

1680. January 2. LITHGOW against MURRAY.

No. 29.

Proof of the
tenor of a dis-
position.

James and Nicol Lithgows pursue probation of the tenor of a disposition granted by umquhile John Lithgow, who had been long a servant to Sir James Murray of Skirling, and, having no children, disposed two tenements to umquhile Mr. John Murray's son, and burdened the one tenement, in Bristo, with 500 merks to James and Nicol Lithgows; which disposition being a-missing, they pursue for proving the tenor of it; and have got warrant to examine witnesses, to lie *in retentis*, they now produce an instrument, bearing, "That John Lithgow went to kirk and market," and adhered to the dispositions made by him to Mr. John Murray; and produced the oath of Quintine Findlay, who had married Lithgow's sister's daughter, and apparent heir, lying in a former process anent the same disposition, bearing, "That Quintine saw this disposition in the hands of Mr. John Murray, containing the foresaid burden," together with the testimonies of Mr. John King, who is writer of the disposition, and witnesses therein, and Alexander Lockhart, his servant, who produces the scroll of the disposition, and both witnesses deponed that this was the scroll, and that the disposition is written exactly conform thereto, and subscribed by the defunct, and them as witnesses. The defenders alleged, That here was no adminicle in writ which could sustain a tenor, which is the most dangerous of all processes; for whereas a witness cannot prove above £.100 Scots, by making up of tenors, they can prove to the greatest value, and therefore the existence of the writ must be proved by writ, and likewise the *casus amissionis* by which the writ was lost, and so was not retired. It was answered, That the tenor of bonds or writs accustomed to be retired upon payment, the probation must be full as to the existence of the writ, by writ under the debtor's hand, or by judicial acts; but in writs not accustomed to be retired, less probation is admitted; so the tenor of a contract of marriage was sustained upon the scroll of the contract, and those of the writer and witnesses, without any other adminicle; and here there is not only an instrument, bearing, "dispositions by the defunct to Mr. John Murray," whereas there is one only extant beside this, but also a former process of exhibition, wherein the husband of the apparent heir, to whom this tenement would belong, free of burden, if this disposition be not made up, depones, "he saw it in Mr. John Murray's hand;" likeas the scroll and witnesses inserted comprehends a clause "dispensing with the not delivery."

The Lords sustained the tenor, and found it sufficiently proved, the testimonies of the witnesses being so pregnant; seeing, where the adminicles are so pregnant, the testimonies of extraneous witnesses, deponing upon the remembrance of the manner of the tenor, will suffice, though there were no witnesses inserted, nor any who saw the writ subscribed.