John Cuninghame of Enterkine, - - *Appellant;* Case 43.
The Hon. Katherine Hamilton, Relict of Wm. Cuninghame of Enterkine, the Appellant's Mother, - - - *Respondent.*

8th *June* 1717.

Tenor.—The tenor of a lost deed of remuneration to a wife over certain lands, for part of her jointure secured upon other lands renounced by her, found to be proved by an instrument of sasine; a deed in which the remuneratory deed was recited, and a slender proof by witnesses:

It was not necessary to prove the *casus amissionis* in this case:

The defender having claimed a proof that his mother, the pursuer, in his minority, had intromission with all his father's deeds and writings, the same is refused.

BY the marriage contract between the appellant's father William Cuninghame and the respondent, in December 1676, John Cuninghame of Enterkine, the appellant's grandfather, in consideration of the said marriage and of 777*l.* sterling, the respondent's portion, did settle upon her a life-rent of 275*l.* sterling, payable out of the barony of Monktoun and other lands, in which she was duly infeft.

About seven years after the marriage it became necessary to sell the said lands of Monktoun, and on the 11th of October 1683, the respondent joined in a deed with her husband, legally ratified by her, to re-convey the said lands to the grandfather. But she retained a life-rent of 100*l.* issuing out of other lands settled for that purpose by her marriage contract.

The respondent states, that in consequence of her renouncing her interest in the lands of Monktoun, the appellant's father did, in recompence and remuneration of the lands so renounced, execute a deed, settling upon the respondent the lands of Enterkine and others in life-rent; and that upon this deed she was duly infeft, on the 21st October 1683, and the sasine recorded the 20th of November thereafter: That after her husband's death in 1690, she entered to possession of the lands of Enterkine, and continued without interruption in the same; but having lost the remuneratory deed the appellant questioned her right, and she, in December 1711, commenced an action for proving the tenor of the lost deed, before the Court of Session against the appellant.

The appellant at first insisted that the respondent should prove the *casus amissionis* of the deed, and he himself craved a proof that the respondent had had a total intromission, with his father's title-deeds after his death, before proceeding to a proof of the tenor: But the Court, on the 13th of February 1712, allowed the respondent to proceed in her action. Accordingly, she insisted upon several adminicles or vouchers to prove the tenor of the deed; These were, 1st. The probability that the respondent should

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be secured in lands equivalent to those she had renounced. 2d. An instrument of sasine in favour of the appellant, dated the 21st of October 1683, bearing that in pursuance of a deed then delivered to the notary by the appellant's father, and read in presence of the witnesses, sasine was made and given to the respondent of the several lands in question. A disposition, dated the 11th of August 1683, signed by the appellant's grandfather and father, in which the whole estate was conveyed to the latter, in three several parts of which was a reservation of the respondent's life-rent in the lands now claimed. And lastly, She examined two witnesses, the import of whose depositions she states to be, 1st, Colin Campbell swears, he saw a life-rent deed granted to the respondent out of her husband's estate, but cannot remember the particular lands, being at 28 years distance, only that the lands of Enterkine and some other lands were mentioned in that deed; (the respondent had no right to these lands by her marriage settlement). The other, Mr. Baillie of Lamingtoun, when he signed as a witness to the respondent's renunciation, was assured by the appellant's father, that the respondent was secured in the equivalent of what she had renounced.

After a hearing of the cause, the Court, on the 18th of June 1713. "found the tenor of the remuneratory or compensatory "right and disposition libelled or granted by the said William "Cuninghame of Enterkine, with the consent of John Cuninghame of Enterkine, his father, to and in favour of the "respondent, of the date and contents particularly above-"mentioned, made up and proved, and therefore decerned and "declared the said deed to be a sufficient and valid evident, "and of as great force and effect as if the said remuneratory "deed itself were yet extant, and not omitted and lost *casu fortuito*." The appellant reclaimed two several times against this interlocutor, but the Court adhered to the same.

Entered 21 Feb. 1716-17.

The appeal was brought from "an interlocutor of the Lords of "Session of the 18th day of June 1713, and the affirmances "thereof."

Heads of the Appellant's Argument.

When this action was first commenced, the Court did refuse the appellant the benefit of proving that the respondent had a total intromission, with his father's whole writs and evidents when he the appellant was under age. This probation, if it had been allowed, might in all probability have cleared this affair.

The law of Scotland, and the constant practice of the Court of Session, require that when issue is joined and no proof made of the *casus amissionis*, the action is to be dismissed; yet the Court allowed the respondent to proceed in her action without proving the *casus amissionis*, and to proceed in the proof of the other parts of her libel.

The respondent has proved nothing of the other parts of her action by the adminicles or vouchers she brought into the court below; for

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1ſt. The conveyance by the appellant's grand father can be no voucher. This conveyance contains nothing of the ſubſtance of the deed pretended to be loſt, only the additional lands claimed by the reſpondent are in the deed, partly interlined and partly written on the margin thereof, not ſubſcribed; nor are they written with the ſame hand or ink with the reſt of the conveyance, as evidently appears by inſpection. Such interlineations and unſubſcribed margins are by the law of Scotland entirely null and void, as appears by the act of parliament 1681. c. 5. wherein it is ſtatuted, "That all writs to be ſubſcribed hereafter, wherein "the writer and witneſſes are not deſigned, ſhall be null." But neither the writer of this interlineation and unſubſcribed margin, or who were witneſſes thereto, are deſigned in this conveyance of 16th Auguſt 1683.

1681, c. 5.

Nor does the interlined conveyance recite the ſubſtance of the ſaid loſt deed, or any clauſe of it: It mentions, too, that the deed pretended to be loſt was of the ſame date with the ſaid conveyance; yet by the oath of William Baillie, the reſpondent's own witneſs, it appears that he was a witneſs to the ſaid conveyance the 16th of Auguſt 1683, but depones that at that time there was only a deed *to be done* in favour of the reſpondent. And further, though the ſaid conveyance mentions alſo in the body thereof, that the reſpondent's renunciation of Monktoun is likewiſe of the ſame date with the deed; yet notwithſtanding the renunciation proves itſelf to have been made two months after the date of the ſaid conveyance, viz. on the 11th of October 1683.

2d. Neither can the reſpondent's infeftment be admitted as a voucher of the ſubſtance and reality of the deed pretended to be loſt, becauſe it is not a notary's buſineſs to enquire into the ſubſtance or verity of deeds, for he can infeſt perſons at any diſtance of time after ſigning, without making any enquiry whether the deed be true or falſe. But it is evident from the ſaid inſtrument of ſaſine that there was no ſuch deed as pretended by the reſpondent, and that the notary gave the reſpondent infeftment upon the foreſaid interlined conveyance only. For in the clauſe of Having and Holding the interlined conveyance only is narrated, and alſo it appears that there was a blank left in the inſtrument of ſaſine which ſhould have been filled up with the date of the pretended deed (if there had been one); but this blank is filled up ex poſt facto with the date of the interlined conveyance only, which neither contains the ſubſtance of the pretended deed, nor is there any precept in this interlined conveyance for infeſting the reſpondent. And therefore the date of the ſaid interlined conveyance was ignorantly inſerted in the blank which is in the inſtrument of ſaſine, inſtead of the date of a deed that had a precept or warrant for infeſting the reſpondent. The Court below has always rejected the inſtruments of notaries as a proof of the ſubſtance and verity of deeds, as appears in the caſes decided 14th June 1667, Harroway v. Haitly, and Corſar v. Durie in Dirleton's deciſions, and the caſe decided 15th July 1675, Phumerton v. Lutefort in Stair's deciſions.

3d. Nor

3d. Nor is there any part of the tenor of the deed pretended to be loſt proved by the reſpondent's two witneſſes, viz. Mr. Baillie and Mr. Campbell. From their depoſitions it appears that they prove nothing as to the reality, the tenor, the date, the writer's name, the parties ſubſcribing, or the witneſſes ſubſcribing to the ſaid deed pretended to be loſt. Theſe are the eſſentials of every deed, and the proving of them in ſuch a caſe as this is abſolutely required of a purſuer by the law of Scotland.

Heads of the Reſpondent's Argument.

Though the reſpondent had intromitted with her huſband's papers, as ſhe never did, and had got the remuneratory right there, yet it was ſtill a deed belonging to her, and was the ſame as if it had been lying by herſelf, ſince the taking infeftment upon it was a clear evidence of her huſband's intending it for her ſecurity. And that ſhe had again renounced that right in favour of her huſband, is not probable; for the law of Scotland appoints ſuch renunciations to be recorded within ſixty days after they are executed, and if there had been ſuch, the appellant might have got an office copy of it.

The proving of the *caſus amiſſionis* in all caſes of proving the tenor of a deed is not neceſſary. It is indeed reaſonable to be done in caſes where the execution of a deed is the only ſolemnity required, and the retiring or cancelling is a ſufficient releaſe. But in rights of lands, as this is, which require other ſolemnities than the deed itſelf, ſuch as ſaſine, &c. the retiring of the deed is not a ſufficient diſcharge, becauſe the inſtrument of ſaſine remains upon record. So that nothing but a formal diſcharge or renunciation could extinguiſh that right, as is obſerved by Lord Stair in his Inſtitutions, and it is alſo cleared by a deciſion of the Lords of Seſſion, 26th July 1662, Lady Miltoun againſt her Huſband; and therefore in ſuch caſes the preſumption is that the right was truly loſt.

Stair's Deciſions.

Though the appellant pretended that the inſtrument of ſaſine was only the aſſertion of a notary, and would not prove any thing; yet theſe inſtruments being admitted by public authority, great deference and faith is had to their veracity. And the inſtrument of the notary is not the only voucher in this cauſe, though if there were no other proof even that would be ſufficient. The precedents quoted by the appellant differ from the preſent caſe: the reſpondent renounced her jointure, in which ſhe was ſecured by her marriage-ſettlement, which was the onerous cauſe of granting her a remuneratory right. But all ſuſpicion of any kind is certainly taken off by this, that ſaſine was given to the reſpondent upon the remuneratory right by her huſband's order ſeven years before he died by the ſame notary, and in preſence of the ſame witneſſes who infeft the appellant in the fee of the eſtate; and immediately thereafter both inſtruments were put in the public record by the ſaid notary.

But another proof of the deed in queſtion (and which of itſelf is ſufficient) was the deed of ſettlement, made upon the appellant,

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wherein there is a particular proviso in three several parts thereof, reserving to the respondent the lands in question settled upon her as a jointure in lieu of the lands of Monktoun, which she had renounced. By that deed it is evident that a remuneratory right or deed in lieu of what the respondent had renounced was granted to her; so the instrument of sasine in pursuance of the deed in question is in these very lands, as inserted in the conveyance to the appellant. In this deed to the appellant the greatest part of the lands claimed by the respondent are inserted in the body of the deed, but the blank left for them being too small, the rest were written upon the margin, as it usually happens in such cases, but by the same hand, though a little contracted. But what seems to take off every appearance from the appellant's objection is, that the words following are all in the body of the deed, "reserving to the respondent during all the days of her "lifetime." (Then follow the lands, part in the body and part on the margin,) "all lying in the barony of Torbolton, bailliery "of Kyle, stewartry and sheriffdom of Ayr, whereunto she is "now provided by me in life-rent conform to a heritable bond "of the date of these presents, in lieu and recompence of the "lands of Monktoun, &c. whereunto she was likewise provided "and infeft in life-rent by virtue of her contract of marriage, "and which now at my request and desire she has disponed and "renounced," &c. And as this deed shews that a recompence was granted, so the lands being specified and ascertained in the deed, sufficiently make up the loss of the respondent's jointure-deed: and whether the appellant enjoy the estate in virtue of that deed or not, does not alter the case; since he does not deny that it was a true real deed done by his father.

There is no occasion for witnesses, where the deed and solemnities are proved by writing, as in this case they are by the instrument of sasine, and deed of settlement to the appellant.

Judgment, 8 June 1717.

After hearing counsel, *It is ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutor and affirmances thereof complained of in the said appeal be affirmed.*

For Appellant, *Dun. Forbes. Spencer Cowper. Rob. Raymond.*
For Respondent, *N. Lechmere. Will. Hamilton.*