

1665. December 2. HUGH M'CULLOCH against MR. JOHN CRAIG.

Hugh M'Culloch having right to an apprising of an heritable bond of 2000 merks, due by umquhile Mr. Robert Craig to Patrick Wood, pursues Mr. John Craig, as heir by progress, for payment thereof, and produces a new extract of the apprising, by the clerk of the apprising, together with the said apprising, but so spoiled, that neither the subscription of the messenger nor clerk could be known. The defender alleged, No process, till the principal apprising by the messenger were produced; because it being in effect the executions of the messenger, to whom more was trusted than the clerk, the extract by the clerk, without the messenger, was not sufficient. It was answered, That apprizings, of old, were all directed to the Sheriffs of the shire, and were in effect judicial processes, wherein parties were cited, called, and decerned; and now, the messenger being constituted Sheriff, in that part, by the letters of apprising, he may choose his own clerk; and the extract of that clerk is sufficient, as of all other clerks; and albeit, for more security, both clerk and messenger subscribe, yet it hath not been determined how far the messenger's subscription is necessary; and the decree of apprising is not the executions of the apprising, which are distinct therefrom, and instructions thereof.

The Lords thought that the new extract behoved either to be astructured with the letters and executions, and other adminicles, or that they would not sustain it alone. But the question was, Whether it should be astructured, *hoc ordine*, or by a proving of the tenor, in a several process? which was carried by the plurality.

Stair, v. 1. p. 319.

1667. June 13. HARNER, OR HARROWAY, against HAITLY.

Harner pursues Haitly, as representing her husband, for proving the tenor of her contract of marriage; who alleged, No process, because there was no adminicle produced in writing, which was the most necessary in any case, but especially in this case, where the tenor of the contract was extraordinary, constituting the one half the fee of the husband's estate to the wife's heirs, failing the heirs of the marriage. The pursuer answered, That albeit adminicles in writ were ordinarily required, especially in writs that used to be taken away by redelivery, or cancelling, as bonds, &c. yet the intent of adminicles is, to render it probable that such a writ was, and thereby to give ground to admit witnesses to prove, *rei gestæ veritatem*: But here there were as strong grounds of probability, there being a marriage of a landed man, and the copy of the contract taken of the writer there-

No 19.
Extracts, of
what avail?

No. 20.
A contract of
marriage was
proposed to
be proved by
a copy from
the writer's
stile-book,
and the oaths
of the writer
and his clerk,
with probabi-
lities. Re-
fused, as there
were no ad-
minicles.

No. 20. of, John Nicol, his stile-book, he and his servants being witnesses, who are yet alive, and the tenor offered to be proved by them; whereas, other tenors used to be proved by witnessess that saw the writ, though they were not the witnesses inserted; likeas the husband having taken the right of an infestment for a sum payable to him and his wife, and the heirs betwixt them, which failing, to his heirs, he took a ratification thereof from the pursuer, which could have no intent, if, in case of failure of heirs of the marriage, the half had not been appointed to return to her heirs; likeas it is offered to be proved by witnesses, that the husband acknowledged that he had the contract in custody from his wife. The defender answered, That our law had rejected probation by witnesses, in matters of importance; and therefore tenors only are sustained when their probation is partly by writ, and partly by witnesses; neither is any other probability sufficient; and it is offered to be proved, that the husband infest his wife in his houses, of a considerable value, without any mention of marriage.

The Lords refused to sustain the libel without adminicles in writ, and assoilzied, albeit it was offered to be proved, that the husband's whole means came by the wife.

Stair, v. 1. p. 460.

* * * This case is reported by Dirleton:

Janet Harroway pursued the heirs of Alexander Haitly, her husband, to hear and see the tenor of her contract of marriage with her said husband proved, being lost, as was pretended, at the time of the troubles. It was alleged, That John Nicol was employed as writer for drawing of the contract; the double of it was inserted and extant in his servants' stile-book: The said stile-book being neither a writ under the defunct's hand, nor a minute or record extant in any register, could not be sustained as any adminicle.

The Lords, albeit it was offered to be proved, by the persons alleged to be writer and witnesses to the contract, that it was subscribed, and of the tenor libelled, and other probabilities were urged, yet they did not sustain the summons without an adminicle, upon that consideration in special, that our law, *ob lubricam fidem* of ordinary witnesses, against whom there is possibly no legal exception, deferring so little to their testimony, that transactions, agreements, or promises, above the value of £.100 cannot be proved by witnesses; if such pursuits should be sustained, without adminicles of writ, contracts of greatest importance might be made up, and proved by witnesses. It was remembered by some of the Lords, that, in a process, Corsar *contra* Durie, the Lords were so tender, that, upon a contentious debate, a sasine was found not to be an adminicle.

Dirleton, No. 77. p. 31.