

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 discust, 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