

No 411. thereafter made up of their memories : Upon which two points mainly they reduced, without discussing the other allegiances ; neither had they respect to Buchanan's homologations of the arbiters' sentences, by taking out diligences conform, and adducing witnesses to prove the rental, nor by acquiescing in his bills to the price ; because there were always some qualities in his consent.

*Fol. Dic. v. 2. p. 248. Stair, v. 1. p. 54.*

---

1663. February 13.

The TOWN of LINLITHGOW *against* UNFREEMEN of BORROWSTOUNESS.

No 412.

A writ found not to prove, being an act of a Town Council, without citation or subscription of the party.

THE Town of Linlithgow insisted in their charge, upon a bond granted by some inhabitants of Borrowstownness, obliging them to desist and cease from using the merchant-trade, under the pain of 500 merks, which was suspended on this reason, That the bond was extorted by unwarrantable force, in so far as the suspenders were taken in Linlithgow *brevi manu*, and incarcerated till they granted the bond. The charger produced a decret of the Lords *in anno* 1643 against several inhabitants in Borrowstownness compearing, who having suspended the general letters, upon the act of Parliament, for finding caution to desist, &c., the letters were found orderly proceeded, and the Town of Linlithgow empowered, not only to seize upon the merchant-goods of the inhabitants of Borrowstownness, if they meddled in merchant-trading, but also bearing with power to put the persons using the said merchant-trade in prison till justice were done upon them ; and thereupon *allege*, That the suspenders being incarcerated by virtue and conform to the foresaid decret standing, there was no unwarrantable force used ; *2dly*, They produced an act of the council of Linlithgow, bearing the suspenders to have compeared before the council, and to have confessed their wronging of the said Town in the trade of merchandize ; and that there was horning and caption against them for that cause, and therefore declared their willingness to grant the bond in question. The suspenders *answered* to the *first*, That albeit the foresaid decret bear compearance, yet there is dispute in it, and it is evident to be by collusion and surreptitious ; because this conclusion now alleged is *ultra petita*, there being no such thing in the general letters, nor doth the decret bear any special charge given, neither is this conclusion warrantable by any law or act of Parliament ; *2dly*, This decret could be no warrant to incarcerate the suspenders, because it is given only against some particular persons then living in Borrowstownness, without calling either of the Baron or Bailies of the Burgh of Barony, and therefore is null as to any other persons ; and as to the *second* answer, upon the act of council, it cannot prove against the suspenders, being only under the Town-Clerk's hand, not being a process upon citation, nor having a warrant subscribed by the suspenders.

THE LORDS having considered the bond in question, albeit they found the tenor thereof not to be contrary to the act of Parliament, yet found the same was unwarrantably taken, if the same was extorted, as aforesaid; and found the decret of the Lords not to militate against the suspenders, or to warrant that incarceration *brevi manu*; and found the act of council proved not against the suspenders; and yet ordained them to renew a bond, by the Lords' authority, of the like tenor.

No 412.

*Fol. Dic. v. 2. p. 247. Stair, v. 1. p. 178.*

1665. January 31. — KIRKTONS against Laird of HUNTHILL.

Two sisters called Kirktons, having obtained decret against the Laird of Hunthill for their mother's executry, who left Hunthill, her brother, and two other tutors to her children, in so far as concerned the means left them by their mother; Hunthill suspends, and raises reduction on this reason, 1<sup>st</sup>, That the only ground of the decret being a confirmed testament, bearing, That Hunthill compeared and made faith and accepted the office of tutory, this cannot be sufficient of itself to instruct he was tutor, seeing acts of inferior courts prove not in any thing but in points of form of process, which are ordinary, but *in aliis* prove not without a warrant; and therefore, unless the warrant of this acceptance were produced, it cannot prove more than an act of tutory or curatory, or cautionry, will prove without its warrant; and therefore now they crave certification against the same; 2<sup>dly</sup>, Neither their subscription to the act nor the principal testament itself can be found, though the registers of that commissariot be searched, and others about that time found; neither can it be astructed with the least act of meddling any way; 3<sup>dly</sup>, A mother cannot name tutors, but the father only, it being *patria potestatis*. It was answered, That albeit *in recenti* the warrants of such acts ought to be produced, or they are not effectual without the same; yet it being thirty-seven years since this confirmation, after so many troubles, the chargers are not obliged to produce the warrants, being such inconsiderable little papers as they are, but they must be presumed that they were so done, as is expressed in the public record; seeing this process has lasted these twelve years, and before nor since, till within a year, no mention thereof. It was answered, That there was no prescription run during which, if at first the chargers were obliged to produce, they are still so, unless they could fortify and astruct the truth *aliunde*, and their silence said nothing, because it was the charger's fault that pursued not till within these twelve years; whereas, if they had pursued timeously, the suspender would then have pursued a reduction. It was answered, They were minors in the suspender's own house the former time, who would not have kept and entertained them at all, if he had not known of the tutory, and that they had means.

No 413.

A tutory found not to be instructed by a confirmation bearing that the tutor accepted and made faith.