

[16th August 1839.]

(Appeal from the Court of Session, Scotland.)

WILLIAM LECKIE EWING and others, Appellants.¹

(No. 31.)

[*Knight Bruce—H. Robertson.*]

GLASGOW COMMISSIONERS OF POLICE, Respondents.

[*Pemberton—A. McNeill.*]

Title to pursue — Statute 1821 (Glasgow Police).— Held (affirming the judgment of the Court of Session) that residenters in Glasgow, rateable in police taxes, had no title as such, at common law, nor under the above police act, to sue the police commissioners, on behalf of themselves and others, for misapplication of the police funds.

THE appellants reside or occupy property in Glasgow, in respect of which they are liable to the police assessments.

2D DIVISION.

Ld. Cockburn,
Ordinary.

An act of parliament which was passed in the year 1821, for establishing a police for the city of Glasgow, among other things provides for the election of general commissioners, to whom is committed the power of carrying the purposes of the act into execution. The act also specifies very particularly the purposes for

¹ 15 D., B., & M., 389; Fac. Coll. 19th Jan. 1837.

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which the general commissioners are authorized to levy assessments upon the inhabitants liable to pay them, as also the way in which the amount of the necessary assessments is to be ascertained. By the 124th section appeal to the Circuit Criminal Court is allowed, and by the 133d section it is declared, that “no
“ action shall be commenced against the magistrates
“ and other commissioners for any thing done in the
“ execution of this act after three calendar months
“ from the time the act is committed,” it being “com-
“ petent to the trades house and merchants house to
“ bring actions against the board of commissioners, or
“ the board against its predecessors in office, in the
“ Court of Session or Exchequer, for misapplying
“ the funds, within twelve calendar months after the
“ offence.”

There are two companies for supplying the city of Glasgow with water, established under separate acts of parliament, the one under the name of the Glasgow Waterworks Company, and the other under the name of the Cranstonhill Waterworks Company. A proposal having been made to unite the two companies, by an arrangement under which the Glasgow company should, under authority of an act of parliament to be obtained, purchase up the Cranstonhill company's property and works, a bill was introduced into parliament (session 1834), to obtain an act authorizing this agreement to be carried into effect. This bill was strongly opposed by various public bodies, and among others by the general commissioners of police, who sent up a deputation to London to oppose the bill. A resolution was passed at a meeting of the board on the 13th February 1834, by a majority of twenty-one

to four, “ That the committee be authorized to co-operate
 “ with the public bodies in giving effect to the resolu-
 “ tions of the board, by opposing the proposed monopoly
 “ in the supply of water, and to constitute a propor-
 “ tional expense of the opposition.” The bill having
 been successfully opposed in parliament, and the ex-
 pense incurred by the deputation having been ascer-
 tained, the board of police, by two resolutions, dated the
 17th and 24th July 1834, ordered payment from the
 police funds of two sums of money, that is, of 47*l.* 7*s.*
 and 600*l.*, towards their share of the expenses.

The appellants brought a process of suspension and
 interdict, and afterwards raised an action of reduction
 and repetition against the respondents, (both bearing to
 be at the instance of certain private individuals,) setting
 forth, as their title, that they were “ residenters in
 “ Glasgow, or occupiers of property there, and rated in
 “ the police books as liable in the payment of police as-
 “ sessments under the police act, and who have hitherto
 “ been assessed accordingly,” and concluding for reduc-
 tion of the two resolutions of the 17th and 24th of
 July 1834, as in contravention of the police statute,
 and to have the commissioners who attended the
 meetings held on those days respectively ordained, “ as
 “ individuals, conjunctly and severally, to repeat and
 “ pay back, or to procure to be repeated and paid back,
 “ into the hands of the said police establishment, the
 “ respective sums of 47*l.* 7*s.* and 600*l.*, which they
 “ illegally and wrongfully authorized, sanctioned, and
 “ ordered to be paid away out of the said funds as be-
 “ fore mentioned, for the purpose of defraying the
 “ expense in part of opposing the said water company
 “ bill, to the effect that the said funds belonging to the

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“ said police establishment may be in the same state
 “ as if the said resolutions had not been passed and
 “ the foresaid sums had not been paid away.” The
 two actions having been conjoined, a record was made
 up. The respondents, inter alia, objected to the
 title of the appellants, and the Lord Ordinary pro-
 nounced the following interlocutor on the 2d February
 1836 :—“ Sustains the title of the pursuers ; repels the
 “ objection to the jurisdiction of the Court of Session ;
 “ finds that the action is not cut off by the statutory
 “ limitation of three months ; finds that the defenders
 “ had no right to levy or apply the sums in question,
 “ or any part thereof, in defraying the expense of op-
 “ posing the bill in parliament, specified in the sum-
 “ mons ; therefore reduces, decerns, and declares in
 “ terms of the first conclusion of the summons ; finds
 “ the defenders liable in the expenses of this branch of
 “ the discussion ; appoints an account thereof to be
 “ given in, and when lodged remits to the auditor to
 “ tax the same, and to report ; and quoad ultra, appoints
 “ the case to be enrolled.”¹

¹ To the above interlocutor his Lordship appended the following note :—

“ *Note.*—None of the principles or authorities about popular actions
 “ apply to this case ; there can scarcely be conceived to be a better title
 “ and interest than that which a person who is taxed illegally has to resist
 “ that tax, at least in so far as relates to his portion of it. The 133d
 “ section of the statute confers a right of action on certain public bodies ;
 “ but giving these a statutory title does not take away any title belonging
 “ by law to individuals ; and even as to these bodies, their right is
 “ confined to cases affecting the misapplication of funds vested in the
 “ commissioners, whereas part of the objection here is, that the defenders
 “ went beyond their powers, and assessed for sums, which, for this
 “ reason, could not be legally vested in them.

“ Section 124 makes an appeal to the Circuit Court lawful, but the
 “ clause plainly does not apply to questions like this ; and, at any rate,

The respondents presented a reclaiming note to the Second Division of the Court, and their Lordships, upon

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“ the ordinary jurisdiction of the Court of Session to protect against
“ excess of power is not taken away. The two sections which precede,
“ and which follow this one, make it clear that the 124th only applies to
“ proceedings in which the person aggrieved was judicially a party.

“ Section 133 limits actions for things done ‘ in execution of this act,’
“ to three months, but this does not apply to cases where the complaint is
“ that the defenders went out of the act; and besides, the act specially
“ challenged took place on the 17th and on the 24th of July, and the
“ action was raised on the 13th October. There were resolutions, no
“ doubt, of February before, to do these acts, which prospective resolu-
“ tions are not brought under reduction; but it was unnecessary for the
“ pursuers to challenge, not merely the act which injured them, but all
“ the votes by which it may have been preceded; if it were, every act
“ might be saved from objection, by being preceded by a resolution above
“ three months before, which, in itself, may do no harm, and of which
“ the party hurt may never hear. In this very case it does not appear how
“ there was any personal interest in any body to interfere, for nothing
“ actually touching any individual was done; there was merely a barren,
“ general, and revocable resolution, that at some future time an unnamed
“ proportion of the expense would be paid.

“ On the merits the Lord Ordinary has abstained from deciding any
“ thing at present, except the first conclusion of the reduction, because
“ the other matters cannot very well be extricated till the general
“ principle be fixed; and if his view of this principle be wrong, it is
“ needless to compel the parties to go minutely into the rest of the
“ case.

“ He is not moved in deciding the reductive conclusion by any con-
“ siderations of expediency; he goes upon the statute alone, and his
“ general opinion is, that the defenders, as police commissioners, have no
“ particle of power, except what they can show that they possess in
“ virtue of the act of parliament which creates them, and that he cannot
“ discover, by any legal reading or construction of that act, that they are
“ authorized to assess for the purpose of opposing or of advancing any
“ parliamentary bill whatever.

“ The case of the defenders rests on the averments, that the bill in
“ question was hurtful to the inhabitants, and interfered with the ex-
“ isting police act, and that, without their official co-operation, it could
“ not have been defeated. It is, and always must be, one of the mis-
“ fortunes of permitting such applications of the funds, that any court, in
“ judging of their propriety, must consider the truth of such averments,
“ and that these are scarcely capable of being judicially ascertained. It
“ appears, from this process, that there are persons in Glasgow who hold
“ that the bill was of a beneficial tendency for the people,—that any
“ obnoxious clauses might have been given up or arranged,—that it

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advising mutual cases, pronounced the following interlocutor on the 19th (signed the 20th) January 1837 :—

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“ could have been thrown out without the defenders help,—and that, at
 “ any rate, their expenditure in obstructing it was extravagant. If the
 “ defenders are not to get unlimited credit, these points must be fixed
 “ before the propriety of what they did can be determined by this Court ;
 “ and how they are to be determined the Lord Ordinary does not know.
 “ They are, to a great extent, matters of mere opinion ; however, he
 “ assumes, in argument, that they are all clear in the defender’s favour ;
 “ still, he cannot discover that legislation was any part of the commis-
 “ sioners business, at least at the expense of the police funds.

“ The general import of the statute is, that the commissioners are to
 “ keep up a proper establishment of officers, and are to see that the city
 “ be watched, cleaned, and lighted, and that they may levy funds for the
 “ purposes herein directed, ‘ and for the other necessary purposes of this
 “ ‘ act, and for no other purposes whatever ;’ this gives them ample
 “ authority to do any thing, such as even raising or defending actions
 “ necessary for the fulfilment of these objects. But, is opposing bills in
 “ parliament one of them ? If the new bill contained clauses injurious to
 “ the public, and repugnant to the existing police act, this may have
 “ excited the public to resist ; but what part of the act says or implies
 “ that the commissioners may not only assess for administering the
 “ statute, but for perpetuating all its parts by obstructing parliamentary
 “ change ? If a bill were to be introduced for repealing the police act,
 “ or for altogether abolishing the police, the Lord Ordinary has no idea
 “ that even such an extreme proposal could be lawfully opposed at the
 “ expense of the ordinary funds. The commissioners had no property in
 “ the police funds or privileges, so as to be entitled, like many other
 “ public trustees, to take all measures calculated to maintain or to extend
 “ their interests ; they were the mere official servants of the public, under
 “ this single and temporary act, so that their preventing a change of the
 “ statute could never be part of their implied duty of putting the statute
 “ as it stood into execution. If such a power was meant to be conferred,
 “ it is odd how it was not mentioned, especially as minuteness is the
 “ principle on which the statute is constructed ; there are about fifty or
 “ sixty sections, specifying what the commissioners may do ; they are not
 “ even allowed to fill up dangerous holes in the street without a clause.
 “ It is difficult to believe that, amidst such jealous precision, it was
 “ intended that so peculiar and irresponsible a power as that of agitating
 “ local bills at the expense of the people, nay, at the expense partly of the
 “ very persons opposed to the commissioners in that proceeding, should
 “ be conferred without any special words at all. If it had been proposed,
 “ in direct terms, to insert a clause in the police act for authorizing the
 “ commissioners to assess the people for the expense of opposing bills
 “ which they thought hurtful to their police system, its probable fate may

“ Recall the interlocutor complained of; sustain the
 “ objections to the title of the pursuers, as laid in this
 “ action; repel the reasons of suspension and reduc-
 “ tion; dismiss both actions, and decern; find ex-
 “ penses of process due; allow an account thereof to
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The suspenders and pursuers appealed.

“ be conjectured from the fact, that no such clause can be produced
 “ in any statute; even when parliament means to permit the individual
 “ bill which it passes to be assessed for, this is always specially enacted, as
 “ it was in this very Glasgow act.

“ It is not necessary to notice the defenders plea under the second
 “ section, except for the purpose of showing the length to which their
 “ argument leads, and the applications of which it admits in other cases.
 “ These sections declare it to be the duty of the commissioners ‘ to have
 “ ‘ a general superintendence of their respective districts,’ ‘ and take all
 “ ‘ measures for preserving the general peace, order, and comfort of the
 “ ‘ inhabitants thereof;’ from which it is inferred, that wherever comfort
 “ is concerned, which it was here, as water and pavement were concerned,
 “ assessments may be imposed. For the same reason, churches, and
 “ prisons, and hospitals, and theatres, and public baths, and other such
 “ things, all most essential, not only to comfort, but to order and peace,
 “ may be erected.

“ This is an individual case, but the similarity of all police bills makes
 “ it one which may be acted upon almost wherever these statutes exist;
 “ and if once the power be recognized, as conferred by implication, it is
 “ not difficult to see what use may be made of it. The general burgh
 “ police act may be supposed to contain the essence of all the power which
 “ parliament thought it necessary for police commissioners to have; it
 “ contains no clause empowering them to assess for bills. But, if such a
 “ power be implied in their mere position, then it may be exercised in
 “ every burgh in Scotland. Something may be said in favour of the
 “ system of establishing boards all over the country, to exercise, at the
 “ expense of the public, a discretionary power of promoting, or of thwart-
 “ ing local parliamentary projects; but something may surely be said
 “ against it. The defence that they only interfere to resist schemes
 “ touching their existing powers, affords no protection to the lieges,
 “ for there is scarcely any local bill which may not be truly said to
 “ do so.”

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Appellants.—The appellants have a direct interest, and a good title, to pursue the conjoined actions of reduction and of suspension against the respondents; the object of these actions being to prevent an illegal assessment from being levied upon them in future, and to obtain relief, in the only competent manner, from the effects of illegal assessments which have been already exacted.

It is maintained by the respondents that the actions of reduction and suspension were of the nature of a popular action; that the appellants had no substantial, direct, peculiar, or immediate patrimonial interest in the matter in question, such as to entitle them to pursue. But the answer is obvious; the interest which entitles the appellants to complain of illegal assessments, by which money has already been taken out of their pockets, and in consequence of which they have grounds to apprehend farther spoliations, is a patrimonial interest of the most substantial, direct, and immediate kind.

The just and sound view of the statute seems to be the converse of that contended for by the respondents, as the statute plainly supposes that the rate-payers have a good right and title to complain of illegal or excessive assessments made upon themselves, and gives them every facility for rendering that right available; and it has even made anxious provision for bringing to the knowledge of all the rate-payers in due and sufficient time the whole details of the respondents conduct in the execution of their power. The annual accounts of the respondents, containing a statement of the receipts and disbursements of the year, are directed to be made out and printed, published in the newspapers, and lodged in the council chambers of the city for six weeks,

open to the inspection of every rate-payer without fee or reward; and it is provided generally that the whole books of the commissioners of police, containing all their minutes of procedure, are to be accessible to every rate-payer who may wish to peruse and inspect the same without fee or reward. For what purpose were these anxious provisions made for the information and satisfaction of the rate-payers, unless it was to enable them to judge whether the commissioners of police had properly performed their duties as prescribed by the statute, whether they had not exceeded their powers in levying assessments, or whether they had not improperly employed the assessments levied? If in any of these respects the board of commissioners transgress the statute upon which their powers depend, it is clear that the rate-payers have a good title, as well as a good interest, to object to such illegal proceedings.

In fact, the rate-payers are the only parties who have a title to challenge irregularities or excess of power in the imposing of the assessments; for it will be remarked, that the power of bringing actions against the board of commissioners, conferred by section 133, upon the three public bodies, before the Courts of Exchequer or Session in Scotland, does not relate to the levying of the assessments, but merely to the “embezzling, squandering, or misapplying the funds vested in them by this act.”

Under the 133d section of the act there is a general limitation of all actions to be raised against the board of police, as to any thing done in the execution of the act, to three calendar months from the time the act was committed. This is the general rule. But then there is an exception from that general rule introduced in

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favour of certain public bodies in regard to a certain description of actions, which are rendered competent at their instance, at any time within twelve calendar months after the offence for which such action may be raised shall be alleged to have been committed. These privileged actions must be raised in the Courts of Session or Exchequer, and they must relate exclusively to the embezzling, squandering, or misapplying the funds vested in the commissioners by the act. The privilege has no relation to actions brought in regard to excess of power assumed by the police board in imposing assessments. Such actions, under the former words of the section, must in every case be brought within the three months. Even within the three months it does not appear that the public bodies in their corporate capacity have any right to bring such action.

The privilege in question conferred upon these public bodies seems to be grounded upon the contribution to the police funds annually made out of the city revenues. The privilege consists in these public bodies being allowed to raise their action at any time within twelve months, instead of being limited to three months, and constitutes an exception to the general rule, and cannot be considered as superseding the ordinary right of action to which the limitation of three months applies.

The rate-payers cannot be held as deprived of their title to resist illegal assessments by the section of the statute in question, because no such right of action is conferred on the public bodies. The Lord Ordinary in his note has most justly observed, "The 133d section of the statute confers a right of action on certain public bodies; but giving these a statutory title, does

“ not take away any title belonging by law to individuals.”¹

Respondents.—The present is an action of reduction and repetition, which does not set forth any direct private and patrimonial interest in these appellants, or conclude for any thing to be paid to themselves, nor is it an action in the name of each, setting forth that some portion of the grievance complained of has fallen upon him, and seeking redress to that extent. There is no conclusion for reduction, or repetition generally, or to any particular extent or amount, in favour of the appellants, either individually or collectively. It only points at some remote benefit or relief from a burden already imposed, to be derived from a successful issue of the action. It is a sufficient objection to the title to pursue in such an action as this, that by the law and practice of Scotland parties are not entitled to sue, where there is not a personal, distinct, and direct patrimonial interest to maintain the action. A remote, contingent, or possible interest, and far less any such imaginary interest as is here set out, will not sustain an action.

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¹ Johnston v. the Stentmasters of Kelso, 25th June 1800, Fac. Coll. No. 187, Mor. 12426, Ap. 1, Title to pursue, No. 1; Cowan v. Wigton, Magistrates of, 23d June 1782, Fac. Coll. 9, 73, No. 46, Mor. 16133; Anderson v. Magistrates of Renfrew, 30th June 1752, Fac. Coll. 1, 35, No. 17, Mor. 2539; Lang v. the Magistrates of Selkirk, 2d Dec. 1747, Elchies, Burgh Royal, No. 27, and 28th Nov. 1748, Mor. 2515; Dean v. the Magistrates of Irvine, 3d July 1752, Mor. 2523; Gilchrist v. the Magistrates of Kinghorn, 5th March 1771, Mor. 7366; the Merchant Company of Edinburgh v. the Governors of Heriot's Hospital, 9th August 1765, Mor. 5750; Finlay v. Newbigging, 15th Jan. 1793, Fac. Coll. 11, 21, No. 10, Mor. 2008; Wilson v. Scott, 16th June 1793, Mor. 2010; Montgomery v. Macausland, *ibid.*; Aitchison v. Magistrates of Dunbar, 4th Feb. 1836, 14 D., B., & M., 421.

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The appellants themselves repudiate the idea, that their action can be maintained upon the principle of the popularis actio of the Roman law; no such species of action finds a place in the books, or is recognized in courts of law in Scotland, and to entertain such actions would be quite subversive of what is fully established as the law of that country.

A board of commissioners is here established, with certain powers as to levying and applying monies raised for the purposes of the act, and those funds are vested in them, and placed under their control in terms of the statute. The commissioners are subject, no doubt, to be called in question by the statute, by certain bodies empowered by the legislature to do so, but mere individual rate-payers cannot, by any such action as the present, interfere with or paralyze the management of the board acting under the statute.

There is no principle recognized in the decisions of the Scotch Courts which warrants the observation of the Lord Ordinary, that “there scarcely can be conceived to be a better title and interest than that which a person who is taxed illegally has to resist that tax, at least in so far as relates to his portion of it.” The very object of the Glasgow police act, in giving certain independent bodies the right of challenge, was to exclude all attempts on the part of individuals to impede or to frustrate the measures of the commissioners.¹

¹ Wigton, 23d June and 1st July 1735, Mor. 1985; Burgesses of Inverury v. the Magistrates, 14th Dec. 1820, Fac. Coll.; Trinity House of Leith v. the Magistrates of Edinburgh, 6th Feb. 1829, Fac. Coll. No. 66, 7 S. & D. 374; Burgesses of Lauder v. the Magistrates, 17th May 1821, 1 S. & B. 17.

LORD CHANCELLOR.—My Lords, the judgment of the Court below in this case was founded on a defect in the title of the pursuers, and did not profess to decide the merits; the decision of the case on appeal, therefore, must depend on the same consideration. The interlocutor appealed from recalling the interlocutor of the Lord Ordinary, sustained the objections to the title of the pursuers as laid in the actions, and dismissed the actions. Those actions were, first, of suspension and interdict, and, secondly, of reduction and repetition; in both the pursuers described themselves as residents in Glasgow, and occupiers of property there, and rated in the police books as liable in payment of police assessments under the police act, and as having been assessed accordingly; and in both they professed to sue for themselves and for all those who had adhered to them, and whose names and designations were to be specified in a minute in the proceedings. The complaint is against the commissioners appointed under the police act for the city of Glasgow, for having applied sums of money, raised under the powers of that act, for purposes alleged not to be authorized by that act; — that is, in contributing towards the expenses of an opposition in parliament to a bill respecting the water companies to supply that city with water. The letters of suspension and interdict prayed that the defenders, the commissioners, might be interdicted from applying any of the monies raised or to be raised under the powers of the police act to those purposes, and from levying any sums in whole or in part for such purposes; and the summons of reduction and repetition concluded that the resolution and act of the commissioners for those purposes might be rescinded

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and declared void, and that the commissioners, who were parties to the payments already made, might individually repay to the police fund the monies so alleged to have been misapplied.

Lord Cockburn, the Lord Ordinary, by his interlocutor of the 2d of February 1826, sustained the title of the pursuers, and repelled the objection to the jurisdiction of the Court of Session. This interlocutor was, upon a reclaiming note to the Second Division, recalled, and the objections to the title of the pursuers, as laid in the action, were sustained.

The title of the pursuers to sustain these proceedings may be considered, first, without reference to the particular provisions of the police act; secondly, with reference to such provisions. It is admitted that what is known under the denomination of a popular action forms no part of the law of Scotland; and the Lord Ordinary, in his appended note, says that none of the principles or authorities about popular actions apply to this case. The title claimed by the pursuers to sue in this mode and for this purpose is a question purely of Scotch law and practice, and must be decided by the precedents adduced.

The appellants (the pursuers) first rely upon the case of *Johnston v. the Stentmasters of Kelso*¹ (ante, p. 857). In that case one of the inhabitants of Kelso brought an action before the sheriff against the treasurer of the stentmasters for production and examination of their accounts, in which he failed, and he then, in his own name, raised an advocacy and declarator before the Court of Session. The pursuer's title was objected

¹ *Johnston v. Stentmasters of Kelso*, 25th June 1800.

to; but he contended that every burgess had an interest to investigate the ground of taxation and amount leviable against himself. The Court, as is said, considered the pursuer's title sufficient; but there was less room to investigate this minutely, as the defenders were thought clearly right on the merits. This, then it must be observed, was not a decision upon the point of title, besides the object of the suit was very different from that now under consideration; the case, therefore, may be altogether rejected.

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The next case relied upon by the appellants is *Finlay and others v. Newbigging and others*, 15th Jan. 1793¹ (ante, p. 857). In that case *Finlay*, a member of a corporation, disputed the application of a sum of money raised upon the members of it, and having refused to continue the annual payment enforced upon him, the corporation resolved to set him aside from the trade, and that he should not be called to any meeting whilst he continued in arrear; whereupon he, and others in the same situation, brought a process of declarator against the deacon and the members of the corporation. In this case the propriety of the application of the funds was discussed, and so far might have been applicable to a discussion upon the merits of the present case; but as to the actual question of the pursuer's title it seems likewise to have no application. The pursuers complained of a personal injury in their exclusion from the corporation; the form of action and its objects were totally distinct from that now under consideration.

The next case is that of *Wilson v. Scott*² (ante, p. 857).

¹ *Finlay and others v. Newbigging and others*, 15th January 1793.

² *Wilson v. Scott*, 16th June 1793.

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That was a bill of advocation, complaining of the judgment of the magistrates of Glasgow, who, upon the complaint of members of a corporation, had held the application of certain funds illegal, and directed the officers to repay them. The Court of Session repelled the reasons of advocation, and remitted the cause simpliciter to the magistrates. In that case the only question could have been as to the jurisdiction and judgment of the magistrates, and not the original jurisdiction of the Court of Session, which is the point in this cause.

The same observation applies to the next case relied upon, — *Macausland v. Montgomery*¹ (ante, p. 857). Upon a complaint to the magistrates of Glasgow by Montgomery of an order by the trades house for the payment of a sum of money, of which it was alleged there had been an improper application, the magistrates pronounced an interdict prohibiting the payment; whereupon the deacon, conveners, and others, complained of the judgment of the magistrates by bill of advocation, and at the same time brought an action of declarator to ascertain the powers of the majority of the trades house in the management of its funds. The Court of Session continued the interdict of the magistrates, and, in the declarator, decided the question of right upon a ground quite peculiar to that particular case. The merits of the judgment of the magistrates was the only matter in question. Their jurisdiction in the first instance, and that of the Court of Session afterwards, was not in dispute; that case, therefore, has no application to the present, upon the point now under consideration.

The case of the Merchants Company and Trades of

¹ *Macausland v. Montgomery*, 16th January 1793.

Edinburgh v. the Governors of Heriot's Hospital¹ (ante, p. 857,) is more applicable; in that case the defenders, being trustees of a charity for poor fatherless boys of burgesses and freemen of Edinburgh, — the pursuers being the merchant company and incorporations of the city, — a process was brought against the governors, concluding to have it found that the governors had no power to feu the charity lands, or, if they had, that the next feuar might be put under certain restrictions. Objections were made to the title of the pursuers, the Lords sustained the pursuers title to carry on the process; but they being of opinion in favour of the defenders upon the merits, no opportunity was offered of questioning this decision upon the point of title; this case was as early as 1765.

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In Aitchison v. the Magistrates and Town Council of Dunbar², (ante, p. 857,) the majority of the town council, describing themselves as burgesses and town councillors, instituted a suit in the Court of Session concluding for reduction of an act of the town council, in which the pursuers were the minority. It was objected, that as burgesses they could not sue, having no private or patrimonial interest in the subject; for the pursuers it was not disputed that the rule of law was against their title to sue as burgesses, but it was contended that, as members of the town council, they were entitled to demand the judgment of the Court of Session, as to the legality of the act of that body. Upon that distinction the Court sustained the pursuers title, the Lord Justice Clerk

¹ Merchants Company of Edinburgh v. Governors of Heriot's Hospital, 9th August 1765.

² Aitchison v. Magistrates of Dunbar, 4th February 1836.

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saying¹, “ The present question has nothing to do with
“ the right of individual burgesses to complain of acts of
“ the magistrates, because the actions were brought at
“ the instance of four constituent members of the town
“ council. The Court of Session is the only tribunal
“ competent to reduce an illegal act or declare its
“ illegality.” Not only, therefore, is this not a case in
support of the title of the present pursuers, but it is a
case in which the reverse was admitted at the bar, and
assumed in the judgment.

Three cases were principally relied upon by the respondents (the defenders): the first that of the Burgesses against the Magistrates of Inverury, 14th December 1820² (ante, p. 858); several burgesses instituted an action against the magistrates, who were charged with misapplying part of the burgh funds, and concluding that they might restore the amount to the burgh funds. The Lord Ordinary (Pitmilley) dismissed the action for want of title, finding “ That the burgesses, though they
“ have a remote interest in the funds and property of
“ the burgh, have no patrimonial right in the funds and
“ property, so as to confer on them a title to call the
“ magistrates to account in the manner concluded for;
“ and that their interest in the funds in question which,
“ as stated in the conclusions of the libel, leads them
“ only to conclude that the money shall be placed to
“ the credit of the royal burgh as articles of charge
“ against the present magistrates, is not such a patri-
“ monial interest in the funds as can entitle them
“ to insist in this action.” This was affirmed by the Court, when it was observed from the bench, “ The

¹ 14 D., B., & M., 425.

² Burgesses of Inverury v. Magistrates, 14th December 1820.

“ Court never sustains an action at the instance of a
 “ party who cannot state a direct or immediate interest
 “ in the result, which plainly cannot be alleged in this
 “ case, where the pursuers ask for no judgment avail-
 “ able to themselves, but complain of acts done to the
 “ prejudice of the burgh.”

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This decision was recognized and approved in the case of the Trinity House of Leith and others against the Magistrates of Edinburgh¹, 6th February 1829, (ante, p. 858,) in which the pursuers, on the ground that they were interested in the completion of the work, instituted proceedings against the parliamentary commissioners for improving the harbour of Leith. It was held that they had no title to pursue, the Lord Justice Clerk saying², “ If we act as in the case of Inverury I
 “ can find no ground for doubt. The principle is there
 “ laid down clearly and distinctly that indirect interest
 “ of this description will not be tolerated by this Court.”

In the case of *Lauder*³, in 1821, (ante, p. 858,) the question was raised in an action of declarator as to the right of the burgesses in certain property. The pursuers were burgesses; the claim was not only for themselves but for other burgesses; and it was held that although each burgh might sue for his own individual interest, yet as the action at the instance of the burgesses was raised by them as a body, it must be dismissed, as they were not a corporation, and the action was the more irregular as it concluded for decree of declarator in favour of all the burgesses, while they were

¹ Trinity House of Leith v. Magistrates of Edinburgh, 6th February 1829.

² Rep. in F. C., 19th January 1837, p. 336.

³ Burgesses of *Lauder* v. Magistrates, 17th May 1821.

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not all pursuers. The Lord Justice Clerk, alluding to this case, says¹, “It is quite clear, when they say they sue not only for themselves but for others, as a sort of body, the law cannot sanction any such thing. That was decided in the case of *Lauder*.” All these cases are subsequent to any which can be relied upon by the appellants.

In England, where parties are numerous, some are permitted to sue in behalf of themselves and others, but they must themselves have such an interest as entitles them to sustain the suit. In *Bromly v. Smith*², 1 Simons, page 8, the plaintiff had a personal interest in the land for the cultivation of which the rates had been raised. The judgment in the *Attorney General v. Heelis*, 2 S. & St., page 75, proceeded upon the same ground, and Sir John Leach, V. C., has aptly marked the distinction in that case.³

If then by the general law of Scotland, and according to the practice of the Court of Session, the title under which the pursuers have instituted this suit is not such as will enable them to support it, certainly the provisions of the police act for Glasgow increase their difficulty; that act provides certain remedies which would not be necessary if it were competent for any rate-payer to maintain such an action as this now in question. By the 124th section any person aggrieved by any order or other proceeding of the commissioners is entitled to appeal to the first Circuit Court of Justiciary to be held at Glasgow; and by the 133d section no action is to be commenced against the commissioners for any thing

¹ Rep. in F. C. ut sup.

² *Bromly v. Smith*, 1 Simons, p. 8.

³ *Attorney General v. Heelis*, 2 S. & St., p. 75.

done in execution of the act after three months, and it is made competent to the town council, the merchants and trades houses of the city, to bring actions against the commissioners before the Court of Session or the Court of Exchequer, for misapplying the funds, at any time within twelve months. I quite agree with the Lord Ordinary that these provisions cannot take away any jurisdiction which the Court of Session might have, but if there be serious doubt as to such jurisdiction, these legislative provisions for particular remedies are not to be rejected in the consideration of the question of jurisdiction.

My Lords, it appears to me, for these reasons, that the interlocutor appealed from is correct, and I therefore move your Lordships to dismiss the appeal, with costs.

The House of Lords ordered and adjudged, That the said petition and appeal be and is hereby dismissed this House, and that the said interlocutor therein complained of be and the same is hereby affirmed: And it is further ordered, That the appellants do pay or cause to be paid to the said respondents the costs incurred in respect of the said appeal, the amount thereof to be certified by the clerk assistant: And it is further ordered, That unless the costs, certified as aforesaid, shall be paid to the party entitled to the same within one calendar month from the date of the certificate thereof, the cause shall be remitted back to the Court of Session in Scotland, or to the Lord Ordinary officiating on the bills during the vacation, to issue such summary process or diligence for the recovery of such costs as shall be lawful and necessary.

RICHARDSON and CONNELL — DEANS and DUNLOP,
Solicitors.

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