

1687. *November.*

OWNER of The CALMER *against* SAMUEL SOWTOUN and JAMES GRAME.

No. 42.

In a proving of the tenor of a discharge, this *causus amissionis* was libelled, and sustained, That it was taken out of the process; which was proved by the clerk and agent that took it up.

Harcarse, No. 820. p. 228.

1687. *December 17.*

MILN of Barntoun *against* DUCHESS of LAUDERDALE.

No 43.
Whether the
tenor of an
apprising can
be made up?

Sir Robert Miln of Barntoun having raised a summons for proving the tenor of an apprising of the estate of Lauderdale, *incidenter*, and condescended on this *causus amissionis*, That it was given out in a process in the English time, and lost,

The Duchess of Lauderdale alleged: That the tenor of an apprising, could not be made up, in respect it depends upon so many solemnities and executions, which cannot be otherwise proved than by their own tenor; for if such a thing were allowed, any body that had an unformal apprising would lose it, and libel a formal tenor, which could not be controuled; *2do*, Many apprisings are discharged within the legal, cancelled and lost, and the discharges omitted to be registered where infeftment did not follow upon the apprising. Now, if a proving of the tenor of apprisings were competent, many persons would be in danger of great loss; *3tio*, If any such apprising was, it was satisfied, retired, and extinct, and in the conclusion of my Lord Lauderdale's affairs, abstracted and taken away; and the Duchess has raised a declarator of extinction and satisfaction, and she craves both processes may proceed *pari passu*.

Answered: Tenors of apprising are competent; for it were a great defect in law, if, seeing apprisings may be lost as well as other writs, there were no remedy to make up the tenor; and in Peppermill's case, December, 1684, No. 39. p. 15803. the tenor of an apprising was sustained. And the case of proving the tenor of letters of horning is different; for horning is merely penal, and expressly discharged by an act of Parliament; *2do*, The pursuer's declarator cannot stop the defender's tenor. But the apprising must first be made up; for, till that be done, it is in vain to pretend to extinction of the apprising, which pre-supposeth the existence thereof.

The Lords resolved to consider the adminicles of the tenor, and the probation of the extinction, together; and all being considered, they found the *causus amissionis* so general and weak, and the documents and presumptions for the apprisings having been retired so strong, that they assoilzied from the tenor.

Harcarse, No. 821. p. 228.