

Hornings, is a particular statute in that case, which cannot be extended, but affords a great argument for admitting of tenors in other cases ; for, by that act it is clear that tenors, even of executions of hornings, were then allowed ; and seeing the law was not extended to decreets, or other executions, there is no place to argue from it. And as to Dirleton's opinion, it is in the case of a comprising, which depends upon great variety of formalities and executions, and is also a decret. Yet, upon the 29th of June, 1675, in the case of Birny against Montgomery, No. 25. p. 15796. a pursuit for proving the tenor of a comprising was sustained upon pregnant adminicles, the executions of comprising being extant and entire ; and in this case the adminicles are most plain, especially the decret of plat contains a great augmentation, and burden upon the tacksman, and mentions a recompence given ; and the proper and only recompence allowed in law is a prorogation, which proceeds as a consequence of the augmentation, without any separate summons, execution, or process ; so that the heritors recovering that decret of plat, there can be no question of sustaining the tenor.

“ The Lords admitted the adminicles and tenor to probation.”

Dalrymple, No. 53. p. 68.

1707. June 14. TROTTER *against* HOME of Eccles.

Mr. Robert Trotter, doctor of medicine, being creditor in two bonds to Home of Eccles, he pursues his heir, and on his renunciation obtaining a decret of constitution, he adjudges ; but, in the great fire in the meal-market, the 3d of February, 1700, these rights among his other papers are burnt ; whereupon he raises a proving of the tenor, wherein sundry pregnant adminicles being adduced, the Lords were clear enough anent the truth and reality of the debts, but it stuck with them that none of the witnesses had deponed, who were the writer and witnesses in the bonds, nor what were their designations. It appeared from the extract of the decret, that one of them was holograph, but that the other was libelled as signed before witnesses, and no vestige nor evidence of probation who were the writer and witnesses therein ; and if this were once dispensed with, then other false or null bonds might be lost, and then made up, and so the nullity palliated and concealed, which is of dangerous consequence. Answered, *1mo*, The common debtor had renounced, which he would not have done if they had laboured under such intrinsic nullities ; and his objecting thereof would no more have brought him under the hazard of incurring a passive title, than if he should object that it was not signed by the defunct. *2do*, The witnesses clearly depone that they read the bonds, and that they appeared to be formal complete writs, without any defect ; and it is impossible that they, on a single transient reading, can remember the writer's name, with the witnesses and their designations ; yea, there is not a creditor of twenty, that, on losing his bonds, can tell who were the

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Where the names and designations of the witnesses were not proved, yet the *casus amissionis* being not-tour, the bond old, and its verity not questioned, the tenor was found to be proved.

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Fountainhall, v. 2. p. 371.

* * Dalrymple reports this case :

Doctor Trotter pursues a proving the tenor of two bonds, which had been produced in several processes, and whereupon adjudication of the debtor's estate was recovered; in which the *casus amissionis* and tenor being admitted to probation, at advising the probation the defenders being absent, it did appear to the Lords that the adminicles were pregnant, both by documents in writ, and testimonies of witnesses who had seen the bonds and the *casus amissionis* clearly proved, viz. that they were burnt in his house in Edinburgh with his furniture and other writs. One of the bonds being holograph, the Lords made no difficulty in finding the tenor thereof proved; but as to the other bond it occurred to the Lords, that the inserting of writer's name and witnesses, and witnesses subscribing, are of the essentials of a bond, and accordingly were libelled in this tenor. But there was no testimony of witnesses deponing that the writer and witnesses libelled were writer and witnesses of the bond, nor did any of the documents in writ adminiculate that point; whereupon the Lords demurred, and delayed the decision as to that bond for some days; and having this day resumed the consideration thereof, it occurred to the Lords that the difficulty above-mentioned was great, seeing by the style of the tenor, writer and witnesses must be condescended on and found proved, otherwise the tenor cannot be made up. Upon the other hand it was argued, that if this difficulty should take place, and found a defence in a tenor, it would be impossible to prove the tenor of any solemn unregistered writ except heritable bonds or dispositions whereupon infestments had followed, which infestments for the most part do ingross the designations of the writers and witnesses as immediately subjoined to the precept of sasine, but no relative writ either voluntary or diligence would afford any document to instruct the writer's name or witnesses, nor do witnesses usually notice, nor can be supposed to remember such circumstances, nor can the creditors, or persons in whose favours bonds or other

solemn writs are made, so much as condescend upon or remember writer's name or witnesses, whereby it would be impossible to make up the tenor of lost writs; which would be a very great inconvenience, especially in such a general calamity as happened in the late fire at Edinburgh. And though there be difficulty in this, and may be in other cases, by making up the tenor even as to writer and witnesses without a clear document and probation; yet, *1mo*, The prejudice is much more upon the other hand. *2do*, In this case the writ was advised, and deliberately considered, in order to found a process, and appeared to those employed who have deponed to be a legal formal writ. *3tio*, There can be no fear of the affected losing of suspected writs and making them better by a tenor, because tenors are made up by documents and adminicles, whereof the Lords are judges; and where there lies the least ground of suspicion against the writ lost either as to the formality, much more as to the quality, or even as to the existence of that writ unextinguished, in such cases the Lords would weigh the whole, and would not make up the tenor if there remained any suspicion against the debt; but where there remains no question, either as to the reality, or formality of the debt, it were hard there should be no remedy.

“ The Lords found the tenor proved.”

Dalrymple, No. 79. p. 100.

1707. *May 13.*

The LADY AIRTH, and GEORGE DUNDAS, her Husband, *against* JAMES BLACKWOOD.

John Telfer, and other creditors of Hamilton of Grange, in a competition amongst Grange's creditors, the Lady Airth produces a charter and sasine, on an adjudication led by her mother against Grange for her by-gone jointures; and it being objected, That the adjudication was not produced, she repeated a proving of the tenor, in regard it was burnt in Sir Robert Miln her tutor's house at Leith; and, for documents and adminicles, besides the charter and sasine, she produces the summons of adjudication extracted from the signet, with the contract of marriage, being the ground of the debt, and a decret of constitution, an extract of the allowances, an executed horning against the superior, the keeper of the minute-book his attest that it is put up there, and the respondee-book, bearing, That the clerk's dues are paid for it; all which evidently prove the existence, being, and substance of this decret of adjudication, and which is only craved to subsist for the sum, without accumulations, or an expired legal. Answered, Though our law has allowed the tenor of lost voluntary rights to be made up, yet it has looked upon the proving a tenor of judicial deeds, as dangerous and impracticable, they depending upon the observing of so many rules, solemnities, and forms, that the most accurate witness in the world cannot mind them all; and what encouragement might this give to falsehood? for if the deed were either

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Whether the tenor of an adjudication may competently be proved? This not here decided, but the adminicles offered found not sufficient.