

the common law before the passing of the Act, and consequently the Act leaves the question exactly where it was. I therefore think we should adhere to the Lord Ordinary's judgment.

The LORD JUSTICE-CLERK, LORD CRAIGHILL, and LORD RUTHERFURD CLARK concurred.

The Court adhered.

Counsel for Suspenders—Rhind—A. S. D. Thomson. Agent—Martin J. Brown, S.S.C.

Counsel for Respondents (Reclaimers)—Shaw—Craigie. Agents—Winchester & Nicolson, S.S.C.

Thursday, February 2.

FIRST DIVISION.

THOM (CLERK TO POLICE COMMISSIONERS OF LINLITHGOW), PETITIONER.

Burgh—Administration of Burgh Property—Nobile officium—Authority to Sell—General Police and Improvement (Scotland) Act 1862, (25 and 26 Vict. c. 101).

In a petition presented by the clerk to the commissioners of police of a burgh constituted under the General Police and Improvement (Scotland) Act 1862, the Court granted authority to sell by public roup part of the burgh property acquired by the commissioners under section 125 of the said Act.

John Thom, Clerk to the Commissioners of Police of the burgh of Linlithgow, presented this petition, in which he averred that the Royal Burgh of Linlithgow was also a burgh constituted under the General Police and Improvement (Scotland) Act 1862 (25 and 26 Vict. c. 101) and the General Police and Improvement (Scotland) Act 1868 (31 and 32 Vict. c. 102); that under section 125 of the first recited Act the Commissioners had in 1877 purchased certain heritable subjects; that these had since that date been partly let to tenants and partly used as a fire-engine house and lamp store, and that the Commissioners were desirous to obtain power to sell the same.

He further averred that the statutes referred to contained no general power of sale, and that the powers of sale specially conferred by sections 161 and 373 of the Act of 1862 would not authorise a sale of the subjects in question, and referred to the petition of Alexander Tait, Clerk to the Commissioners of Police of the burgh of Grangemouth, 1st July 1884 (not reported), in which warrant to sell the old Town Hall of Grangemouth by public roup had been granted.

The petitioner accordingly prayed for authority to sell, by private bargain, that portion of the subjects not required for the purposes of the Commissioners.

The Court, on the petition being amended so as to embrace an alternative prayer for warrant to sell the subjects in question by public roup, granted warrant to sell by public roup.

Counsel for Petitioner—Wilson. Agent—Petitioner.

Wednesday, February 2.

SECOND DIVISION.

[Lord M'Laren, Ordinary.]

MORRISON v. NEILSON.

Agreements and Contracts—Volunteer—Volunteer Act 1863 (25 and 26 Vict. c. 65), secs. 24, 25, and 27.

Held that subscriptions to the funds of a volunteer corps, made payable by rules made under the Volunteer Act 1863, and approved by the War Office in terms of that Act, are debts which may be recovered in a court of law.

A volunteer corps made in March 1885, and obtained approval of rules which, *inter alia*, provided that the honorary colonel's subscription should be a certain sum, and that all subscriptions should fall due on 31st October in each year for the twelve months preceding, and that a member should be liable for a subscription provided he had been a member for one month in any year. Held that the rule, though dated in March 1885, made the honorary colonel legally liable for a subscription at the rate fixed by it, for the year ending 31st October 1885. Lord Young *dissented*, holding that the rule ought not to apply to the year in which it was passed, but only to the twelve months which began to run after 31st October 1885.

The Act 26 and 27 Vict. c. 65, provides, sec. 24—“The officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps, and may alter or repeal any such rules, but any such rules shall not have effect unless and until the commanding officer of the corps thinks fit to transmit the same to the lieutenant of the county to which the corps belongs, and such lieutenant thinks fit to submit the same for Her Majesty's approval, and such approval, signified through one of Her Majesty's Principal Secretaries of State, is notified by such lieutenant to the commanding officer of the corps, to be by him forthwith communicated to the corps, whereupon the rules so approved shall be binding on all persons.”

Section 25, which is quoted in the opinion of Lord Craighill *infra*, provides that all money subscribed for the use of volunteer corps, and all effects belonging to it, and not the property of any individual volunteer, shall, along with the exclusive right to sue for and recover current subscriptions and other money due to the corps, vest in the commanding officer for the time being.

Section 27—“If any person belonging or having belonged to a volunteer corps . . . neglects or refuses to pay any money subscribed or undertaken to be paid by him towards any of the funds or expenses of such corps . . . or due under the rules of such corps, and actually payable by him, or to pay any fine incurred by him under the rules of such corps, such money or fine shall (without prejudice to any other remedy) be recoverable from him with cost at any time within twelve months after the same becomes due and payable as a penalty under this Act is recoverable,” &c.

This was an action in which the pursuer was Adam Morrison, the Lieutenant-Colonel and

commanding officer of the 6th Regiment of Lanarkshire Volunteers, as commanding officer, and the defender Walter Montgomerie Neilson of Queenshill, Ringwood, Kirkcudbrightshire, Honorary Colonel of that regiment. The conclusion of the summons was for the payment of £75 sterling, with 5 per cent. interest from the 31st October 1885.

The defender had formerly been Lieutenant-Colonel of the regiment, but retired in 1873, retaining the honorary rank of Colonel.

The pursuer averred that the defender was subject to all rules and regulations affecting the regiment, except in so far as honorary members were specially exempted therefrom; that by the rules of the regiment made in virtue of the 24th section of the Volunteer Act 1863, and approved by Her Majesty the Queen as required by the Act, all officers and honorary members were liable to pay an annual subscription to the funds of the regiment according to their rank, and to the scale thereby fixed; further, that all members of the corps, whether active or honorary, were liable for the full year's subscription, provided they had been members for one calendar month in each year, and all subscriptions fell due on the 31st October in each year for the twelve months preceding; that the amount of the annual subscription payable by the defender as Honorary Colonel, and which in terms of the rules fell due on 31st October 1885 for the twelve months preceding that date, was fixed by the rules at £75.

The pursuer produced a copy of the rules. It appeared therefrom that on 26th March 1885 the corps passed a new set of rules providing that there should be two classes in the corps—(1) Enrolled members, (2) honorary members, including the honorary colonel, and other officers retiring, but retaining their rank, and that all subscriptions should fall due on 31st October in each year for the twelve months preceding. "All members of either class shall be liable for the full year's subscription, provided they have been members for one calendar month in any one year." The honorary colonel's subscription was fixed by these rules at £75. The subscription fixed by these rules differed materially from those in previous rules.

The defender averred that neither the corps nor the officers had power to make these rules, and that they were *ultra vires* and illegal, especially in so far as they fixed the defender's subscription at £75 per annum; that the subscription was not imposed in order to benefit the regiment, but for the purpose of forcing the defender to resign his rank by imposing a heavy fine upon him.

The pursuer pleaded—" (4) The defender being due and resting-owing the amount sued for, the pursuer, as commanding officer foresaid, is entitled to decree as concluded for with expenses."

The defender pleaded—" (5) The alleged rules being *ultra vires* and illegal, the defender should be assolized."

On 1st July 1886 the Lord Ordinary issued the following interlocutor:—" Finds, on a true construction of the enactment contained in the Volunteer Act 1863, that the power of making rules, subject to approval of Her Majesty on the advice of the Secretary of State, includes the determination of the sums to be contributed by

officers of each rank towards the Regimental Fund: Finds that the defender's contribution has, in conformity with the said statutory power, been fixed at the sum of £75; that no cause has been shown for inquiry into the procedure relative to said rules, and that the same are *ex facie* valid, being approved of by the War Office: Therefore decerns against the defender conform to the conclusions of the libel: Finds him liable in expenses, &c.

"*Opinion.*—I am quite clear that I must give decree in this case. I think I must take it as a matter of general knowledge, of which the Court may take cognisance, that there is a Regimental Fund in connection with all the Queen's regiments, whether they are the regular forces or the volunteers, and that it is part of our military system that the officers are called upon to contribute according to a scale to this fund. If there were any doubt about this, information could easily be got from the War Office. But being part of the public administration of the country, I think I am entitled to proceed upon the general knowledge which everyone is supposed to possess of these facts—that there is a Regimental Fund to which officers are liable to contribute. That being so, and the Volunteer Act empowering the members of the corps to make rules subject to the approval of the Queen on the recommendation of Her Minister, I hold that there is a sufficient statutory authority to the persons designated to deal with this fund—to deal with it as a fund kept up in the manner that has already become matter of practice. Now, this is not the first occasion on which the officers of the corps in question have been assessed according to a scale for contributions to the Regimental Fund, because what is complained of is that the scale of contributions has been raised, and it is admitted that there has been a fund in time past. I think the defender, as I read the record, does not indeed dispute that there is such a fund, and that all the officers are to contribute to it. That being so, I do not see any good reason why rules should not be made regarding it, and approved by the War Office under the statutory power. If it could be shown that under an erroneous interpretation of the statute the approval of the military authorities has been obtained to something for which they had no statutory authority, then a question for a court of law would have arisen; but that has not been shown to my satisfaction. I conceive that the regulation of the contributions to the fund is fairly within the scope of the statutory powers; and under the statute a discretion is vested in the first instance in the corps itself, and secondly in the War Office, in the form prescribed, to enact such rules. I do not think that this Court has any power to interfere with that discretion. It is a proper matter of administration by the Executive. I think we have no more power to interfere with the War Office than the War Office would have power to review a decision of the Court of Session. But the aid of the Court is necessary in order to enforce payment of the sum when fixed; and when it is admitted that the defender has not paid, I think that decree must be given against him. I therefore grant decree, with expenses."

The defender reclaimed and argued—On a proper construction of the Volunteer Act 1863,

sec. 24, the regiment had no power to raise money compulsorily at all. Section 24 only gave the regiment the power of making rules for the management of such funds as might be raised for the use of the corps voluntarily; this view was supported by the words of section 27. Even if the power of raising funds compulsorily did exist, there was no power to raise funds from honorary officers. Honorary officers were not really members of the corps, as under section 17 they were not to be called out for actual military service. (2) For these rules to take effect under this summons they must be held to be retrospective, and that was not allowable. The rules were made in March 1885, and the subscription was said to be due on 31st October 1885, but unless the defender was honorary colonel for a month after that period he could not be held liable under these rules.

The respondent argued—The rules in question were made under the authority of the 24th section of the Volunteer Act 1863, and had been drawn up and approved of in the regular manner as sanctioned by the rules 495, 496 of the "Regulation for the Volunteer Force, 1884." Under these regulations honorary members were of two classes—(1) persons who contribute to the funds of a corps but are not enrolled for service; (2) persons who having served as efficient for a certain time were willing to rejoin their regiment when called on. The defender belonged to the first of these classes, and was bound to pay the sum allotted to him by the rules of the corps. Under the 25th and 27th sections the commanding officer had power to sue for the honorary colonel's subscription. The rules had been properly authorised in the manner prescribed by the statute, and the Court of Session could not go behind them.

At advising—

LORD CRAIGHILL—The pursuer of this action is Mr Morrison of Gartloch, Lieutenant-Colonel commanding the 6th Regiment of Lanarkshire Rifle Volunteers, and the defender is Mr Montgomerie Neilson, Honorary Colonel of that regiment. The subject-matter of suit is the sum of £75 said to be due as the defender's annual subscription to the regimental funds for the year from 31st October 1884 to 31st October 1885. The ground of action is the rules of the regiment made in March 1885 by virtue of the 24th section of the Volunteer Act 1863, for the management of the property, finances, and civil affairs of the corps, duly approved by Her Majesty, as required by that statute. The second of these rules is that the corps shall consist of two classes—(1) Enrolled members, consisting of efficient and non-efficient, and (2) honorary members, including the honorary colonel and officers, who retire or have retired with their rank, and wish to continue members of the corps, the latter class contributing to the funds of the corps, but not being enrolled for service; the third,—"All subscriptions shall fall due on the 13th of October in each year for the twelve months preceding; all members of either class shall be liable for the full year's subscription, provided they have been members for one calendar month in any one year;" and the fourth, that "the annual subscription of officers, honorary officers, and honorary members shall be

as follows—to wit, honorary colonel, £75," the annual subscriptions of other officers being in like manner particularised.

There are five pleas-in-law set forth in defence on the record, but that alone upon which argument is offered in support of the reclaiming-note was the 5th, which is as follows—"The alleged rules being *ultra vires* and illegal, the defenders should be assoilzied." The Lord Ordinary has repelled this plea, and decerned in favour of the pursuer. I concur in this judgment, and in the reasons for it which have been given by the Lord Ordinary. These appear to me to be perfectly satisfactory, and consequently little in addition requires to be said in explanation of my views of the case.

The formality of the rules is not disputed, and all the statutory conditions required for efficacy having been fulfilled. The interpretation of the rules is not doubtful. Contributions or subscriptions, according to the language of the rules, are not mere free-will offerings which may be given or withheld at the officer's pleasure. On the contrary, they are presented as matters of obligation, and it is upon this view alone that the consideration and decision of the defender's fifth, which may be said in truth, so far as his pleadings on the record are concerned, to be his only plea, becomes necessary on the present occasion. It would be strange were it otherwise, for the volunteer forces are essentially self-supporting, and wholly unpaid, although Government arms the men and contributes a certain sum towards the corporate expenditure. Provision must be made accordingly within the regiment itself for supplying its wants, and hence not merely the propriety but the necessity there is for raising funds by which this result may be accomplished. There is no hardship whatever in the arrangement, for the corps itself with the officers fixes what is to be paid. This is the plain import of the rules. Are these within the purview of the Volunteer Act 1863? This mainly depends on the interpretation of the 24th section of that statute, which enacts that "the officers and volunteers belonging to a volunteer corps may from time to time make rules for the management of the property, finances, and civil affairs of the corps, and may alter or repeal any such rules; but any such rules shall not have effect unless and until the commanding officer of the corps thinks fit to transmit the same to the Lieutenant of the county to which the corps belongs, and such Lieutenant thinks fit to submit the same for Her Majesty's approval, and such approval signified through one of Her Majesty's principal Secretaries of State, is notified by such Lieutenant to the commanding officer of the corps, to be by him forthwith communicated to the corps, whereupon the rules so approved shall be binding on all persons." The rules in question were passed by the officers and volunteers belonging to the defender's regiment. They obtained Her Majesty's approval. They were transmitted to the officer commanding the regiment by the Secretary for War, the consequence being that rules so approved of and so transmitted are binding upon all persons. No enactment could be broader or more absolute. The rules having been passed, approved, and transmitted, everyone concerned is bound. The defender, even if others could, cannot say that he is exempted from their operation,

because he is as good as named in the rules. The second rule provides, *inter alia*, that the honorary colonel and officers who retire or who have retired with their rank, and wish to continue members of the corps, shall be members, and shall contribute to the funds of the corps. This is not putting contribution in his option; it is making contribution a matter of obligation. What was said at the debate was, that though by section 24 authority was given to make rules for the management of the property, finances, and civil affairs of the corps, this does not imply authority to pass rules for raising money by making subscriptions matters of debt. This contention is, I think, erroneous. The raising of money is a necessity, and when there was power given to manage the finances and civil affairs of the corps—or in other words to provide for the requisite expenditure—it is only reasonable to hold that power was given to pass such rules as those which are the ground of action here. This has always been the recognised interpretation. The War Office acts upon it. Other volunteer regiments have acted upon it, and so far as appears the defender is the first person in his position who has resisted legal liability. But in truth the point is fixed by the closing words of the 24th section of the Volunteer Act 1863, already quoted—“The rules so approved shall be binding on all persons.” Therefore the £75 sued for is of necessity a debt due by the defender in terms of the 4th of these rules. There can be no opposite determination unless the statute is to be disregarded in the judgment to be pronounced.

In connection with section 24, section 25 of the Volunteer Act of 1863 must be taken into view. This latter section enacts that “All money subscribed by or to or for the use of a volunteer corps, and all effects belonging to any such corps, . . . and lawfully used by it, not being the property of any individual officer, or volunteer, or non-commissioned officer, or volunteer permanent staff belonging to the corps or regiment, and the exclusive right to sue for and recover current subscriptions, arrears of subscriptions, and other money due to the corps or regiment . . . shall vest in the commanding officer of the corps or regiment for the time being, and his successors in office, with power for him and his successors to sue, to make contracts and conveyances, and to do all other lawful things relating thereto.”

Subscriptions therefore are things that may be sued for, which they could not be if the officers of the regiment particularised in the rules were not under legal liability for them. The two sections taken together make it quite clear. The sums mentioned in the rules are debts in the ordinary acceptation of the word, and may be sued for as such by the officer commanding the regiment. This 25th section is not necessary for the case of the pursuer, but it is very convenient.

The defender, however, urged at the debate that the rules in question could not be acted on to the effect of giving judgment against the defender, because that would be to give to the rules a retrospective operation. I was somewhat impressed with this consideration when it was first presented, but I have come without much difficulty to the conclusion that it must be overruled. The rules must receive effect. This is matter of statutory enactment, and accord-

ingly, as rule 3 provides that all subscriptions shall fall due on the 31st of October in each year for the twelve months preceding, and that all members of either class shall be liable for the full year's subscription provided they have been members for one calendar month in any one year, and as the fact is that the defender has been a member of the corps and honorary colonel for more than one calendar month in the current year, his liability for his subscription of £75 must be held to be established.

On the whole matter my opinion is that the decision of the Lord Ordinary is right and ought to be affirmed.

LORD RUTHERFURD CLARK—I agree in that opinion.

LORD YOUNG—This is, I think, an unpleasant case. I put the question when the case was argued to us whether any similar case had ever occurred, and I think the answer was that none had. It is therefore the first case of an officer of a volunteer corps and his brother officers getting upon such terms that an action is brought in the Court of Session—the remark applies to any other Court—against him for his subscription to the corps. I should have thought—and past experience seems to prove it, if it be true that this is the first case of the kind—that subscriptions which are really due, whether in law or in honour or in good feeling, are recoverable without resorting to a court of law, and that, if not recoverable, the corps had better go without them and without the officer. Because, in so far as subscriptions or any other payments stand upon the Queen's authority, they may be enforced against any officer who is contumacious in resisting that authority by the War Office without anything so unseemly as an action in a court of law.

But this case seems to have been brought, or at least defended, in order to determine a general question of law. The only defence which is here stated is, that the rule under which the subscriptions sued for is imposed is illegal. There is a statement to that effect, and the plea-in-law founded upon that statement is as follows—“The alleged rules being *ultra vires* and illegal, the defender should be assoilzied.” That is the fifth plea; the others might be stated as well in any other case as in the present. That plea is stated of course in reference to the particular case in hand, and the action is brought to recover a subscription for the year from October 1884 to October 1885 as prescribed by these rules. I must concur with my brethren in holding that these rules are legal, and therefore binding. It is suggested—and I must say there is an unpleasant amount of plausibility in the suggestion—that the officers of the regiment, having not a good feeling towards their Honorary Colonel, but rather the reverse, made the rules for the purpose—and only for the purpose—of introducing into them the provision that the Honorary Colonel should pay a subscription of £75 a-year, which was represented to us as an altogether extravagant and unprecedented sum. I asked if there was any precedent for such a thing, and I got much the same answer as I did to the question whether there was a precedent for such an action: I was told there was none. The defender said this was

done behind his back, and without any notice to him, and it was, he says, to his surprise, and of course pain, that he found that such a proceeding had been resorted to behind his back in order, as he believed, that he might be forced to resign. I should have wished that there had been less countenance given to this surmise as a probable one in itself from the actual facts of the case. But I concur with the Lord Ordinary upon that—I understand it is also the opinion of your Lordships—that upon that question we cannot enter here. If he has been really ill-used, and taken advantage of in an unworthy manner, he ought to have recourse to the War Office authorities, who are perfectly competent to inquire into the matter, and if they see fit, to redress any such iniquity if such was perpetrated. Of course it may not be supposed that the War Office authorities would countenance any indirect attempt to get forward the one side of a quarrel the object of which was to get rid of the honorary colonel of a regiment, and if the answer to any resort on the part of the officer to the War Office was this, “This is all right, and as we intended, and there is precedent for it in other cases,” then of course the honorary colonel, irrespective of all those other matters, would be acting unworthily and contumaciously if he refused payment. And if he did refuse payment in any such circumstances, there is a remedy without coming to a court of law at all. But since the case is here, I agree that we cannot make an inquiry in regard to that matter, because we cannot give any remedy or redress so far as it is concerned. I concur that the rules are lawful and binding, and that the subscription, whether a voluntary subscription or a subscription due by the rules of the corps (by that I mean lawful and binding rules, as the rules in question are), may according to the Act of Parliament be recovered by action, and may even be recovered as a penalty may be recovered without prejudice to other claims and remedies. Therefore, if the rules apply here or to the subscription sued for, I should concur entirely in the judgment of the Lord Ordinary, and with that which your Lordships are to pronounce.

But then the question arises, Do these rules apply to the year in question the subscription for which is sued for? The year was that from 31st October 1884 to 31st October 1885, as I have already stated, and as is set out in Cond. 4. It is further said there—“This sum” [that is, the sum of £75] “fell due in terms of said rule on the 31st day of October 1885 for the twelve months preceding.” Now, it should be observed that the rules relied on are dated 26th March 1885. According to the previous practice, and according to existing rules, subscriptions are annual. Subscriptions for the year begin and end on the 31st October. They are as much “annual” as rents would be or are in the general case; as much “annual” as rates would be or are in the general case. This, then, is a subscription for the year from 31st October 1884 to 31st October 1885. Does a rule made in March 1885 apply to that year? I am of opinion—and I confess very clearly of opinion—that it does not. If the rule had said so—that it shall apply to the current year, six months of which had passed—of course it would have to receive effect. But with respect to retrospective, or only prospective operation, I cannot read the rule otherwise

than I would read an Act of Parliament. If an Act of Parliament, passed in the month of March 1885, dealt with an annual tax or rate which ran from October to October, I think it too clear to be disputed that it would not apply to a tax for the current year, but that its operation and application would begin with the commencement of the following year. A subscription for the year 1884-1885 stands upon another rule or upon no other at all. It is the same case as I have put by way of illustration; it is just as if a rate or tax for a current year stood upon a prior Act of Parliament. Any Act of Parliament for increasing a rate or reducing a rate must be passed in a current year, for there is no interval, and there never is an interval. What, then, is the rule of operation? Is it retrospective, so that it will increase the rate for the current year I think very much otherwise, and but for the opinion which your Lordships have to the contrary I should have felt no doubt or hesitation about it. Neither the rule, which by Act of Parliament is imperative, nor the provision of the Act of Parliament itself, is read as retrospective. If it relates to an annual tax, an annual burden, annual rent, or annual subscription, it applies to the tax, rent, burden, or subscription for the year immediately following the passing of the Act of Parliament. The rule says—“All subscriptions shall fall due on the 31st October in each year for the twelve months following.” Well, but the only annual subscription which follows this rule—that is, which immediately follows it—begins in October 1885, which is the commencement of the first year after the passing of the Act. Take another month. If the rule had been passed in the month of August, or any month before October, would its operation have commenced in the month of October preceding or following? The rule containing nothing on the subject, there can in my view be no doubt when its operation would commence. I must say that upon this point I have a very distinct and clear opinion.

Therefore, agreeing with your Lordships and the Lord Ordinary upon the merits of the case, that the rule is binding and that the subscription under the rule is a debt recoverable by action, I differ upon the other point, being of opinion that the rule founded on has no application to the annual subscription which is here sued for.

The judgment of the Court, in accordance with the opinion of your Lordships, will be to refuse the reclaiming-note and affirm the interlocutor.

The Court adhered.

Counsel for Pursuer — Pearson — M'Lennan.
Agent — James Skinner, S.S.C.

Counsel for Defender — Graham Murray—
Dickson. Agents—Webster, Will, & Ritchie,
S.S.C.