

1768. *November 18.*M'DOWAL of Castlesemple *against* MAGISTRATES of Glasgow.

IN the year 1668, the Magistrates and Town-council of Glasgow purchased the lands of Provan, and were infeft holding of the crown. The charter contains a clause, annexing and incorporating the said lands into the burgh of Glasgow, to remain inseparably therewith in all time coming. These lands were all feued out from time to time; and at last the town being oppressed with debt, sold the whole feu-duties to M'Dowal of Castlesemple, at a price above 40 years purchase. The purchaser, doubtful of his title, brought the cause into the Court of Session by suspension, insisting that magistrates and a town-council have no power to alien the common good of their town. And in particular, that the Magistrates and Town-council of Glasgow, stand prohibited by the charter above mentioned to alien the estate of Provan.

With respect to the first point, a royal burgh is a legal coporation that can buy and sell land. The common good is the property of the burgh; and was so from the beginning, even when the property of other feudal holdings remained with the superior, and the vassal had only the usufruct. A charter to a corporation, perpetual *sua natura*, transfers the property entire: A charter to a family transferred only the usufruct; because originally upon extinction of the family the superior's property became unlimited. And that the full property belongs to the town, is vouched; for the royal burghs have all along been in the use of granting feus, which an *usufructuarius* cannot do. And their power of contracting debt, which is acknowledged by statute, implies power to alien. It was never doubted that a town's common good can be adjudged for debt due by the town; and it would be singular indeed if legal diligence could not be prevented by selling land to the creditor. It is true that magistrates who act for the town, are in the common case of tutors, curators, or other administrators: They are trustees only; and if they betray their trust, they are subjected to the controul of a court of law; and to that controul they cheerfully submit.

As to the particular objection with respect to the lands of Provan, we are to consider whether the annexing clause be the deed of the King granting the charter, or of the magistrates. In an original grant of land, it would be held the deed of the superior; which the town, accepting the grant upon that condition, is bound to submit to. But in the present case, it was a charter of resignation only, which the superior could not limit. Therefore it was a limitation proceeding from the town itself; and as no obligation is created by it to any third party, it is no more but a resolution, which is alterable at pleasure.

The Magistrates did not pretend that they were subject to no controul in alienating the town's property. They were willing and desirous to justify their proceedings to the Court of Session, by showing that the sale in question was beneficial to the town, and were willing at the sight of the Ordinary to apply the price for payment of debt.

No 24.
The magistrates of a burgh have a power to alienate the town's property.

No 24. ' THE LORDS having advised the memorials, and additional memorials, and having heard parties, they found, That the lands of Provan, purchased by the town in 1668, are alienable by the Magistrates and Town-council ; and remitted to the Ordinary to see the price applied for payment of debts.'

Fol. Dic. v. 3. p. 140. Sel. Dec. No 263. p. 336.

* * * The same case is reported in the Faculty Collection.

IN 1668, the Magistrates of Glasgow, for behoof of the community, purchased the lands of Provan, which were annexed to the common good by charter, ratified in Parliament.

The lands having been feued out from time to time, the superiority was sold to William M'Dowal of Castlesemple, who suspended the charge for the price, upon the ground that the Magistrates could not give him a sufficient progress, being tied up from alienating any part of the common good.

Pleaded for the suspender ; Magistrates of burghs are merely administrators for the community ; and, so far from being at liberty to alienate, they are laid under restrictions, with regard to their administration of the annual revenue, as appears from *Iter Camerarii*, cap. 39. § 17, 18. and many acts of Parliament, as 1491, c. 36. ; 1535, c. 26. ; 1587, c. 113. ; 1593, c. 185. ; 1693, c. 28.

No example appears of actions brought against magistrates for direct alienations of the common good of the burgh, which seems not to have been attempted till now. But actions have been brought against them for smaller acts of mal-administration, as granting feus, and giving leases for a longer space than three years ; for attempting to impose burdens on the community, as in the case, *Town of Wigton contra Town of Stranraer*, No 1. p. 2495. : for discharging bonds belonging to it, as 3d March 1685, Magistrates of Glasgow *contra* Barns, observed by Harcarse, *voce* MAGISTRATES, No 20. p. 2515.

Answered ; The alienation of a superiority, an unimproveable subject, is a beneficial act of administration ; and, even in the days of Balfour, the benefit of the burgh was the criterion for determining whether the alienation was lawful or not ; *Pract. p. 45. c. 14. in fine*. Indeed, the lands now in question were no part of the original common good of the burgh, to which only the antient acts of Parliament seem to apply.

But these acts of Parliament are now in desuetude. Tacks of the common good of burghs are daily granted for a longer term than three years, and these tacks are effectual in law, when they are beneficial to the community. This appears from sundry decisions, as *Paterson contra Magistrates of Edinburgh*, No 4. p. 2496. ; *Anderson contra Magistrates of Renfrew*, No 33. p. 2539. ; *Dean contra Magistrates of Irvine*, No 23. p. 2522. In the late case of *Heriot's Hospital*, not only were feus sustained which had been granted by the governors, but even alienations of the feu-duties.

As, therefore, magistrates have been supported in granting tacks, and even feus, where they appeared to be beneficial to the burgh, it follows that the alienation of a superiority must be equally effectual; and no example can be pointed out where the contrary was decided.

' THE LORDS found, That the lands purchased by the Magistrates of Glasgow in 1668, were alienable by their successors in office; and, therefore, repelled the reasons of suspension.'

Reporter, *Justice-Clerk.*
G. F.

Act. *Ilay Campbell.*

Alt. *Alex. Bruce.*

Fac. Col. No 80. p. 328.

1774. *July 15.*

MAGISTRATES and TOWN-COUNCIL of the Burgh of PITTENWEEM, *against*
ROBERT and WILLIAM ALEXANDERS, THOMAS MARTIN, and Others.

UPON the death of Sir Harry Erskine, Baronet, previous to Michaelmas 1765, a competition arose for the district of burghs, of which Pittenweem is one, Sir John Anstruther, Baronet, and Mr Robert Alexander, assisted by his brother and partner William, having severally declared themselves candidates to represent that district in Parliament; on which occasion, John Borthwick merchant in Edinburgh was constituted by Mess. Alexanders their political agent for the burgh of Pittenweem.

The election of Magistrates and Council in the Burgh of Pittenweem, at Michaelmas 1765, being over, a complaint was brought before this Court, upon the statute 16th of his late Majesty, and also an ordinary action of reduction at common law, at the instance of Peter Ramsay and Andrew Wilson, constituent members of the Michaelmas meeting, and certain other burgesses and inhabitants, concluding to void that election, upon the ground of bribery and corruption practised on the council by Mess. Alexander and their agents; and, in particular, that these gentlemen had entered into a formal agreement with Bailie Martin, the eldest magistrate, for himself, and as authorised by his brethren of the magistracy and council, to pay off the debt of the burgh, amounting to about L. 400, besides other stipulations; and that, on the other hand, Bailie Martin engaged, in behalf of his brethren, that the council should be modelled according to Mr Alexander's pleasure at the ensuing election, and that they should support the interest of Robert Alexander, who was the real candidate, and vote for him to be their representative in Parliament.

After the summons was executed, the magistracy and council, called as defenders, assembled themselves, and resolved, by a majority of votes, to defend against the same, though Peter Ramsay for himself, and all such as should adhere to him, protested that there should be no defence; and they chose the foresaid John Borthwick for their agent, by an act of council 9th December 1765, empowering him to choose advocates to defend the town in the above

No 24.

No 25.

A bond granted by magistrates in office, for a sum to defray the expense of their own defence against a complaint upon the head of bribery and corruption, (in which the complainers prevailed) to the person employed by them to conduct that defence, and by him assigned to the person whose political agent he was, and where the principal was in the knowledge of corrupt stipulations made on his behalf with those magistrates, on which the complaint was founded, was found not binding as a debt upon the burgh.