

No 577.

paid for, lying in the clerk's hands, and never signed, nor taken out. And to allow the marking of a decret by a servant, without any public authority, for the clerk's private use and conveniency, to supply or make up the tenor of a formal writ, is a stretch and absurdity to be exploded.

Duplied, It cannot be inferred that the decret was never extracted from its not being booked, seeing many decreets at that time were never booked, nor the warrants carried to the laigh Parliament House, which was not so ordinary twenty-seven years ago as now; and yet extracts have been taken out conform to such old warrants as are yet in the clerk's hands. Now will any man say, that the not booking, or not transmitting these warrants to the low Parliament House, should so prejudice one that hath lost his first extract, that he cannot take out a second at any time.

THE LORDS found no sufficient probation that there was a decret extracted, and allowed parties to be heard *in causa*.

Fol. Dic. v. 2. p. 264. Forbes, p. 22.

SECT. V.

Marriage.

No 578.

1611. July 5.

BARCLAY *against* NAPIER.

THE LORDS sustained a relic's process upon her contract of marriage, licet matrimonium nunquam fuerat in facie ecclesiæ celebratum.

Fol. Dic. v. 2. p. 267. Forbes.

*** This case is No 329. p. 6115, *voce* HUSBAND AND WIFE.

No 579.

1714. February 23.

MIS JEAN ANDERSON *against* NINIAN WISHEART of Logie.

In a process at the instance of Mrs Jean Anderson *against* Wisheart of Logie, for kenning her to a terce of lands wherein the deceased Captain James Wisheart, whom the defender represents as heir, died infest, upon this ground, that the pursuer was lawful wife to the Captain; she having produced a letter writ by him to the Lady Cartwright, signifying, that he had writ to her without

waiting upon her, in order to save his Jeannie's blush, in trusting her Ladyship with the secret of their marriage; and also a testament writ by him, wherein he leaves and bequeaths to Mrs Jean Anderson his spouse the sum of L. 200 Sterling; the LORDS found it relevant to entitle the pursuer to a terce, that the letter and testament are holograph, and that she was held and reputed lawful wife to the defunct, albeit neither the letter nor testament bore either place or date or witnesses.

No. 579.

Fol. Dic. v. 2. p. 267. Forbes, MS. p. 30.

1752. December 13.

PENNYCOOK and GRINTON *against* GRINTON and GRAITE.

JOHN GRINTON, a tenant, made proposals of marriage to Alison Pennycook, and obtained her consent. Upon receiving repeated promises of marriage, she permitted him to have knowledge of her body oftener than once; by consequence of which, in July 1747, she bare a son, whom he acknowledged to be his, and presented to the minister of the place to be baptized. After this, John Grinton declined to adhere; upon which, in 1748, Alison Pennycook commenced a suit against him before the Commissaries of Edinburgh, setting forth the facts above mentioned, but concluding only for expenses of child-bed, alimant to the child, and damages. In this process, the courtship, the promises of marriage, the copulation, and the procreation of the child, were referred to John Grinton's oath; and he in effect acknowledged them all, although, at the same time, he alleged his being in liquor when he made the proposals and promises.

A year and a half having elapsed, and no further motion made in this process, John Grinton, in January 1750, made his proposals to Anne Graite, and married her. But this marriage was private, and without proclamation of bans; however, he brought her immediately home to his house, and lived publicly with her as his wife. Another year elapsed, and a child was also born of this marriage. During all this while, Alison Pennycook, although she had opportunity to know of John Grinton's second marriage, yet took no step in her process; but, in January 1751, she raised against him a new summons, in her own and her son's name. This summons, setting forth the very same facts as the former had done, and referring for proof thereof to the oath above mentioned, contained the proper conclusions, declaratory of her marriage, and of the legitimacy of the child; at the same time, it contained a conclusion of divorce, on account of the defender's open adultery with Anne Graite. Upon this, Anne Graite raised a counter-process, declaratory of her marriage. The Commissaries found "the marriage between John Grinton and Alison Pennycook proven, and declared them husband and wife, and James Grinton their lawful child; and

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A promise of marriage, followed by a copula, makes a lawful marriage *de presenti*, and the after marriage of either of the parties is void.