

1771. July 26. MRS ELIZABETH NIMMO *against* ANDREW ST CLAIR.

TENOR—PROVING OF THE TENOR.

What is sufficient evidence for that purpose?

[*Faculty Collection, V. 292; Dict. 15,825.*]

AUCHINLECK. The only question at present is, as to the proof of the tenor. Proving the tenor is a nice question. Here it is pleaded that there must be adminicles in writing; but it is proved that Lady Jane Nimmo put the deed in the fire. One owes a bill, and asks to see it; he swallows it: would he be allowed to require adminicles in writing for proving its tenor? As the *casus amissionis* is admitted, the assignation, without power of revocation, is also proved. But *here* there is an extraordinary clause, that of delivery to Mr Nimmo; it requires an adminicle in writing, and it is not even proved by witnesses.

KENNET. Lady Jane admits that the deed was delivered to Mr Nimmo; and so Mr Nimmo himself averred. If Lady Jane had kept possession of the second deed, it would have been no better than the first, in whose place it was substituted.

PITFOUR. The intention of granting the deed at all, is inconsistent with the idea of revocation. Lady Jane acknowledges that she left the deed upon the table; that Mr Nimmo took it and kept it: it was to be the ground of a translation. Mr Nimmo was the proper custodiar, being the father of the grantees of the fee.

COALSTON. It is agreed that the *casus amissionis* is proved, and that the deed was destroyed by Lady Jane. When a special *casus amissionis* is proved, there is no occasion for adminicles in writing. We must not separate the proofs. Lord Marchmont's evidence, written adminicles, real evidence of the *res gesta*, may not be sufficient singly, but are jointly; so we must judge when the destruction of a deed by a tortious act is proved.

ALEMORE. It is said that *here* is an extraordinary clause: Not so; for every clause in a deed is common or extraordinary, *secundum subjectam materiam*. This clause is not extraordinary; for a contrary clause would have been inconsistent with the purpose of the parties.

On the 24th July 1771, the Lords "found the *casus amissionis* and tenor proved."

*Act. R. M'Queen, H. Dundas. Alt. H. Campbell, A. Lockhart.*