

1661. July 26.

No 410.

WILLIAM KER *against* Mr ROBERT STEEDMAN, Minister at Carridden.

IN this process it was found, that a stipend of a suspended minister did not vaque, the suspension being only interpreted to be *ab officio, non beneficio*; as also, found, that an act of the Presbytery, subscribed by the whole Presbytery, bearing, that William Ker's father, then minister at Carridden, did consent thereto, could not prove his consent, unless he had subscribed the same.

*Fal. Dic. v. 2. p. 248. Gilmour, No 4. p. 4.*

\* \* \* Stair's report of this case is No 2. p. 461, *voce* ANNAT.

1661. July 24.

LAIRD of BUCHANAN *against* OSBURN.

No 411.

Consent of parties to a decree judicially, not sufficiently instructed by the decree, there being a minute by which it appeared, that this consent was not minuted till half a year after it was granted.

THE Laird of Buchanan pursues reduction of a decret, obtained against him at the instance of Lieutenant-Colonel Osburn *in anno* 1653, upon many reasons, mainly, because the ground of the decret was only a bill not past the signet, at the instance of umquhile Mr William Cuningham, continued in Osburn after his decease without transferring, for rectifying or rescinding a minute of disposition of the lands of Ballindalloch by Mr William to Buchanan, put in the hands of Mr David Buchanan, who gave his ticket that the same should be kept until it were perfected according to equity and justice; and deponed, that the point to be rectified was only the warrandice which in the minute was absolute; upon which bills the then judges ordained the parties to submit, who accordingly submitted to four friends and two oversmen, who were to report 10th February 1653, which oversmen did unwarrantably report after the expiring of the said reference, upon the 19th of February, to Buchanan's great prejudice, contrary to justice, in so far as they ordained him to pay Osburn sixteen years' purchase for the price of the lands, without production or debating of the parties' rights, or calling or hearing the arbiters, and with warrandice from Osburn and his goodfather's fact and deed only, albeit the lands were insecure, holden ward, and lying in the highlands; and found the rental of the lands to be 5000 merks yearly, without distinguishing between stock and teind, though the testimony of the witnesses proves not above 3000 merks, beside the teind; of which lands Osburn nor his goodfather had neither title nor possession of Buchanbeg, Buchanmore, and Ballochroon, which are parts of Ballindalloch, whereunto the judges did most unjustly interpone their authority, superseding 20,000 merks until the right of Buchanbeg, Buchanmore, and Ballachroon, were discussed; and whereas the decret bears Buchanan to have consented, he denied the same; neither was there any minute of process taken upon the day of his alleged consent, but by an ordinance of the judges half a year thereafter, made

upon their memory, which cannot prove against him, not being subscribed by him, at least he might have resiled *re integra*, before extracting the decret, as he did. The defender *answered*, That whatever was the ground of the process yet there was a submission subscribed by both parties, and a report by the oversman conform, which is express contrary to all that is alleged, and is sufficient and full probation, arbiters having so great trust; and the decret bears the report made upon the 9th of February; and albeit the minutes of process were wanting or contrary, *nihil est*, because the clerk being *publicus proto-notarius*, his solemn instruments make full probation, and the minutes are but the notes taken by him for remembrance till the full instrument be completed, against which parties may object at extracting, as not conform to the warrants, but not thereafter, otherwise the clerks, by altering or losing the minutes, might destroy all decreets, which are the greatest securities of the kingdom. The report also bears inspection of the parties' rights, and consideration thereof, and of the debates and informations given in by either party in writ; and if Buchanan saw not Osburn's rights, it was his fault, that called not for them out of the oversmen's hands, where they long lay, being expired apprisings and infeftments against Glengarnock, the ancient proprietor, and against the Lairds of Buchanan themselves; so that the report being a decret-arbitral, and confirmed by the judges, and consented to by parties, is most solemn. And as to the consent, it was judicial and palpable, by joining hands, and needed no subscription, it being most ordinary that decreets bear consent of parties, especially when the consent quadrateth with and is conform to a process, as the compareance of parties, whereby decreets became irreducible, accepting of offices of tutory or curatory; and so if Buchanan had appeared, and said for L. 40,000, *non faciam vim*; but as for the 20,000 merks, the right of these lands would be first cleared; it would have been an unquestionable consent. Albeit contrary or extrinsic acts require subscription, and *ex abundanti* have the same; yet they need not, seeing *publica scriptura*, by the instrument judicial of the clerks of a supreme court, is more solemn than a private writ by parties' subscription; and albeit *de recenti*, at the same time when consents or offers are proposed, parties may resile, yet *ex intervallo* they cannot; for there is only *locus pœnitentiæ* in dispositions or tacks of lands, where writ is requisite not only as an evidence, but as a solemnity accomplishing the right; but in other pactions and promises, where writ is not essential, there is no place therefor. THE LORDS having considered the decret, and whole warrants thereof, reduced and turned the same into a libel, ordained Osburn to proceed upon the two supplications on which the decret was pronounced, and continued his possession till the close of the next session; for they found, beside many informalities, the sentence and report of the oversmen to have been after expiring of the reference, by the warrant thereof subscribed with their hands; and as to the consent, they found by signature of process, under all the then judges' hands, that there was no minute of the said consent at the time it was alleged to have been, but half a year.

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.