and if any such assignation was thereafter granted, it was upon trust, it being ordinary to entrust friends with such assignations, and to the granters to keep them beside them, or in their own proper power, though intimated; and this pursuer cannot say, nor can he make it appear, that ever he gave money for this assignation, nor that ever it was in his custody as his own evident: And therefore, unless *casus* of his *amissio* thereof, be condescended upon, there can be no process. It was answered, That *casus amissionis* can in very few cases be condescended upon, far less proved; men oftentimes tining their writings, not knowing how or where.

No. 16.

In a proving the tenor of writs, the *casus amissionis* need not, in some cases, be condescended on.