

has been, that such obligations have been validated, either by the oath of party, or subsequent deeds of homologation. See Hope's Minor Practicks, § 347.

N.B.—This point carried by the President's casting vote.

2d, The second question was, Whether the party could so qualify his oath, that he indeed did give order to the notary to subscribe for him, but that he imagined it was a deed of a quite different nature from what it really was? But this quality was rejected unanimously; only the party was allowed to insist in a reduction, as accords.

1739. July 6. DRUMKINTON *against* MAGISTRATES of ELGIN.

DRUMKINTON, and three other pursuers, having been Magistrates of Elgin, did, during their administration, settle an Episcopal minister in one of the kirks of Elgin, where the Presbyterian ministers were in use to preach on the week days. This it seems was done with some sort of violence; for the kirk-session of Elgin raised criminal letters against the four above mentioned persons, and prosecuted them for a riot. About the time these letters were raised, the council met, and came to a resolution that the kirk belonged to the town in property, and that they would to the utmost assert the right of the town, and defend the pursuers in the prosecution for the riot. The council consists of seventeen, and there were here present thirteen, including the pursuers, eleven of which subscribed the act of council, and two did not. When the affair came before the Lords of Justiciary, they thought that it depended upon a previous question, *viz.* Whether the kirk belonged to the town or kirk-session, and remitted the prosecutors to the civil court to fix that point. Accordingly, declaration was raised before the Session, in name of the kirk-session, in which they prevailed, and the kirk was declared to belong to them. In consequence of this, Drumkinton and his followers were condemned by the Justiciary to pay a considerable fine; but they appealed to the House of Lords, who reversed both the sentence of the Session and of the Justiciary, and ordered the defendants to pay back to Drumkinton the fine they had got off him. The matter rested there, till now that Drumkinton and the three bailies bring a process against the Magistrates and Council of Elgin, for repetition of the expenses they had laid out in defending the town's right (as they said,) before the Justiciary, the Session, and the House of Lords.

It was argued for the pursuers, 1mo, That, as administrators for the town, they were obliged to defend the property of it, which was here the principal question, and upon which all the others depended.

2do, That they had an express mandate for so doing by the above mentioned act of council.

3tio, That the event sufficiently justified their conduct, and shewed they had good reason for what they did; since, by the decree of the Supreme Judicature, the church in question was declared to belong to the town.

The defences were, 1mo, That the council, upon which the pursuers founded,

could not be said to be a council in its *fullest convention*, in terms of the statute 1693.

*2do*, By the second alternative of that Act, the Town is not liable; for, by the Act, it is declared, That the contractors shall be obliged to relieve the town, if either the act of council is not made in the *fullest convention*, or, *2do*, If the uses and purposes condescended upon in the said Act are not found to be *just, true, and real*. That here there was no just, true, or real cause for contracting of debt: on the contrary, the cause was trifling, frivolous, and inconsiderable, being a dispute about the property of a church which did not yield a farthing to the town.

*3tio*, That though the mandate of the council might empower the pursuers to carry on the process before the Justiciary and Session, yet it could never authorize them to appeal when the question was given against them by the Supreme Court here.

As to the first defence, it was not much insisted on; though several of the Lords declared they were in great doubt whether it could be called the *fullest convention* of council, from which there were four absent, two did not subscribe the act, and four of the eleven subscribing were parties.

The second defence was chiefly insisted on; and with respect to it the Lords seemed to be all of opinion that there was here a contraction of debt, in consequence of an Act of Council, which fell under the statute 1693, cap. 28; and so the defence, upon the cause not being *true, just, and real*, was relevant: with respect to which, the President and Arniston argued, that, by the complexion of the case, it appeared that the pursuers themselves gave occasion to the process by putting in an episcopal minister into a presbyterian kirk, without any previous Act of Council to authorise them; an act which, though perhaps not criminal, was certainly not prudent or expedient: That the question about the Town's property came in only *incidenter*, and as a defence to the pursuers against the criminal prosecution; and therefore they thought that Drunkinton had no reason to pretend that the Town should be at the charge of proving his defence: That if the kirk-session, without any provocation, had attacked the property of the Town, the pursuers, in that case, were obliged to defend the Town, however trifling and inconsiderable the property in dispute might have been;—but that here Drunkinton and his associates were the aggressors, and though afterwards they came to be defenders, yet in reality they ought to be considered as the first pursuers. In a word, that Drunkinton and his followers had, by their rash and inconsiderate conduct, involved themselves in a criminal process, and raised a question about the Town's right, which otherways would never have been thought of; and that, though they had interest enough to engage the council to stand by them, yet that was no *just, true, and real* cause for contraction of debt; and so the pursuers behoved to bear their own expenses.

The Lords found, That, as to the expenses of the criminal process, the Town was not liable; and, as to the appeal and process before the Session, they superseded giving any judgment till the records were searched to see against whom the declarator before the Session was raised.

*July 10.*—This being accordingly done, it was found, That, in the process before the Session, the Town was not called, nor was it judged necessary, see-

ing the question was betwixt the Kirk-session and Drumkinton, and the Town's right was only brought in *incidenter*, as a defence to Drumkinton; therefore unanimously found no expenses due on account of that process. The appeal was likewise only in the name of Drumkinton, who, by the decree of the House of Lords, was put in quiet and peaceable possession of the church. Therefore found no expenses due for the appeal neither.

---

1739. July 6. ——— *against* ———.

THIS was a petition craving letters of loosing an arrestment laid on during a dependance which affected the petitioner's whole substance and hindered him from uplifting any of his effects.

The Lords ordained the arrestment to be loosed upon his finding caution for a limited sum, which, in this case, was not one fifth of the claim.

---

1739. July 10. HEIRS of SIR JAMES ROCHEAD *against* EXECUTORS.

THE question here was, Whether a moveable bond to heirs and executors compensates a bond secluding executors?

The Lords found, That it did, upon this specialty, that the money lent upon the moveable bond appeared evidently to be given in payment of the heritable bond, though there was a bond taken rather than a discharge, for certain reasons of expediency. As to the general point, some of the Lords were not clear.

---

1739. July 10. DAVID KINLOCH *against* FULLERTON.

[C. Home, No. 125.]

By the law of England, bills, promissory notes, and merchants' accounts only burden the executry, but do not affect the heir. The question here was, Whether such bills, &c. granted in England, could affect the heritage in Scotland?

The Lords found they did: because, being deeds, which, of their own nature, were valid by the law of Scotland, there was no reason for refusing them the full extent that law had given them. The *locus contractus* regulates the form of any deed or obligation, but never the subject which it affects; thus the law of England will regulate the form of a testament there, but will never extend it to heritage here in Scotland. However, Drummore was of