

Wright refusing to restore the money, he pursues him before the Sheriff, and on a probation of the bargain, obtains a decreet, which Wright suspends on this reason, that one of the witnesses, by whom you prove the bargain, confesses he was not present at the making of it, and so can never be a habile witness. *2do*, The depositions are only subscribed by the party, and not by the Judge. *Answered* to the *first*, The probation is pregnant and full, the one deponing he was witness to the bargain, and that it was conditional on a week's trial, the other depones, he heard Wright declare these were the terms of the sale, which is every whit as good against him, as if he had been present. To the *second*, Though it be customary for the Judge to sign with the witnesses, yet its want is not a nullity, (though the Commissary of St Andrews, was censured by the Lords for that omission.) THE LORDS refused the bill of suspension, but ordered the Sheriff to be more observant of form in time coming.

Fol. Dic. v. 2. p. 249. Fountainhall, v. 2. p. 474.

1714. November 26. WILLIAM KING *against* The MAGISTRATES of ELGIN.

WILLIAM KING pursues the Magistrates of Elgin for payment of L. 2104, conform to an act of Council, dated the 22d of February 1702, mentioning, that the Council having considered the report of a committee appointed to consider the state of the Town's debts, and to prepare an allocation of the debts resting to the Town for payment of their creditors, they did ratify and approve the same, and found the Town debtor to the pursuer in the sum libelled, as a balance after deduction of a debt owing by him to the Town, and ordained certain debts owing to the Town to be disposed for payment of the pursuer's debt, and others mentioned in that act of Council.

The debts destined for the pursuer's payment being otherwise applied, he now pursues for payment, and gives out in process the foresaid act of the Town Council, with the other act therein mentioned, appointing a committee to consider the state of the debts, and to report.

The defenders *alleged*, The acts libelled and given out were no sufficient instruction of a debt; *1mo*, Because the extract of the act appointing the committee is null, not bearing to be subscribed by the Preses, much less by a *Quorum* of the Council. *2do*, There is no vestige of a report made by the committee alleged to have been named further than what is related in the act libelled, which is very general, mentioning only that there was a report, by which such a balance was due after adjusting accounts of debit and credit, but no narration of the particulars of the debit and credit from which the balance did arise, nor is there any such report to be found upon record. *3tio*, Neither is the act of the 22d February libelled, signed by a *Quorum* of the Council, but the extract bears only to be signed by the Preses, which is not sufficient to burthen the Town, seeing by the 29th act, Parliament 1693, there is a method laid down for preventing embezzlement of the common good, whereby it is provided,

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as by the witnesses themselves.

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An act of Council in favour of the Provost of a burgh royal, bearing to proceed upon the report of a committee, found to be no sufficient constitution of a debt against the Town, there being no evidence upon record, that the committee did make the report narrated in the act, and the act appointing the committee being null, as not signed by the Preses.

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that no debt shall be contracted, nor bond granted, obliging successors in office without a previous act of the Town Council in their fullest convention, certifying the Magistrates and others who shall contract debts and grant bonds without a previous act, or if the causes condescended on be not found just and real, that the contracters and subscribers shall be found personally liable to relieve the Town. This act requires a previous act of Council for granting the security, and presupposes that the bond or obligation for the debt must be subscribed by the plurality, because the subscribers are liable to relieve the Town, whereas in this case, the Preses only subscribes, and there is no previous act in the terms of the act of Parliament.

It was *answered*, The pursuer opposed his act of Council, which liquidates and establishes the debt due to the pursuer, which was for debursements during his magistracy upon account of the Town, upon which he relied, and gave up the instructions of his debt depending upon the act of Council libelled, for his security and payment, and he is not answerable for the formalities objected. If need were, he could make appear, that the act in his favour is in the form and style of other acts of that Town Council, which were always reckoned binding, and neither can he be obliged to instruct that the report of the committee was carefully kept or recorded; the trust of all that depends upon the Magistrates, and whom they have intrusted in framing their minutes and keeping their records, and the act of Parliament 1693, does only direct the caution that Magistrates are to use in contracting of debt, and the penalties in neglecting that caution, but with an express provision in the end of the act, without prejudice always of the right and security of the creditors.

It was *replied*, That the pursuer is no ways in the case of the act of Parliament for security of his debt, because that act does only concern the case of creditors contracting with the Magistrates by bonds or other contracts duely signed by a *Quorum*, of which subscribers and their heirs are liable to relieve the Town, if the method subscribed be not observed, and the provision without prejudice to the creditors, is only in the case of formal bonds presupposed to be subscribed by a *Quorum* as above; whereas the pursuer having no bond, but only an act of Council, and that act of Council depending upon a report of a committee not to be found, and that committee not duly authorised by an act so much as signed by the Preses, the same is no ways sufficient to instruct any debt; more especially considering, *imo*, That the power of the committee as mentioned in the extract of the act authorising &c. was only to state the Town's debts, but not to constitute unclear or illiquid claims, much less to discharge the pursuer of debts which he was due, as being compensated with his other claims, and so to state a balance. *2do*, If the pursuer's accounts were considered, it would be found they were no ways debursed for the benefit of the common good, but upon his own private and personal account. *3tio*, Whereas he *alleges* That he gave up his instructions; it is *replied*, *Gratis dic-*

rum, and if it were so, *sibi imputet*, for no reasonable man would part with the instructions of a debt, upon such a lame act. No 426.

THE LORDS found the acts of Council produced were not sufficient to instruct a debt against the Town.

Fol. Dic. v. 2. p. 249. Dalrymple, No 121. p. 168.

1724. December 2.

MR JAMES PHILP, and the Moderator and Presbytery of Ellon, *against* The HERITORS of the Parish of Cruden.

In the process betwixt the above parties, about settling Mr Philp schoolmaster of Cruden, observed the 7th February last, *vocæ* PUBLIC OFFICER, the defenders offered to disprove the extract of the proceedings of the presbytery, with respect to due intimation having been made, by their order, to the heritors; against which the pursuers *objected*, That presbyteries, being Courts of Record, extracts from their records ought to be sustained probative of their proceedings, as well as other Courts of Judicature.

It was *answered* for the defenders, That whether presbyteries were Courts of Record or not, it was certain that the alleged proceedings, in any inferior Court, may be disproven *per membra curiæ*, as the extracts from thence may be by the original minutes; or otherwise too great a power would be given to clerks, of framing wrong minutes, and giving wrong extracts.

THE LORDS found, that the defenders might disprove the minutes of presbytery, produced for the pursuers, by proving, that the minutes produced were disconform to the records, and that the facts therein mentioned were not so done; and remitted to the Ordinary to grant commission to the Judge Ordinary of the bounds to inspect the records, and receive the oaths of the clerk and other members of the Court.

Reporter, Lord Pencaitland.

Act. Jo. Dundas.

Alt. Ja. Graham, sen.

Clerk, Hall.

Fol. Dic. v. 4. p. 165. Edgar, p. 124.

1755. March 1. HELEN MILLER *against* GEORGE BEARD.

THE pursuer *alleged*, That the defender was the father of a natural child brought forth by her, and pursued him for the expenses of the child-birth, and for the aliment of the child.

In proof of the fact, the pursuer produced the minutes of the kirk-session, bearing, that the defender being interrogated, If he was guilty with the said Helen Miller, and father of her child? acknowledged he was; and the oaths

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The minute of a Kirk-session, bearing that the defender had acknowledged himself the father of a child.