

1752. June 30.

ANDERSON and Others, *against* The MAGISTRATES of RENFREW.

JOHN ANDERSON and others, burgesses of Renfrew, raised a reduction of a long lease of the common property, which the Magistrates and Town Council had granted.

The Magistrates and Town Council objected to the title of the pursuers, and *pleaded*, That private burgesses cannot compel their Magistrates to render account of their administration. The abuses which may prevail in the management of the patrimony of burghs, are to be corrected, not by a popular action, but by other methods which the law has appointed. Anciently these things were subjected to the control of the Chamberlain; by the 26th act, 4th Parl. Ja. V. the Magistrates of burghs were obliged to account for the common good yearly in Exchequer; and, by 28th act, 1693, it is declared, that it is the royal prerogative to oversee and control the management of the common good of burghs, and that the Crown will appoint for that purpose commissioners to be vested with the powers which were in the Exchequer. Such are the provisions made by the wisdom of the Legislature; and by these only is the administration of Magistrates to be examined, and their malversations corrected.

*Answered* for the pursuers, The purpose of this reduction is to enforce the observance of a public law, and to vindicate a right of pasturage which the pursuers have, by immemorial possession, acquired; and therefore the objection to the title must be repelled; more especially as in the case of Johnston *against* the Magistrates of Edinburgh 1735, the Lords found, that Johnston, *quid* burgess, had a sufficient title for carrying on a reduction of a feu granted by the Magistrates of Edinburgh of the mills belonging to that city.

THE LORDS found the pursuers had a sufficient title to carry on this process. *See* TITLE TO PURSUE.—JURISDICTION.

Reporter, Minto. Act. Lockhart. Alt. Advocatus. Clerk, Pringle.  
D. Fol. Dic. v. 3. p. 142. Fac. Col. No 17. p. 37.

1794. January 16.

MATTHEW COMB and Others, *against* The MAGISTRATES of Edinburgh.

THE Magistrates of Edinburgh, by an unprinted act, dated 13th June 1693, are authorised to levy a duty of two pennies Scots upon the pint of ale and beer to be brewed and in-brought, or vended, tapped, and sold within the said town, and suburbs and liberties thereof. This duty was to continue during the space of 15 years, and further during their Majesties pleasure, not ex-

No 33.

Private burgesses may pursue the Magistrates and Town Council of a royal burgh, to account for their administration of the common good. *See* No 21. p. 2515.

No 34.

An action of declarator and damages against the Magistrates of Edinburgh, sustained at the

No 34.  
instance of  
individuals;  
brewers,  
who com-  
plained of  
inequality in  
levying the  
duty of two  
pennies Scots  
on the pint  
of ale and  
beer.

ceeding the space of 30 years, as a just time and space calculated for the payment and discharge of the town's debt.

By the act, the Magistrates are directed to keep distinct accounts of the produce of the tax, and overseers are appointed to superintend their conduct in the execution of it.

By the 3d of Geo. I. this duty was continued for 19 years, after the expiry of the former statute; and additional overseers were appointed to act in concert with those named by the first act.

This duty was renewed by the 9th of Geo. I. and afterwards by an act passed in the 25th year of his late Majesty, which is still in force.

Matthew Comb, and certain other brewers liable in the duty, having raised an action of declarator and damages against the Magistrates, in which they complained that the defenders, or the collectors appointed by them, levied this duty unequally from the different traders; and asserted, that while it was exacted from them to its full amount, other traders were either totally or partially exempted, by which means the latter were enabled to undersell them at least 20 *per cent.* The Magistrates, in defence,

*Pleaded, 1mo,* The tax is the creature of statute, and every question relative to it must be regulated by statutable enactment. Unless, therefore, it can be shown, that the acts of Parliament which empower the Magistrates to levy the duty, confer upon every individual burghess, *tanquam quilibet*, a right to call the defenders to account for their management, the pursuers can have no such right at common law. Now, the acts of Parliament appoint overseers, in whom the power of controlling the conduct of the Magistrates is vested. It lies therefore with them, and not with any private party, to call the Magistrates to account.

Besides, it is a maxim of law, that no person is bound to answer as a defender in any case, or with any pursuer where an absolutor will not afford him an *exceptio rei judicatae* against a similar process, raised at the instance of any other person. Now, it is evident, that although the defenders were to be successful upon the merits in the present action, this absolutor would not operate as a *res judicata* in any process brought against them by the overseers, in whom the title to pursue is vested by the statutes.

*Answered,* The pursuers, in consequence of the conduct of the defenders, have sustained a great patrimonial loss, and must therefore at common law be entitled to redress. Even ordinary burghesses are entitled to call Magistrates to account for their management of the revenue, Anderson against the Magistrates of Renfrew, No 33. p. 2539. But the patrimonial interest of the pursuers, and consequently their title, is much stronger than that of ordinary burghesses, as they offer to prove that the favoured brewers are enabled to undersell them at least 20 *per cent.*

The overseers named by the acts of Parliament were appointed solely with the view of attending to the interest of the public, and not to that of private trad-

ers, who should be injured by the defenders in the collection of the duty. Indeed, so far as the action is brought for reparation of the damage which the pursuers have already sustained, it is evident that the overseers have neither title nor interest to insist in it; and it seems equally clear that the pursuers are entitled, by a declaratory conclusion, to guard themselves against a repetition of the injury.

The objection, that a decree of absolvitor from this process would not avail the defenders in a similar action, at the instance of different pursuers, does not apply to that part of the libel which concludes for repetition and damages. And at any rate, this objection has been over-ruled in other cases; 9th August 1765, Merchants Company and Trades of Edinburgh against the Governors of Heriot's Hospital, *voce* HOSPITAL.

THE LORD ORDINARY reported the cause on informations.

THE COURT sustained the pursuers' title, and repelled the defences stated on this point.

Reporter, *Lord Dregborn.*

Act. *Dean of Faculty Erskine, Monypenny.*

Alt. *Lord Advocate Dundas, Neil Ferguson.*

Clerk, *Menzies.*

R. D.

*Fol. Dic. v. 3. p. 142. Fac. Col. No 90. p. 201.*

---

## SECT. VI.

### Powers of a Box-master.—Liability of Interim Magistrates.

1664. *June 24.* HAMMERMEN of EDINBURGH *against* STEWART.

THE Hammermen of Edinburgh, in *anno* 1641, obtained from the King a gift of mortification of certain feu-duties belonging to the bishoprick of Dunkeld; and thereupon having charged Sir William Stewart of Innernytie, for payment of a feu-duty for certain byrun years, resting before the restitution of the bishops, he suspended upon this reason, That there being certain feu-duties resting by old Garntilly, the suspender's father, for which the suspender was charged as executor to his father, he did truly pay the same, and not only obtained a discharge thereof, but also of the same feu-duties yearly in time coming; which discharge was subscribed by the deacon, box-master, and their factor.—It was *answered*, That the discharge could not be respected, as to any further years than were truly satisfied; because, it being a mortification to the use of poor beedmen, the subscribers of the discharge had no power to subscribe the same, without true and real payment made thereof, unless they had

No 34.

No 35.

The office of box-master to a trade, being annual, the Lords found that this officer could discharge only the duties, due during his inumbency; unless the trade had given him an express warrant for discharging future duties, upon a just and one-rous ground.