

within that church; and in December 1696, in the evening, gathered eight or ten to remove the desks, and dig his grave; some of whom brought a lighted coal or peat alongst with them for lighting the candles, and left the said fired coal on some of the timber-seats, whereby, after their removal, the whole church was burnt down to ashes.

ALLEGED,—*Incendium* is indeed presumed to arise *ex culpa inhabitantium* in dwelling houses; but here there can be no fault qualified against Gillanders, unless they prove he was the person who brought in the peat, and carelessly laid it on a timber-desk, and forgot to bring it away with him, or to lay it on the earthen floor. And the church has a sexton or beadle to whom the care of the church is particularly intrusted; and he being present, they cannot answer for his neglect. And Gillanders cannot be reached unless his accession were proven, *nam præsumptio indeterminatæ personæ non sufficit ad condemnationem*; l. 11, *D. de Peric. et Commod. Rei Vendit. l. 6, sect. ult. Nautæ, Caupon. Stabular. l. 6, sect. ult. D. Furti Adversus Nautas*; l. unic. *C. ut Nullus de Vicariis*; *Novell. 134, cap. 4.*

ANSWERED,—Though there is not here a *dolus*, or *lata culpa*, which would expose him to criminal punishment, yet there may be such a negligence as may subject him to damages *quoad civilem effectum*, though he was in *acto licito*, if he did not adhibit all that diligence which a prudent *paterfamilias* would have done *in re sua*: as appears by the 75th Act, 1426, which speaks of *misgovernance*; so it cannot be called a mere *casus fortuitus qui omni culpa vacat*.

The Lords allowed a conjunct probation of all the circumstances of the fact from which either guilt or innocence may be inferred.

See *Dr Sibbald's pursuit against The Lady Rosyth*, marked *supra*, 13th February 1685, on the same account. *Vol. I. Page 822.*

1698. February 10. ROBERT CRAW and WILLIAM SHEILLS *against* CAPTAIN BROWN of BLACKBURN.

THE Lords having ordained that point to be heard, in the improbation pursued by Robert Craw and William Sheills, against Captain Brown of Blackburn, How far a decret of proving the tenor of a writ ought to satisfy the production in a pursuit of improbation of the same writ;—the Lords advised it this day.

It was CONTENTED for the pursuer of the improbation, That a tenor made up no more but the naked existence of the writ lost, which noways hinders but it might have been originally false; which falsehood can never be tried out, if a decret of tenor be as sufficient as if the principal writ were lying in the field; for we are deprived of all the means of improbation both direct and indirect: For, *Imo.*---If the writer and witnesses be alive, how can they depone anent their subscription unless they see it. If they be dead, it can never be redargued *comparatione literarum*; and, therefore, besides the existence, it is necessary, for our security, that the verity of the writ be also astructed, and evidences adduced for the same; otherwise a forger has no more to do but, after he has fabricated a false writ, to show it to sundry honest persons, and, after they have read it, he may destroy it, and then, by their oaths, make up its tenor; and which is no imaginary chimerical fear, seeing the case has several times occurred, as my

Lord Haddington observes in his Decisions, *24th January 1610, Meldrum of Dumbreak against Barclay of Torway*; 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 decret of tenor was scarce relevant to stop improbation. Dirleton, in his Doubts and Questions, *voce Tenor and Transumptis*, pages 202, 203, and 215, goes farther, That a decret 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 decret 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 decret 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.