

No 423. restrictions need not be subscribed. *Vide* 24th July 1661, Fuchannan and Osburn, No 411. p. 12528; but there it was a making up a consent *ex intervallo* on the reminiscence of the Judge and clerk.

Fol. Dic. v. 2. p. 248. Fountainhall, v. 1. p. 574.

1697. June 25.

WALTER STUART, JAMES LEVISTON, SIR GILBERT ELLIOT, and Others, *against*
The MAGISTRATES OF EDINBURGH.

No 424.

The assertion of a town-clerk in a decree, that fines had been applied to the town's use, found not probative against the town.

WALTER STUART, James Leviston, Sir Gilbert Elliot, and sundry others, pursue the present Magistrates of Edinburgh, on this ground, that they were fined in 1683, and thereafter, for absence from the church, and attending conventicles, and other church irregularities; and now the 25th act 1695 ordains repayment of such fines; and the decreets produced by them bearing they had paid down their fines at the bar, and were applied to the Town's use, therefore craved the present Magistrates might refund them. *Alleged*, By the acts of Parliament in 1670 and 1672 against conventicles, the fines of heritors did not belong to the Judge but to the King, and most of them being landlords and heritors in the Town, such can never convene the Magistrates; and as for such as were fined and not heritors, the Magistrates who pronounced the sentence must be *primo loco* called and discusst, and it must be proved the fines came to the Town's use. *Answered*, Heritors, in the acts, must only be understood of country heritors, and they are no more bound to insist against the Magistrates at that time, than if it were in a subsidiary action for a prisoner's escape, and the decret sufficiently instructs the fines went to the Town's use.

THE LORDS thought the whole affair would be best understood if the former Magistrates were brought into the field, and therefore ordained them to be cited summarily and *incidenter* in this same process; but would not sustain the clerk's assertion in the decret, that it was converted to the Town's use, to be probative *per se*, that not being *actus officii* wherein clerks are to be credited, else they might bind great debts upon the incorporation.

Fol. Dic. v. 2. p. 249. Fountainhall, v. 1. p. 780.

No 425.

Depositions of witnesses ought to be subscribed by the inferior judge who examines them, as well

1708. December 22. DALRYMPLE *against* WRIGHT.

MR GEORGE DALRYMPLE, Advocate, buys a horse from one Wright, a horse-couper, for L. 14 Sterling, but with this condition, that he should have a trial of him for eight days, and if he did not please him, he had liberty to return him in that time; and he having rode upon him to Newliston, he fell with him and crushed his leg, whereon he sent him back within a day or two; and

Wright refusing to restore the money, he pursues him before the Sheriff, and on a probation of the bargain, obtains a decreet, which Wright suspends on this reason, that one of the witnesses, by whom you prove the bargain, confesses he was not present at the making of it, and so can never be a habile witness. *2do*, The depositions are only subscribed by the party, and not by the Judge. *Answered* to the *first*, The probation is pregnant and full, the one deponing he was witness to the bargain, and that it was conditional on a week's trial, the other depones, he heard Wright declare these were the terms of the sale, which is every whit as good against him, as if he had been present. To the *second*, Though it be customary for the Judge to sign with the witnesses, yet its want is not a nullity, (though the Commissary of St Andrews, was censured by the Lords for that omission.) THE LORDS refused the bill of suspension, but ordered the Sheriff to be more observant of form in time coming.

Fol. Dic. v. 2. p. 249. Fountainhall, v. 2. p. 474.

1714. November 26. WILLIAM KING *against* The MAGISTRATES of ELGIN.

WILLIAM KING pursues the Magistrates of Elgin for payment of L. 2104, conform to an act of Council, dated the 22d of February 1702, mentioning, that the Council having considered the report of a committee appointed to consider the state of the Town's debts, and to prepare an allocation of the debts resting to the Town for payment of their creditors, they did ratify and approve the same, and found the Town debtor to the pursuer in the sum libelled, as a balance after deduction of a debt owing by him to the Town, and ordained certain debts owing to the Town to be disposed for payment of the pursuer's debt, and others mentioned in that act of Council.

The debts destined for the pursuer's payment being otherwise applied, he now pursues for payment, and gives out in process the foresaid act of the Town Council, with the other act therein mentioned, appointing a committee to consider the state of the debts, and to report.

The defenders *alleged*, The acts libelled and given out were no sufficient instruction of a debt; *1mo*, Because the extract of the act appointing the committee is null, not bearing to be subscribed by the Preses, much less by a *Quorum* of the Council. *2do*, There is no vestige of a report made by the committee alleged to have been named further than what is related in the act libelled, which is very general, mentioning only that there was a report, by which such a balance was due after adjusting accounts of debit and credit, but no narration of the particulars of the debit and credit from which the balance did arise, nor is there any such report to be found upon record. *3tio*, Neither is the act of the 22d February libelled, signed by a *Quorum* of the Council, but the extract bears only to be signed by the Preses, which is not sufficient to burthen the Town, seeing by the 29th act, Parliament 1693, there is a method laid down for preventing embezzlement of the common good, whereby it is provided,

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as by the witnesses themselves.

No 426.

An act of Council in favour of the Provost of a burgh royal, bearing to proceed upon the report of a committee, found to be no sufficient constitution of a debt against the Town, there being no evidence upon record, that the committee did make the report narrated in the act, and the act appointing the committee being null, as not signed by the Preses.