

No. 72. perform: Besides, the defunct having disposed his estate, did not die a Baron; and his heir is not entitled to heirship moveables.

The Lords adhered.

Act. *H. Home.*

Alt. *Boswel.*

*D. Falconer, v. 2. No. 68. p. 74.*

1750. July 11. EARL of CASSILIS *against* The TOWN of WIGTON.

No. 73.

A declarator sustained, that the pursuers were not liable in certain tolls for passing through the defenders' grounds.

The Earl of Cassilis and other gentlemen insisted in a declarator against the burgh of Wigton, and other burghs, and against sundry particular heritors, That they were not liable in any tolls for cattle passing through these towns, or by certain roads or bridges leading through their grounds, or those of the other defenders.

Objected: The defenders have grants of tolls; and the pursuers are insisting in a reduction and improbation of them, which they have no title to pursue; and they are not bound to produce their rights; and the declarator libelled, that the pursuer or other lieges are not subject to any tolls, is only a consequence of the improbation. They have no title to pursue this general declarator for the lieges; and it ought not to be sustained for themselves, as no absolvitor can proceed upon it; and they are obliging the defenders vexatiously to shew their writings: But if any unjust toll is asked of any in particular, he may in a proper way obtain remedy against it.

Answered: The pursuers do not insist in any conclusion of improbation or general conclusion of declarator, but on their own right of immunity, which is competent to every man; and there is in the summons a distinct conclusion for that purpose, without any connection with, or dependence upon, the improbation.

The Lords sustained the pursuers' title to pursue the declarator libelled.

Act. *W. Grant & Lockhart.* Alt. *R. Craigie & Haldane.* Reporter, *Justice Clerk.*

*D. Falconer, v. 2. No. 146. p. 172.*

1752. June 30.

ANDERSON and Others *against* The MAGISTRATES of RENFREW.

No. 74.

The citizens of a burgh are entitled to call their Magistrates to account for their administration.

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 controul of the chamberlain; by the 26th act, 4th Parl. James 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 controul 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 *qua* burghess, had a sufficient title for carrying on a reduction of 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.”

Act. *Lackhart.*

Alt. *Advocatus.*

Reporter, *Minto.*

Clerk, *Pringle.*

D.

*Fac. Coll. No. 17. p. 35.*

1753. *January 2.*

BURN *against* OGILVIE.

A person decerned executrix to one who was said to have died abroad, pursuing for payment of a bond due to the defunct, was found obliged to prove the death, the decree dative not being held sufficient evidence thereof, as such decrees pass of course without any proof.

*Sel. Dec. Fac. Coll.*

\* \* This case is No. 335: p. 11667. *voce* PRESUMPTION.

1753. *November 26.*

WEDDERBURN of St. Germans, and Others, *against* YORK-BUILDINGS COMPANY.

A division of the muir of Tranent being demanded in a process by some neighbouring heritors, who held their lands feu of the Earl of Winton, against the York-Buildings Company, successors to the Earl; and the titles founded on being infeftments of the lands belonging to the pursuers, with parts and pertinents, and an allegation of 40 years possession of the muir by common pasturage; an act was pronounced for dividing the muir. In a reclaiming petition, it was objected,

No. 74.

No. 75.

No. 76.

A division of a muir upon the title of an infeftment with an alleged 40 years possession of