

1675. June 29.

BIRNIE *against* MONTGOMERY.

No. 25.

A suit for making up the tenor of a comprising was sustained, in respect adminicles were most pregnant, and the executions were extant and entire.

A pursuit for making up the tenor of a comprising was sustained, in respect the adminicles were most pregnant; and, in special, the executions were still extant and entire.

Clerk, *Monro*.

* * It was thought, that much caution and tenderness should be used in processes of the nature foresaid, for proving the tenor of comprising; seeing comprising are to be considered either as decrees or as executions; and, in effect they are both upon the matter; in respect the messenger decerns, adjudges, and disposes the lands and others comprised; and therefore the same ought to be subscribed, both by the messenger, who *in subsidium* doth that which the party ought to do, and doth dispoise his estate in satisfaction of his debt, and by the clerk of the comprising, as a decree; and the tenor of decrees cannot be proved but by extracts; and a comprising being, as said is, *processus executivus*, and ultimate execution, it ought not to be proved but *per relationem nuncii*, and execution under the messenger's hands. And it were hard that executions should be made up by witnesses, and probation of the tenor, seeing there may be a nullity in the same if they were extant; and though witnesses may remember they had seen executions, they can hardly remember upon the precise tenor of all the words of the same; and if the tenor of the executions might be made up, there should be no security, seeing prescription, which is the greatest security of the people, may be evacuated, upon pretence that there was an interruption by the execution of a summons, but that the same, being lost, is made up, by proving the tenor; and by an act of Parliament, K. Jam. VI. Parl. 6. Cap. 94. it is ordained, "That the tenor of letters of horning, and executions thereof, is not proveable by witnesses;" and there is parity, if not more reason, as to comprising, whereby the greatest estates may be taken away, by a decree for proving the tenor.

Dirleton, No. 283. p. 137.

1675. November 27.

ANDERSON of DOWHILL *against* LOWES.

No. 26.

Proof of the tenor of a disposition.

William Gibson did dispoise to William Norvel his son in law, and Elizabeth Gibson the dispoiser's daughter, certain acres near Glasgow; which thereafter the said William Norvel did dispoise to Thomas Norvel his brother, and by a right from the said Thomas thereafter did pertain to Anderson of Dowhill.

But John Lowes, having thereafter married the said William Norvel's relict, Elizabeth Gibson; and having, upon an assignation to a debt of the said William Gibson, adjudged the said William's right from his apparent heir; and having

pursued an improbation and reduction of Dowhill's right, and in special of the foresaid disposition made by the said William Gibson to the said William Norvel, Dowhill was forced to pursue for proving the tenor of the said disposition, which was out of the way, and which he pretended to have been in the hands of the said Elizabeth Gibson, and to have been abstracted by the said John Lowes, her second husband, intending to patch up the right foresaid;—and these adminicles being libelled, viz. That the said Elizabeth Gibson being pursued at the instance of the said Thomas Norvel before the Court of Glasgow, for exhibition of that disposition, the said Elizabeth, for obtaining a suspension of the decret of exhibition recovered against her, did consign in the hands of Henry Hope the said disposition and other writs, and that thereafter the said Thomas Norvel, upon the said disposition, did obtain a decret *cognitionis causa*, before the Bailies of Glasgow, in which the said disposition is mentioned as produced; and thereafter the said Thomas did also obtain an adjudication of the said acres wherein also the same was produced; and that there is an attested double of the said disposition, which is written by James Galbraith, agent, and attested by two famous notars;—the Lords admitted the summons to probation; and diverse witnesses being examined, and in special the said James Galbraith, and those who were servants to the Clerk of the Court of Glasgow, the time of the obtaining of the said decreets *cognitionis causa*, adjudication, and others;—after much debate, before advising, *in presentia*, and amongst the Lords themselves, some of the Lords were of opinion, that pursuits of the nature foresaid, being of so great importance, and tending to make up a right to lands which may be of great value, the adminicles ought to be in writ and most pregnant; and that in this case, though there might be ground of presumption, yet it cannot be said, that there are clear adminicles in writ, in so far as the attested double cannot be considered as an authentic writ, and it wants a date, and as to the decret of adjudication, though it mention the production of the letters of disposition, yet it appears by the depositions of the witnesses, and it was granted at the bar, that the principal disposition was not produced, but only an attested double, and needed not to be produced, the decret *cognitionis causa*, being sufficient to instruct the pursuer's title in the adjudication; and as to the decret *cognitionis causa*, that it is not a sufficient adminicle, seeing both it and the decret of adjudication, bearing the production in the same terms, there might have been the same mistake in the decret *cognitionis causa* that is confessed to have been in the adjudication, viz. That the attested double being only produced, yet the production is made to bear the disposition; and there being so short a time betwixt the decret *cognitionis causa*, which was the 19th February, and the adjudication which was on the 24th of the same month, it is to be presumed that the attested double has been produced in both; and seeing in such pursuits for proving of tenors *rei gesta veritas* ought to be proved, yet it does not appear, by the testimonies of any of the witnesses, that they knew that there was a disposition truly subscribed by the said William Gibson to the said William Norvel; and a pretended disposition might have been pro-

No. 26. duced the time of the obtaining of the said decreets, and might be truly doubted, and yet be a false writ; and it were of a dangerous consequence, upon such pretences and adminicles, to make up an authentic writ, to have the force of a principal disposition as to all effects; especially it being considered, that even extracts do not satisfy in improbations, though out of the registers of the highest judicatories; by reason that parties concerned will be prejudged of the means of indirect articles of improbation, arising upon the sight and production of principal writs, by comparing hand-writing and subscriptions and others; and if tenors being made up, should be of more force than extracts, there should be the same inconvenience and hazard to the people; and a door should be opened to contrivances, if after papers are produced in judgment, they should be destroyed on purpose, and the tenors of the same should be thereafter made up by a decreet, which should satisfy the production in improbations.

The Lords thought fit again to re-examine the said James Galbraith, before they should proceed to sentence.

1676. February 15.—The Lords, in the case above mentioned, found the tenor of the writ therein specified proved by the adminicles therein mentioned—*In presentia*.

Dirleton, No. 304. p. 149. & No. 335. p. 160.

1676. February 24. JOHNSTON *against* ORCHARDTOUN.

No. 27.

In a pursuit upon a bond of corroboration, it was alleged, That the principal bond ought to be produced; which was repelled, in respect the maxim, *non creditur referenti nisi constet de relato*, holds only in the case where there is only a naked relation to a writ, and not when the writ that relates thereto doth proceed to an obligation thereupon; and it is not only relative but dispositive.

Reporter, *Glendoick*.

Clerk, *Robert Hamilton*.

Dirleton, No. 347. p. 165.

1677. December 9. BOYD *against* MALLOCH.

No. 28.

The Lords found the 94. act Parl. 1579, anent discharging the proving the tenor of letters of horning by witnesses, did not extend to proving the tenor of executions of apprisings; though some understood the act only where executions of horning were extended; but there seems no difference, whether extended or not.

Fountainhall MS.