

less it had been subscribed under his hand ; for, though the assertion of the clerk may instruct a passing from *pro loco et tempore*, which only *perimit instantiam*, yet it cannot a passing from *simpliciter*, which *perimit causam*. 3tio. The decret, being unwarrantably extracted, must be turned into a libel ; at least turned back unto the minute, as if it had not been extracted ; and therefore, albeit the pursuer had passed from the cautioner simply, he may resile before a warrantable extract.

It was ANSWERED, to the *first*, That the scoring of the minute-book can prove nothing *ex intervallo* ; but this decret was pronounced four years ago ; and it were of dangerous consequence to reduce decreets, if not recently quarrelled, upon scoring them in the minute-book, which might be done by any hand ; and there is no reason to put all decreets in the power of the keeper of the minute-book. To the *second*, Whatever is ordinary to be proponed without writ, is sufficiently instructed by the clerk's minutes, and extended decret ; for, upon his assertion, depend all the interlocutors, both of relevancy and probation, and it is very ordinary to pass from some defenders *simpliciter* ; but, if there were a decree of consent of special nature, it behoved to be upon a subscribed warrant.

The Lords considering that the decret was extracted when Mr George was abroad, they did take the oath of the keeper of the minute-book ; and he deponing *affirmativè*, they did reponè against the decret, as if it had been unextracted ; and found that Mr George might resile before a warrantable extract : and so had no need to determine whether his passing from *simpliciter* required his subscription.

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1681. *February 25.* The COMMISSIONERS of the BORDER *against* ELLIOTS.

THE Commissioners of the Border having apprehended Robert Elliot upon an accusation of theft, there were two Elliots gave bond to present him to the Border-court, at Jedburgh, the 25th April 1676, or at any other time or place thereafter the Commissioners of the Borders pleased, under the pain of 5000 merks, upon six days warning, allenary. And, in 1680, they summoned them, upon six days, to produce him again at Jedburgh ; and, upon their failie, decerned them in 5000 merks. And having obtained letters of horning upon the said decret, by deliverance of the Lords, and having therewith charged the said cautioners, they gave in a bill of suspension. And the Lords having appointed the cause to be heard upon the bill, before report, there was an address made to the council, that the council would, by their act, prohibit the meddling with the sentence of the Commissioners of the Border : they being a commission of many eminent persons and having their commission under both the Great Seals of Scotland and England, and being a supreme criminal court, not subordinate to the Justice-General,—the Lords of Session, who have no criminal jurisdiction, could not meddle with their sentence, but should refuse all bills of advocacy or suspensions thereanent.

The matter being debated in council sharply enough, it was shown, That the Lords of Session were the King's ordinary council in matters of right, as the

council were in matters of state and public peace; and therefore they might, and did supply the defect of any criminal court; and therefore letters of horn-ing did pass upon the Lords' deliverance upon all pecunial sentences of the justice-court; and no other could suspend these sentences, even upon obedience. Likeas, the Lords have advocated causes even from the justices, when the justices were concerned in the cause before them as a party, or had near relation to the parties, or was in enmity with either of them; though the Lords could not judge these causes, as being criminal, in name of unsuspected judges. For that cause, much more might they suspend the letters given out by themselves upon a pecunial matter of the Commissioners of the Border. And though there was a commission by the King, under the Great Seal of Scotland, to so many Scots and English, and under the Great Seal of England, to the same persons, yet they did not become a third kind of judicatory from both kingdoms: but, when they sat in Scotland, they sat by the Great Seal of Scotland; and even the English were become Commissioners of Scotland; and, when they sat in England, the Scots were Commissioners of England, and behoved to keep the laws of either kingdoms that they sat in, though they might keep the fits and customs of the Border.

Whereupon the Privy-Council did not concur in that motion; but recommended it to the Lords of Session to be tender of discouraging the Commissioners of the Border.

And now, the cause being called, the Elliots repeated their reason of suspension, That the decret of the Commissioners of the Border was most unjust and unwarrantable, having decerned the suspenders in the failie of 5000 merks for not producing of Robert Elliot upon six days' warning, when they were out of the kingdom, and therefore no less days were requisite than sixty; for even charges of horning upon bonds bearing a charge of six days only, must proceed upon sixty days against persons out of the country: and Robert Elliot himself was not cited.

It was answered, *1mo.* That, albeit sixty days be required to cite and charge persons who are notourly out of the kingdom, yet that cannot be extended to the inhabitants upon the Border, who may pass the Border oft-times every day; and therefore a citation at their dwelling-house must be sustained, unless it were notour in the country that they had been long absent out of the kingdom. And it would exceedingly retard the commission, if citations at the market-cross of Edinburgh were requisite upon sixty days. *2do.* Though there had been any informality, decerning the penalty to be incurred, yet, it being a liquidate penalty in the suspender's bond, it is incurred upon the cautioners not presenting Elliot at Jedburgh the 25th April 1676. For, albeit it be subjoined to their bond, "or at any other time or place the commissioners pleased, upon six days' warning," that did not import an alternative obligation in the option of the cautioners, but was absolutely in the option of the commissioners, when they pleased; and, therefore, Robert Elliot, having neither been offered at Jedburgh the 25th day of April, or any time since, the Lords, in justice, ought to find the letters orderly proceeded for the liquidate penalty.

The Lords found this answer relevant, and therefore found the letters orderly proceeded; but had not the occasion to determine the other point, concerning the days of the charge requisite on the Border.