

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