No 9. for payment of the debt, but not the proper effects of any one member. A royal burgh is a proper example, being an incorporation holding land of the King, and having consequently a power to contract debt. The present magistrates of Edinburgh are liable to a summary charge for payment of debt borrowed by their predecessors in office; the creditor may proceed to incarcerate the magistrates, as representing the town, if they postpone payment; but no creditor ever dreamed, that the provost of Edinburgh's proper estate can be adjudged for payment of any of the Town's debts.

Such is the case of incorporations who have power to contract debt. But there are many incorporations who have no such power, which is the present case. The butchers of Edinburgh have a seal of cause, and are united *ad hunc effectum* only, to bar any person from exercising that trade without paying them a composition; they may have a box, but no other common property; and they have no power to contract debt *qua* incorporation. If a man lend his money to such a society, he can have by law no action, except against the persons who receive the money; unless he can shew, that it was *in rem versum* of the society; in which case, he can claim his money out of the box. But it is absurd to think, that the office-bearers of such an incorporation can bind their successors in office, when they have no power to borrow money in name of the corporation. A man who accepts to be deacon of such an incorporation, has no reason to apprehend danger from public debt; he can never dream that an incorporation which has no power to borrow money, can be in debt.

The company of archers were incorporated by James VI. but with no power to borrow money. Suppose any one had been so foolish as to lend money to the company twenty or thirty years ago, would he not be laughed at to make a demand upon the present office-bearers of the company?

'THE LORDS passed the bill without caution, upon consigning a disposition to the effects of the incorporation.'

Rem. Dec. v. 2. *No* 24. *p.* 38.

1744. *January* 11.

JAMES WALKER Charger, *against* JAMES CUMMING, Deacon of the Fleshers of Edinburgh, Suspender.

No 10.
This seems to be the same case with the above.

ANNO 1715, the charger lent 100 merks Scots to the then deacon, box-master, and masters of the said incorporation of fleshers; and having charged James Cumming, the present deacon, on the bond, for payment, he offered a bill of suspension, on the following grounds; 1*mo*, Because, though the debt charged on may be justly due by the incorporation, yet no diligence ought to proceed against the suspender's person or effects, unless he had the incorporation's money in his hands, or refused to uplift, recover, or dispose thereof, for payment of the debt charged on, which is all that any office-bearer is bound to do, unless fraud

can be made appear against him; more especially, as this debt was contracted twenty-eight years before the suspender was a member of the incorporation. No 10.

Answered; By the tenor of the bond, the persons therein bound, bind and oblige themselves, and successors in office, conjunctly and severally, to repay the money to the charger; which clause must subject all the members of the incorporation, whether they were members at the time of granting the said bond, or became so afterwards, not only to repay the money, but to make them liable to personal diligence. The members of an incorporation can certainly bind their successors in office as validly as themselves; and if once a person enter himself a member of an incorporation, he is as much bound to fulfil the obligations of that society, although entered into by former members, as if he had entered into them himself. The incorporation is considered as one person; and though the members may change, yet the incorporation is still the same, and the members of it are as much subjected to its debts, as if they were contracted for their own private use; because they are as effectually bound in payment in the one case as the other.

That a clause should be inserted in a bond subjecting the present, and all future members to payment, and personal diligence, and yet not to give it effect, would be absurd, when it was upon the faith thereof the creditor lent his money. By becoming a member, the suspender has right to exercise his trade, and to enjoy all the privileges of the society; now, to have a right to these, and yet not be liable to the obligations of the incorporation, would be inconsistent. Besides, the members of an incorporation are in the very same state with heirs, who are reckoned *eadem persona* with the defunct, and are in the same manner liable to his debts, that they are to their own.

Replied; The charger endeavours to introduce a new passive title, altogether unknown in our law, viz. that every man, by becoming a member of an incorporation, is as much liable to the debts of the incorporation as an heir; but the error lies in not distinguishing among different sorts of corporations; *e. g.* when a set of men are incorporated, with a view to carry on traffic, and with power to borrow and lend, there is no doubt the present office-bearers may be sued for payment of money borrowed, as representing the incorporation; but, even in that case, the proper effects of the office-bearers will not be affectable by such diligence. His person may be thrown into jail, as representing the incorporation; but that is all the length that diligence can be extended against him. The effects of the incorporation may be attached for payment of the debt, but not the effects of any one member. The case of royal burghs will illustrate this, which is an incorporation holding lands of the King; and having, of course, a power to contract debt, the magistrates are liable, no doubt, to a summary charge for payment of any debt contracted by their predecessors: Nay, the creditor may proceed to incarcerate the magistrates, as representing the town; but nobody ever supposed that their own proper estates could be adjudged for payment of any such debt. But the present case is quite different;

No 10.

as this incorporation have a seal of cause, and are united *ad hunc effectum* only to bar any person from exercising that trade, without paying them a composition; and they have no power to contract debt *qua* incorporation; so that if any person lends them, he can have no action, but in so far as he proves that it was *in rem versum* of the society.

Duplied; The holding lands of the Crown, or a subject, can give no privilege to contract debt; and, that the having or wanting an heritable subject, will not in the least alter the obligation to repay; and so the present question will not depend on that principle. None of the royal burghs have a power in their charters to borrow money; and if they had, it would not be good, without it were confirmed by parliament. Such power does not depend on their grant, but on the members themselves: For a proof of this, the instance given by the charger, of a company incorporating together to carry on trade, and to borrow or lend, will suffice. The charger will not take upon him to say, there were any such express powers in this case, but the same thing has been done tacitly, and as effectually. Their giving authority to borrow, either by a sederunt in their books, or by their signing the bond, and continuing such a practice, is *tantamount* as if each had signed a formal contract, empowering their office-bearers to borrow.

THE LORDS passed the bill, upon the suspender's consigning a disposition to their effects.

C. Home, No 256. p. 412.

1744. *February* 28.

CAMPBELL of Carquhine, *against* The MAGISTRATES of BANFF.

No 11.

The Magistrates of Banff being pursued as representing the community, for damages sustained by the culpable neglect of former Magistrates, who had refused to restrain a mob from pillaging a ship in the harbour, and carrying off a valuable cargo of meal; the Lords assoilzied, as there was no law

CAMPBELL of Carquhine, *&c.* having purchased a quantity of victual from Ogilvie of Rothiemay, to be delivered at Portsoy or Banff, sent a vessel to receive it. Accordingly it was delivered, and shipped on the 8th, 9th, and 11th of May 1741: But, on the said 11th, a number of the inhabitants of Banff convened in a riotous manner, secured the men on board the ship, and took away part of the victual; and which they repeated next day, carrying then off a greater quantity. When the ship was unloaded on the 11th, the master intimated to the Magistrates the violence he had suffered, and that he dreaded the like attempt next day; which accordingly happened; but no measures were taken to stop the mob; nay some of the rioters were taken and put into the Magistrates' hands, but were thereafter dismissed. Upon which the owners of the victual brought an action against the Magistrates on account of their neglect, to have them liable for damages.

The defence offered, was, that there was no law making the Magistrates, *&c.* of a town liable for the delict, or negligence of persons formerly in the magistracy, *&c.* and which ought only to affect those that were guilty,