Lord Haddington observes in his Decisions, *24th January* 1610, *Meldrum of Dumbreak* against *Barclay of Toway;* and *6th March* 1612, *Lockinvar and Murray* against *Drumlanrick;* and *11th June* 1611, *Lady Dumbreak* against *The Lord Elphiston.* The Lords had the same distinction under their consideration, That there behoved to be evidences of the veracity of the writ as well as of its being; else a decreet of tenor was scarce relevant to stop improbation. Dirleton, in his Doubts and Questions, *voce* Tenor and Transumpts, pages 202, 203, and 215, goes farther, That a decreet of tenor in no case should stop improbation. But *omnis definitio in jure est periculosa,* and the general abstract point may be of dangerous consequence; therefore Craw's procurators plead it no farther but that the adminicles should give evidence of the truth of the writ as well as of its existence.

It was ANSWERED for Brown of Blackburn, That it was never controverted but a decreet of tenor stopped certification in an improbation; and, if it were otherwise, then the lieges would be in an unextricable labyrinth, where they lost their evidents either *casu fortuito,* or by the malice of their enemies, if there were not this necessary remedy of making them up by proving their tenor; and, though such a decreet satisfies the production in an improbation, yet it does not hinder but he may improve the made-up tenor in the same manner as he would have done the principal if it were still extant. It is true, the indirect means are here irrecoverably lost; but, *incommodum non solvit argumentum;* and the inconveniences are stronger on the other side; and, because one false writ may be thus made up, shall we destroy the means of proving a hundred true ones accidentally lost?

The Lords thought it of great importance for the people's security, That, as tenors are absolutely necessary in some cases, so, if not strictly adverted to, may embolden falsehood; therefore the evidences adduced should bear some characters of the veracity of the writ as well as of its simple existence, especially where the writ is quarrelled as false before ever the proving of the tenor was raised; and that it was produced either judicially or otherwise, which might have given the party concerned occasion to quarrel it, and yet he did it not till it was lost; and that a general rule could not be fixed for all cases: Therefore they resolved to hear the parties debate upon the adminicles for inferring the tenor, and be more strict in allowing any but such as were very pregnant. And they gave the same answer in an improbation depending at *George Bell's instance* against *Hepburn of Bearford,* who had also raised the proving the tenor of some bonds amissing, whereon his apprising of the lands of Craig was founded.

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1697. *February* 11. ROBERT MILNE *against* ADAM GAIRDEN of GREENHILL, and ROBERT CAMPBELL.

ROBERT Milne, mason, enters into a minute of sale for buying some houses at the Weigh-house, where the square is now built, with Adam Gairden of Greenhill, and Robert Campbell, as factors for Mr James Stevenson, heritor of the same; whereby they obliged themselves to procure a valid disposition of the tenements from their constituent, and he was to pay 4000 merks as the price.

They failing to procure a disposition, and Mr James dying abroad within two years after the minute, or thereby, whereby the thing became imprestable, Deacon Milne pursues them either to obtain a right from Mr James's sisters, his nearest heirs, or else to refund his damages, as succeeding *loco facti.*

ALLEGED, 1*mo.* You were first to peruse the progress; and accordingly, having got in the writs, you never declared your satisfaction therewith; without which we were not obliged to proceed any further.

ANSWERED,—His throwing down the houses, and rebuilding on the ground, and his joining with them in sending up the scroll of a disposition to London to Mr James, was declaration enough of his acceptance.

REPLIED,—It ought to have been explicit and intimated to them, else they needed not notice it. The Lords repelled the defence.

2*do.* ALLEGED,—Their obligement was to procure a valid disposition from their constituent betwixt and a limited day, which can imply no more save to use their endeavours, which they offer to prove they did; but Mr James stuck both at the warrandice and price; and, in all such cases, *verba non sunt Judaice sed civiliter interpretanda;* as Faber shows the Parliament of Savoy found in 1695, in *lib.* 8. *codic. tit.* 26. *definit.* 14. *promittens se curaturum tenetur solummodo ad diligentiam ut res fiat.* Yet there he acknowledges, if there be a *pœna adjecta, qui factum alienum promittit tenetur præcisè ad effectum præstandum. Vide Matthæum de Afflictis Decis.* 195. *et l.* 8. *D. de In diem addict.*

ANSWERED,—There is a great difference between a positive obligement to procure a disposition, and an obligement only to use their endeavours; and though thir factors were rash in undertaking on the assurance they had of obtaining it from their constituent, yet their failing cannot exoner them at Deacon Milne's hands.

The Lords thought it hard on the factors, but they behoved to find them liable in the precise terms of their own minute; and Robert Milne having followed their faith, they must make a valid right to him, and those who have bought from him: besides, it would discourage all such public works for the decoration of the Town, especially upon the High Street. *Vol. I. Page* 823.

1698. *February* 18. MARY BALCANQUALL *against* LADY BAVILAW, &c. Patrick Fermor's Creditors.

IN a competition between Mary Balcanquall, relict of Patrick Fermor, merchant in Edinburgh, and the Lady Bavilaw, and his other creditors, this point came to be controverted,—What preference a relict had in her husband's executry, for her jointure and liferent provisions. The Commissaries had indeed preferred her to all the creditors in the confirmation of the testament; and it was ALLEGED, it was the practice through all the Commissariots of the kingdom, and had grown up to a consuetude, till President Lockhart, in a case decided *supra,* 16*th February* 1687, between *Keith of Lentush* and *Marjory Keith,* found, that relicts had no such prerogative at all; and though the Roman law gave them a hypothec and prelation *in bonis mariti ob dotem et donationem propter nuptias,* yet it was a mistake to translate and adapt that to our law, who had no