

that is the sentence of the law, which their jurisdiction gives them only authority to pronounce; and her Majesty, in whom the Privy Council powers are vested eminently, did, by her proclamation, call and authorize the ordinary Judges to put the laws in execution, which is their duty. 2. A reward of the law is no bribery, or exception against a witness. Besides, the prosecution was not at the instance of the constables, but of the procurator-fiscal. And the constables had no pretence to a reward in this case. These were not the discoverers, but went, in obedience to the magistrates' order, and seized Mackie. Again, women are habile witnesses in occult crimes, as this is. And he refused to purge himself by taking the *formula* against popery. 3. No law requires trial by an inquest before the Justices of Peace in Scotland. And the Privy Council (when in being,) did proceed in the trial of the same crime without any inquest.

The Lords refused to pass the bill of suspension.

*Page 533.*

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1711. *July 26.* MR. ALEXANDER PATERSON and others *against* the TOWN OF EDINBURGH and their assignees to the two pennies on the pint.

An Act of Parliament, June 13, 1693, gave to the town of Edinburgh, an imposition of two pennies Scots, over and above the King's excise, upon the pint of all ale and beer to be brewed, in-brought, or vended within the city, and privileges thereof (except what is sold within the palace of Holyroodhouse, and the castle of Edinburgh,) for fifteen years; and further, during the sovereign's pleasure, not exceeding thirty years; for paying the town's debt; commencing from the first of July thereafter; to be paid, uplifted, and gathered weekly, monthly, quarterly, or otherwise, as the magistrates and town-council shall prescribe and order; who are empowered to farm, and set in tack, the said imposition by way of public roup to the best advantage, at the sight of the Lords of Privy Council or their nominees. In case of misapplication of this fund by the magistrates, they, as well as the receivers of the misapplied imposition, shall be liable to refund the same with interest, to the creditors of the town, at the instance of them, or any burghess of the burgh. Two of the Lords of Session, to be named by the sovereign from time to time, with the eldest commissioners to the Parliament of the shires of Mid and East Lothian, are to inspect the town's book of accounts; and in case of misapplication or malversation, to control, and make the misappliers or malversers, liable in manner aforesaid. The debts of the city remained a very great burden, although her Majesty had been pleased to continue the grant, and there were but thirteen years thereof to run: for four of which years, Mr. William Johnston and his partners had a tack of the said imposition. In order to sink these debts, the town-council, by their act, transferred their right of the said imposition to the said Mr. William Johnston and his partners, for thirteen years, including the four years of their current tack, from the first of July, 1700, for payment of L.547 Scots, with annual-rent from Lammas thereafter.

Mr. Alexander Paterson and his partners, raised a reduction and declarator of nullity of the assignment, upon this ground, that that branch of the town's revenue was not set by roup, as the Act of Parliament above-narrated prescribes; containing a conclusion of L.500 Sterling of damages to the pursuers, against the magistrates and others of the council, who subscribed the agreement.

ALLEGED for the defenders,—No process can be sustained at the instance of the pursuers, who have no title to call the magistrates, to account for their administration.

REPLIED for the pursuers,—1. It is an inherent right in the members of every society, to see to the right management of the common good thereof; for which *actio popularis* is competent to every burges; especially considering, that he may be *subsidiarie* liable for the debts and burdens of the community, if the common stock should fail. So in the case of Sir Francis Kinloch and Sir Andrew Ramsay, the Lords sustained a declarator at the instance of private burgesses, and reduced an act of the town-council of Edinburgh, perpetuating the magistracy, as prejudicial to the rights of the burgh: and much more may they pursue the pecuniary concern and common good, whereof the magistrates are but tutors and administrators. 2. The pursuers have another title as highest offerers for the assignment: whom the magistrates rejected, by their arbitrary act in favours of Mr. Johnston and his partners.

DUPLIED for the defenders,—1. The administration and policy of burrows is under the direction of the sovereign, whose great officer in that matter, anciently, was the high chamberlain, who had his *Iter Camerarii* or his airs. *Cap. 38. of Iter Camerarii, Act 36, Par. 4. J. 4.* When these chamberlain-airs ceased, the accounts of the common good of burrows were brought before the Exchequer. *Act 26. Par 1535.* And in the *Act 39. Parliament 1693,* the care, oversight, and control of the public goods and revenues, and administration thereof, is asserted to belong to the sovereign: for, to oblige the magistrates of burghs to answer at the instance of every single burges as such, would encourage faction, to the discouragement of magistracy; *M'Kenzie, Obser. on the Act 26. Par. 4. J. 5.* Nevertheless the magistrates of burghs are not left without control; being accountable not only to the government, but also to their successors in the magistracy. It is philosophizing against the rules of the burgher constitution, to pretend that the burgesses would be liable personally for the debts, *ergo,* have right to quarrel the administration of the revenue, which should be applied for payment of these debts; for so remote possible consequences do not found a title of action. This is not *actio popularis*, which was allowed only *publici juris tuendi gratia, cuilibet ex populo*; for the pursuers insist upon their right to the subject, as burgesses of Edinburgh. Besides, popular actions, which arose under the Roman republic, do not agree with a monarchical state; and, as the doctors observe, *moribus hodiernis populares actiones exoleverunt. Wissembach Tit. ff. De popularibus actionibus; Gudelin. de Jure Novissimo, Lib. 4. Cap. 1.* Therefore this decanted notion of a popular action, can never found a title in this country, where such actions are only known by sound; except in some few cases upon a fresh notion, that laws might be made so as to execute themselves; a conceit more acceptable in speculation than ever it will be found in practice. 2. The pretence of highest offerers is no title, seeing there was no roup: and a seller hearing different proposals at different times, from

persons intending to buy, is not obliged, by hearing these proposals, to let any of them have the bargain, nay, not the highest offerer.

TRIPLIED for the pursuers,—This action doth not clash with the royal prerogative, whereof the Act 1693 is declaratory; for though her Majesty hath the decisive capacity, private burgesses may provoke to judgment. Again, though it be the privilege of her Majesty to call magistrates to account for all their proceedings in general, burgesses may pursue a particular malversation, or deed of embezzling, before the judge competent. Again, by a clause in the town's gift, burgesses and creditors are empowered to pursue the town-council for misapplying the fund; consequently, they may pursue, when, through mismanagement, the same is not rightly and fully got in. *Actio popularis* is not so circumscribed as the defenders plead it, but is more or less extensive, according to the nature of the thing. *V. G.* If any thing hazardous to the life of man, be set up in a public highway, *actio popularis* is competent to any Scottish man; and here *actio popularis* is competent to any burghess of Edinburgh, for redressing mismanagement of the common good of that city.

It was farther ALLEGED for the pursuers,—That the magistrates' assignment was null, not being conform to either of the two methods of ingathering, determined by the Act of Parliament; viz. by collection, imported by these words, to be uplifted and gathered weekly, monthly, &c. or by way of public roup, to the best advantage.

ANSWERED for the defenders,—These words in the act, “to be uplifted and gathered weekly, monthly, quarterly, or otherways, as the town-council shall think fit to prescribe,” imply an administration *cum libera*, by giving factories, assignments, or in any other probable way for the town's advantage; and the true meaning of the subsequent clause prescribing the form of a roup, was not to tie down the council to roup the impost, but because of an Act of Parliament, restraining the burrows from setting longer than three-year tacks, to declare it lawful for the magistrates to set for as many years as should be agreed upon, at the sight of the Privy Council. Now, the Privy Council being suppressed, the magistrates had full liberty to use a discretionary power, as *bonus paterfamilias*, or provident men; which they have done.

REPLIED for the pursuers,—The general “or otherways,” cannot be extended beyond the foregoing particulars; as a general clause of a discharge subjoined to particulars, is never extended beyond the species. 2. *Quorsum* would the act have left a latitude, to assign for as many years as they pleased in a private way, and yet restrained a farm to a public roup? This is to catch at words, *et interim sententiam legis circumvenire. L. 29. ff. De legibus.*

The Lords waved to advise the dilator: and found that, though process were competent at the pursuer's instance, yet the magistrates and town-council of Edinburgh, had power by the Act of Parliament, to dispose of the imposition of two pennies on the pint otherwise than by tack and public roup.