

a debt referred to his oath; the LORDS repelled this nullity, objected against the creet, That it was obtained at the instance of tutors nominate acting for George Houston their pupil, and no nomination of tutors produced therein; in respect the pursuit was in their name, founded on a decret dative, decerning them executors for their pupil, and a licence to them to pursue, procured before the commissaries, upon production of the nomination, which is *probatio probata*. THE LORDS also repelled this nullity, That the decret proceeds upon a licence to pursue, which excludes sentence till confirmation intervene, and yet doth not bear, that the debt was confirmed, or the confirmation produced; in respect the defender now produced the confirmation of a date anterior to the extracting of the decret; and though law requires the debt to be confirmed before extracting, there is no necessity to mention the confirmation in the decret.

*Fol. Dic. v. 2. p. 204. Forbes, p. 648.*

No 329.

1736. January 27. ADJUDGERS of Falahill against CUNINGHAM of Comrie.

THE first adjudication upon which charter and sasine had followed, and of which the rest were not within year and day, was challenged upon this ground, That the extracted decree of adjudication was disconform to the warrants. The extract bore, that the decree was simply in absence, whereas upon looking into the warrants it appeared that the decree was *in foro*; a production made by a third party of a right to the lands, in order to bar the adjudication; another production made by the pursuer, in order to take off the effect of the former production; interlocutors upon these productions, &c. It was answered, That though there might be some error in the form, there was none in the substance; the extract narrated the precise lands that were adjudged, and so no hurt to any mortal. Replied, The extractor's province is to give a faithful and exact account of the steps of procedure, and not to dress up processes in fancied shapes of his own; and if such liberties were allowed, extracts could bear no faith, which behoved to render them useless to the lieges. THE LORDS would have found the decree simply null; but the creditors having insisted in their objection *ad hunc effectum* only, to bring them all in *pari passu*, the LORDS found the decree informally extracted, and sustained the objection, to restrict the adjudger to a preference *pari passu* with the other adjudgers. See APPENDIX.

*Fol. Dic. v. 2. p. 204.*

No 330.

1746. July 2. MACLEOD of Geinzies against MACLEOD of Cadboll.

IN this cause, whereof mention is made in the decision, 21st December 1744, Macleod of Geinzies against John Mackenzie, *voce WITNESS*, it being proved that the said arrestment was impetrated by Cadboll;

No 331.  
Decree was pronounced in name of the clerk for a fine.

No 331.

THE LORDS, 19th June, besides finding him liable in Geinzies' whole expense, fined him in L. 20 Sterling for the use of the poor, which they ordained to be paid to Mr William Kirkpatrick, clerk to the process, and decerned, that so diligence might be awarded at Mr Kirkpatrick's instance therefor; and this day refused a petition, and adhered.

Act. Hay.

Alt. Lockhart.

Clerk, Kirkpatrick.

*D. Falconer, v. I. No. 125. p. 152.*

No 332.

1747. July 5. BURGESSES OF RUTHERGLEN *against* The MAGISTRATES.

A COMPLAINT against the Magistrates of Rutherglen, for an undue election, being given in to Court, and appointed to be served, it was *objected*, That the Court's warrant for serving the petition and complaint had not been regularly executed; for, in place of extracting the interlocutor, the complainers had borrowed it up from the clerk, and delivered it to a messenger to be executed. Observed from the Bench, That the practice had not been unfrequent, authorised probably from the ancient custom, which was, that macers used to cite all parties living within two miles of Edinburgh, carrying with them the record itself as their warrant. THE LORDS over-ruled the objection.

*Fol. Dic. v. 4. p. 151. Rem. Dec.*This case is No 14. p. 3689. *voce* EXECUTION.

\* \* \* A similar decision was pronounced 28th July 1761, Stewart against Dalrymple, No 18. p. 8579. *voce* MEMBER OF PARLIAMENT.

1748. February 3. ACT of SEDERUNT anent extracting DECREETS.

No 333.  
Decrees on  
refused repre-  
sentations  
must be put  
up in the mi-  
nute-book,  
and not ex-  
tracted till  
after three  
days.

THE Lords of Council and Session considering that sometimes decreets are precipitantly extracted, after interlocutors refusing representations, reclaiming against interlocutors of Lord Ordinaries pronouncing decreets; do therefore statute and ordain, That when any decret shall be pronounced by a Lord Ordinary, and a representation shall be presented against the same and refused, that immediately the decret formerly pronounced shall be again put up in the minute-book, of the date of the interlocutor refusing the representation; and discharge any decret to be extracted upon the refusal of such representation, for the space of three days after the said decret shall be last put up in the minute-book; and after expiring of the said three days, allow the decret to be extracted, unless the same be again stopt by an interlocutor of the Ordinary, or that application shall be made to the Lords in presence, by petition; and ordain this act to be recorded in the sederunt-books, and printed and published as usual.

*D. Falconer, v. I. No. 134. p. 320.*