1795. *February* 24.

The Common Agent in the Ranking of Polquhairn *against* Andrew Corrie.

No 236.
The Court may allow a cree *cognitionis causa*, to be extracted before it is read in the minute-book.

Mr Crawfurd Newall having died, leaving his affairs in disorder, Andrew Corrie, his creditor in a bond for L. 250, after charging his heir to enter, brought an action of constitution against him on the passive titles, containing also a conclusion for adjudication *contra hæreditatem jacentem*, in case he should renounce, which he having done, Corrie, on the 16th February 1791, obtained a decree *cognitionis causa*.

Next day he presented a petition, which was intimated to the heir apparent and all concerned, stating, that adjudications had been led against the estate of Polquhairn, so far back as the 25th February 1790; and therefore praying the Court, "to dispense with the reading of the decree of cognition in the minute-book, and to allow it to be extracted immediately," in order that he might be enabled to obtain "an adjudication, within year and day of the first effectual one."

The Court granted the prayer of the petition, "reserving to all parties concerned their objections, as accords of law."

Corrie upon this extracted his decree of constitution, and thereafter obtained a decree of adjudication.

A ranking and sale of the lands of Polquhairn having been afterwards brought, Corrie claimed to be ranked on these decrees.

The common agent

Objected; The act of sederunt, 20th January 1671, ordains, that no act or decree shall be extracted, until twenty-four hours elapse after the same is read in the minute-book; and that of the 5th June 1725 "appoints the reading of the minute-book to begin the sixth sederunt day of this and all subsequent sessions."

These regulations are in daily observance, and the Court, although they may repeal, cannot dispense with an existing act of sederunt. The decree of cognition being therefore null, as having been extracted before it was read in the minute book, the adjudication founded on it must be inept.

Answered; Although the words of the act of sederunt 1671 are general, it was intended to apply only to such decrees as might be followed by immediate diligence against the defender, and not to decrees of cognition, in which the heir, after renouncing, has no interest. Decrees of cognition also differ materially from ordinary decrees, in this respect, that being always granted *periculo petentis*, they remain subject to future challenge.

Besides, such decrees could not be in the view of the Court when the regulation was made. At that period, and long after, it was the practice for the pursuer, where the heir renounced, not to take a decree *cognitionis causa*, but in-

stantly to protest for adjudication; Craig, B. 3. D. 2. § 23.; Stair, B. 3. Tit. 2. § 46. and 47.; Erskine, B. 2. Tit. 12. § 47. No 336.

The supporting of the dispensation in question will have the equitable effect of admitting an onerous creditor to a share of his debtor's funds, and will be agreeable to the practice of Court in other cases, where dispatch is required, as in the appointment of interim Sheriffs, in acts and commissions for proofs, and in warrants for personal protections.

THE LORD ORDINARY "repelled the objection."

On considering a reclaiming petition and answers, memorials were ordered; on advising which, it was

Observed on the Bench; Although the Court are not perhaps bound to adhere so rigidly to an act of sederunt as to an act of Parliament, where equity suggests the propriety of deviating from it, yet it would be dangerous to yield too far to this doctrine, especially in competitions of creditors; but, as a decree *cognitionis causa* contains no personal conclusion, this case does not fall under the spirit of the act of sederunt, the sole object of which was, to give the unsuccessful party time to apply for an alteration of the judgment before the decree is extracted.

One judge thought the decree came under the words of the act of sederunt, and that as dispensing with the minute book would affect the interest of the other creditors, the Court were not entitled to interfere. The only cases, in his Lordship's opinion, in which they could do so with effect, were those where no third party was in any way hurt by the dispensation.

THE COURT, with only one dissenting voice, "adhered."

Lord Ordinary, *Dunsinnan.* For the Common Agent, *Geo. Fergusson, M. Ross.*
Alt. *Morthland.* Clerk, *Pringle.*

R. D. *Fol. Dic. v. 4. p. 152. Fac. Col. No 160. p. 366.*

1804. *May 22.* EARL of KINNOUL and OTHERS, Petitioners.

No 337.
If, in the extract of a process for the purpose of appeal, the grand decerniture has been inserted, the Court, on the appeal being dismissed, cannot proceed to determine the rest of the cause, unless it sees fit to recall the extract, to the effect of allowing the parties to proceed.

ON moving a petition to apply the judgment in the House of Lords, dismissing the appeal in the case of Earl of Kinnoul against Hunter, *voce* SALMON FISHING, a difficulty occurred, how far the Court could now proceed to determine the quantum of damages, notwithstanding of a reservation to be heard upon that subject before the Lord Ordinary, contained in the interlocutor appealed from; for, in extracting the proceedings for the purpose of the appeal, the grand decerniture had been thrown in, as if it had been a final extract.

This difficulty was removed, by a deliverance recalling the extract of the decree in question, to the effect of allowing the parties to be heard on the ques-