and also the superiors thereof, viz. the Lairds of Calder and M. had not their precepts of sasine conform to the retours of blench, and therefore domini superiores videbantur confessi tacite terras easdem in albam firmam teneri, and therefore the LORDS assoilzied the assize from wilful error, because the matter was doubtful, and not the less because blench-holding cannot be proved but by charter and sasine thereof, and that retours in this case make no sufficient probation; therefore the LORDS retreated the said retour for ignorance of assize, as said is; and in this case the Laird of M. was the other party, and this retour was by the said James's tenants retreated, for not production of the charter and sasine, which would not have been done in case that they had been produced. No 576.

Fol. Dic. v. 2. p. 267. Sinclair, MS. p. 50.

1705. *July* 3.

JOHN DICKSON of Hartrie *against* ALEXANDER MILN of Caridden.

No 577.
A decree being marked in the respond-book as extracted, and an attestation from the keeper of the minute-book, that the dues of extracting were paid, not sustained as sufficient proofs that such a decree wasextracted, it not being found in the register.

IN the action at the instance of Dickson of Hartrie, against Alexander Miln of Caridden, an allegeance of *res judicata* being proponed by the defender, who could not produce the extracted decreet, but only the whole warrants thereof, it was *alleged* for the pursuer, That albeit such a decreet could now be extracted from these warrants no extract being produced, it stands in the terms of a naked interlocutor, and the matter may be reconsidered, which is never denied to any party applying upon new grounds before extracting; for nothing but a decreet already extracted makes a *res judicata*.

Answered; For proving the decreet to have been extracted, the defender adduceth an attestation under the hand of the keeper of the minute-book, that the dues were paid, which is never done till after extracting, and the Respond-book in the clerks' chamber, where the decreet is again set down as extracted, and so marked by the extracter. Now no decreet is inserted in the Respond-book until it be signed by the clerk, that book being the rule of counting for the clerk's dues.

Replied; The evidences and instructions produced do not prove that the decreet founded on was extracted; for no such decreet is found booked. It is true the Respond-book mentions a decreet betwixt parties of the like surnames, but *non constat* that the parties were the same. And albeit that were cleared, yet the presumption from thence is but weak; for decreets in the Respond-book, whereof the dues are paid, are many times stopped and recalled and sometimes never taken out. Nay further, it appears from the records of decreets pronounced about that time, that the decreet founded on was never booked. And though such a decreet had been given out and extracted, it might have intrinsic nullities; it might have been recalled; it might have been

No 577. paid for, lying in the clerk's hands, and never signed, nor taken out. And to allow the marking of a decreet 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 decreet 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 prejudge 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 decreet extracted, and allowed parties to be heard *in causa*.

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

SECT. V.

Marriage.

1611. *July* 5. Barclay *against* Napier.

No 578.

The Lords sustained a relict'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.

1714. *February* 23.
Mrs Jean Anderson *against* Ninian Wisheart of Logie.

No 579.

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 infeft, 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