accept of the office, and gave his oath *de fideli administratione*, and for instructing that Aikenhead did act as curator, produced a contract betwixt him and Ralstoun, whereby he disponed to him the foresaid stock and plenishing; *alleged* for the defender, That the warrant of the act of curatory not being subscribed by the defender, the extract could not instruct his acceptance of the office, especially being but the assertion of a clerk of an Inferior Court; and the contract betwixt Ralstoun and the defender, by which he dispones to Ralstoun the stock and plenishing, cannot prove that he accepted of the office, or acted as a curator; seeing it appear only, that he as having a factory from the minor and curator, did enter into the contract, and disponed the stock to Ralstoun, and the defender is not obliged to produce the factory; but seeing the pursuer makes use of that contract, to instruct the defender's intromission, which bears only that he acted as factor, and not as a curator, the pursuer cannot controvert it, seeing *quod approbat non reprobat*, and it could not be imagined that the defender had granted a disposition as curator, seeing he could not dispone as curator, but only consent to the minor's disposition, so that the disposition behoved to have been granted as factor, and the curator having counted to the pursuer, and obtained a discharge, the defender as factor could not be further liable;—the LORDS sustained the allegeance proponed for the defender against the act of curatory, as not being subscribed by Aikenhead, and likewise sustained the other allegeance, bearing, that by the contract, it appears Aikenhead acted as having a commission and factory from the minor and his curator, and found no necessity for Aikenhead to produce the factory.

Sir P. Home, MS. v. 2. No 880.

No 422.

1693. *December* 1.

MARY BROWN *against* HENDERSON of Brignies, and his Tutor.

No 423.
The clerk of an inferior court's assertion of an alleged consent of a party or his procurator, extraneous to the ordinary steps of process, not probative.

MARY BROWN against Henderson of Brignies, and his tutor; the LORDS found, in the general, that a clerk of an inferior court's assertion, that a party or his procurator consented to do such a thing, was not binding nor obligatory on them, unless their consent were otherwise instructed, and that they had subscribed it, and that the Judges subscribing the decreets now with the clerk, by the act 3d, of Parliament 1686, did not alter the case; yet here, in this circumstantiate affair, the LORDS found the decreet probative of their consent to a roup of the land the next year, seeing she had passed from her two defences, on this concession, viz. that the minor was not infeft, and the tutor had not made inventory, which she would not otherwise have done, and that they had homologated the decreet; for though in extraneous points, the acts of clerks of Courts are not to make faith, yet *in actibus officii et processus credendum est clerico*; as if a party or his procurator declare he passes from such a conclusion of his libel, and insists only for the remanent *hoc loco*, such declarations and

No 423. restrictions need not be subscribed. *Vide* 24th July 1661, Buchannan 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 decreet 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 decreet, 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