SECT. III.

Powers of Magistrates in the Administration of the Common Good.

1685. *March* 3.

PROVOST and MAGISTRATES of Glasgow, *against* JOHN BARNS, late Provost there.

No 20.
Magistrates cannot alienate the common good gratuitously.

IN a pursuit at the instance of the Magistrates of Glasgow, against John Barns their late Provost, for payment of L. 1700 he was owing to the town *per* bond.

Alleged for the defender, *1mo*, He is discharged of the said bond by an act of Council, and *par in parem non habet imperium*; *2do*, The discharge was granted for the onerous cause of good services done to the town; and it is ordinary to gratify the good services of Magistrates.

Answered, Magistrates are but administrators of the town's common good, and cannot, more than curators, gift away any part on't gratuitously; and if there be any such custom, it is but *vetustas erroris*.

THE LORDS decerned against the Provost.

Fol. Dic. v. 1. *p.* 157. *Harsarse*, (MAGISTRATES.) *No* 683. *p.* 193.

1748. *November* 28.

JOHN LANG, and Other Burgesses of Selkirk, *against* The MAGISTRATES.

No 21.
The administration of the common good of burghs was formerly under the inspection of the Chamberlain of Scotland; now of the Exchequer. Burgesses are competent witnesses for the town, in questions concerning the town's property. Is action competent to private burgesses against the Magistrates for malversation?

JOHN LANG, deacon of the taylors of Selkirk, and other craftsmen, who, with Thomas Elliot, late Bailie there, amounted in all to the number of 18 persons, brought a process against the Magistrates and Town Council of Selkirk, challenging them for embezzlement and misapplication of the town's revenues; and concluding, that they should be decerned to repay the sums therein mentioned to the treasurer for the time being. The defenders, without entering into the merits of the cause, insisted upon the following preliminary objections, That the pursuers had neither title nor interest to carry on this process. These objections being reported to the Court, process was sustained and the objections repelled. Upon a reclaiming petition for the defenders, the objections were sustained. The pursuers having next reclaimed, process was sustained and the objections repelled. It lay upon the defenders now to reclaim, which was done by an elaborate petition, containing the following arguments.

In order to set the objections in their proper light, the defenders found it necessary to premise a short view of the constitution of royal burghs. The constitution of a royal burgh among the different nations presently in Europe, is borrowed from the Romans; or rather, the constitution of such cities or burghs

No 21. as were in being during the time of the Roman power, is continued down to the present times, with some slight alterations occasioned by the introduction of the feudal law, and has been communicated generally to other burghs of later creation. Our Town Council corresponds to their Senate: We have Magistrates and office-bearers as they had, differing only in names; their Consul is our Provost; their Prætors our Bailies; their Ædile our Dean of Guild; their Decurions our Counsellors, &c. They had a common good as we have, which was understood to belong not to the particular citizens, whether *pro diviso* or *pro indiviso*, but to the politic or corporate body. Our notion is the same, with this addition derived from the feudal law, that this corporate or politic body is the vassal, which holds the town, with its common good, of the King as superior.

Hence in the Roman law, as well as in our law, the property that belongs to a corporation is always distinguished from the property that belongs to any burgess, *l.* 6. § 1. *De divis. rer.* 'Universitatis sunt, non singulorum, veluti quæ 'in civitatibus sunt theatra, et stadia, et simila, et si quæ alia sunt communia 'civitatum. Ideoque nec servus communis civitatis, singulorum pro parte in- 'telligitur, sed universitatis. Et ideo tam contra civem, quam pro eo, posse 'servum civitatis torqueri, divi fratres rescripserunt. Ideo et libertus civitatis 'non habet necesse veniam edicti petere, si vocet in jus aliquem ex civibus.' Again, *l.* 7. § 1. '*Quod cujuscun. univers.* Si quid universitati debetur, sin- 'gulis non debetur; nec, quod debet universitas, singuli debent.'

Upon the same account burgesses are in all cases admitted as good witnesses for the town, in questions concerning the town's property. Balfour, p. 377. Town of Leith *contra* Town of Kinghorn, *voce* Witness; Fount. v. 2. p. 502. 14th June 1709, M'Kenzie *contra* Town of Inverness, *voce* Witness; Bruce, No 38. p. 49. 30th of November 1716, Moncrief *contra* Town of Perth, *voce* Witness. The Town of Inverness having brought witnesses to prove the quantity of the multures of their mill, it was found, That the present Bailies could not be witnesses in a cause which concerned the common good; but that private burgesses might be witnesses, though they had formerly born office within the burgh, Stair, v. 2. p. 84. 13th June 1672, Town of Inverness *contra* Forbes, *voce* Witness. And in another case observed by Fountainhall, v. 1. p. 34. 17th January 1679, Lord Hatton *contra* Burgh of Dundee, *voce* Witness; the inhabitants were not admitted as witnesses for the burgh, where the question was, Whether the burgh had or had not an exclusive criminal jurisdiction? because this is a question in which every inhabitant is personally interested; whereas their common good relates to them only as a body corporate.

Holding it then to be law, that the common good of a burgh is the property of the corporation, not of the individuals, and that the debts due to or by the corporation are not due to or by individuals; the objections against the present action appear in a strong light. The libel contains two conclusions, *1mo*, A reduction of an act of the Town Council, passing the town treasurer's accounts;

and the ground of the reduction is, 'That certain articles are therein stated and 'allowed, with which the common good of the town ought not to be burdened.' The other conclusion is, 'That the defenders, who concurred in this act of 'Council, ought to be decerned and ordained, conjunctly and severally, to pay 'the sums excepted to, to the treasurer for the time being, and to take his 'receipt and obligement to charge himself therewith in his accounts for the 'current year.' Here there is not a single conclusion for the benefit of the pursuers themselves, but merely for the benefit of the town; and the question is, Whether, at common law, an action is competent, more than an exception, that concludes in favour of a third party, and not in favour of the pursuer? A defence of this nature would be repelled as *jus tertii*; and why an action should be sustained, more than an exception, where the objection of *jus tertii* lies, is left upon the pursuer to explain. No 21.

The *first* objection to the process is, that the pursuers have no title; and the next is, that they have no interest. With regard to the first, this process is for misapplication of the town's revenues, arising from their common-good; which is one of the actions competent upon property; and therefore, the same cannot be competent to private burgesses or inhabitants, to whom the common good belongs not. No burgess can say that he is proprietor of the common-good, or that he has any real estate therein, to found him in any claim for the rents. Such an action would not be competent at the instance of a partner of either of the banks against the governor and assistants, nor at the instance of a member of the East India Company against the directors, nor at the instance of a creditor of the York Buildings Company against the managers, nor at the instance of a child having right to legitim, against the father's factor; and yet, in most of these cases, there is a pecuniary interest to found the action, if the party had any right in the subject itself, to be a title for carrying on such action. And this leads to the *second* objection, that the pursuers here are as much destitute of a pecuniary interest, as they are of a title; since the conclusion of this action is not to put money in their pockets, nor to gain them any pecuniary advantage whatever. And it is an established rule, that no man is entitled to prosecute but for his own interest. Every man, and every body politic, are left to prosecute their own claims, and no man, at his own hand, is entitled to prosecute a claim for another, whether the other be a single person, or a body politic.

Among the Romans there never was such a thing imagined as an action at the instance of a private burgess for behoof of the town. *See* Voet. tit. *Quod cujusque univers. nomine vel contra*, § 5th and 6th, where it is said, that in every city there was a public officer, whose province it was to pursue and defend all causes concerning the town, known by the name of *Syndicus*, or *actor universitatis*; and that it was not lawful for any other person to move any action belonging to the town. In the 7th section, he goes on to show how the *Syndicus* was created, viz. either by the set of the burgh, appointing the eldest or the youngest of the

No 21. council to this office; or, if there was no regulation upon this point, by an express appointment of the council from time to time.

The defenders proceeded to observe, That if this action can be sustained upon any legal footing, it must be as a popular action, competent to every one of the lieges. But it will not be seriously maintained, that any one person in Scotland, who pleases to give himself the trouble, is entitled to bring an action against the Magistrates of any town for mal-administration; and if the matter be put upon the footing of a popular action, the private burgesses of Selkirk have no privilege beyond any other of the lieges. More particularly, it is true, that by the Roman law private persons were allowed to bring actions, civil as well as criminal, for the benefit of the public. But as experience discovered, that such processes were oftener directed by private resentment than by zeal for the public, they are universally laid aside through all Europe, both in civil and criminal cases; special cases excepted, directed by particular statutes. No man is now indulged to bring a criminal accusation where his own interest is not concerned, unless it be the King's Advocate, who, for that reason, bears the name of *calumniator publicus*. And Voet, upon the title, *De Popular. Action.* makes the following observation, 'Moribus interim nostris nullus privatus actione populari, qua tali, experiri potest; sed omnino ad privatum interesse.' He cites Groenewegen for his authority, who cites many others.

But this is not all. Of a popular action there are two essential requisites, 1*mo*, That the matter of the action concern the public; 2*do*, That the matter be such, as that no particular person has either an interest or title to pursue. With respect to the *first*, the administration of the revenues of a burgh is not a public concern, more than the administration of the revenues of an hospital, or of a college. With respect to the *second*, there undoubtedly lies an action at the instance of the town, represented by its Magistrates, against the former Magistrates out of office to account for their management. And, indeed, to sustain, at the same time, a popular action, would reduce Magistrates to a deplorable situation, by laying them open to a process at the instance of factious burgesses, which may hurt them but cannot benefit them; for it it will not be maintained, that an absolvitor in this process will afford them an *exceptio rei judicatæ* against a similar process at the instance of the burgh itself. And the consequences would be still more deplorable, could the prevention of a private burgess extinguish the town's claim; for Magistrates in office would never be without a friend to bring a collusive action, in order to save them from being called to account by the town itself.

And that this is of no late invented doctrine, appears from Balfour's Practiques, p. 45. (anent the disposition and alienation of the common good,) where two decisions are quoted, in which the point contraverted was, Whether an action, like the present, be competent at the King's instance? The words are, 'Attour giff any burgh within this realm, analzies, dispones, or dilapidates, the common good, contrair to the known well of the same, the King's grace and

'his council has good action and interest to cause the same to be restored and 'redressed again *in integrum*.' If it was made a question, Whether such action was competent at the instance even of the King and Council, we cannot imagine that an action would have been sustained at the instance of a private burgess. And that the King is here in a peculiar situation, is obvious; for, as the common good of almost all the burghs in Scotland is derived from the Crown, it is justly reckoned the King's prerogative to oversee and controul the administration of the common good of royal burghs. *See* KING. No 21.

As the persuasion of the expediency, or rather necessity, of this action, weighed with the plurality of the judges to pronounce the said interlocutors in favour of the pursuers, neglecting the strict principles of law; the defenders, in order to obviate the argument from expediency, found it material to point out another method for checking the mal-administration of Magistrates, beside the action at the instance of the town represented by the succeeding Magistrates, which was admitted to be but an imperfect remedy. And, to this end, they gave a short deduction of that part of our public police which concerns the administration of the common good of burghs. The danger of dilapidation, where there is no other check but an action at the instance of succeeding Magistrates, was early perceived in Scotland; therefore, by our most ancient police, this matter was put under the superintendency of the Chamberlain of Scotland. And among the many instructions of articles to be inquired of by secret inquisition, and punished, contained in the *Iter Camerarii, cap.* 39. the following is one, § 45: 'Giff there be an good assedation and uptaking of the common good of the 'burgh, and giff faithful compt be made thereof to the community of the 'burgh; and giff no compt is made, he whom and in quha's hands it is come, 'and how it passes by the community.' In pursuance of this instruction, the Chamberlain's precept for holding the ayr, directed to the Provost and Bailies, enjoins them 'to call all those who have intromitted with the town's revenues, 'or used any office within the burgh, since the last Chamberlain-ayr, to answer 'in sik things as shall be laid to their charge.' *Iter Camerarii, cap.* 1. And in in the 3d *cap.* which treats of the form of holding the Chamberlain-ayr, the first thing to be done after fencing the Court, is to call the Bailies and Serjeants to be challenged and accused from the time of the last ayr.

This office, which had too much power annexed to it, was suppressed; and the consequence was, that the royal burghs, being left without any effectual check upon their management, noblemen and gentlemen of estates, in the neighbourhood, thrust themselves into the administration under the name of Magistrates, and converted all to their own profit. This evil was complained of in the days of James V. and a remedy provided by act 26th, Parl. 1535. This remedy shall be considered anon. In the mean time, the following observation must occur upon the statute, that, in these days, there was no notion of a popular action at the instance of any particular burgess for mal-administra-

No 21. tion; for, had there been so ready a method for redress, strangers would have had no such opportunity to usurp upon the privileges of a burgh, as it appears they had from the narrative of the statute.

The regulations introduced by that statute, in order to prevent the evil complained of, are, 1*mo*, That none be qualified to be Provost, Bailie, or Aldermen, but an indweller-burgess. 2*do*, That no inhabitant in the burgh purchase lordship out of burgh, to the terror of his com-burgesses. And, 3*tio*, 'That all Provosts, Bailies, and Alderman of burghs, bring yearly to the Chequer, at the day set for giving of their compts, the compt-books of their common good to be seen and considered by the Lords-auditors, giff the same be spended for the common well of the burgh or not, under the pain of tinsel of their freedom; and that the saids Provost, Bailies, and Aldermen, warn yearly, fifteen days before their coming to the Chequer, all they quha like to cume for examining the said accompts, that they may argue and impugn the same as they please, sua that all murmur may cease in that behalf.'

In pursuance of the statute, a brieve was issued out of Chancery, to force the Magistrates of royal burghs to bring their compt books yearly to Exchequer. The brieve, after enjoining the Magistrates to bring into Exchequer the rents due by them to the King, goes on in the following words: 'Et expensarum dispensationis computa communium bonorum dicti burgi, si utiliter impensa vel diffuse dissipata fuerint, inspicienda.' Then follows this clause, 'Omnesque alios interesse haben. seu pretend. per quindecim dies ante dict. diem acto nostri Parliamenti conforme, inde premoneatis.'

There appears to have been a defect in this statute, which made it less effectual than it was designed to be: Magistrates brought their compt-books to the Exchequer, because they were enjoined to do so under a penalty; but they brought no rental of the common good to be a charge against themselves. This defect is remedied by act 28th, Parl. 1693, in which there is the following clause: 'And for preventing the like abuses and misapplications, in all time hereafter, their Majesties statute and ordain, that every burgh royal, within this kingdom, shall, betwixt and the first of November next to come, bring the Lords of their Majesties Treasury and Exchequer, an exact stated accompt of charge and discharge, subscribed by the present Magistrates and town-clerk, of the whole public good and revenues, and of the whole debts, burdens, and incumbrances that affect the same.' This completed the remedy for preventing misapplication of the common good of burghs. And it must be obvious, that here is a more easy and expedite method to prevent or redress mal-administration, and, at the same time, much less expensive than a process before this Court.

The regulations laid down by the foregoing statutes are *in viridi observantia*. There is every year a precept issued out of the Exchequer, signed by one of the Barons, addressed to the Director of the Chancery, requiring him to make out a

brieve for every royal burgh. The brieve is accordingly made out, returned to the Exchequer, and sent to the several Sheriffs, to be served in all the royal burghs within their bounds, as directed by the statute. These brieves are accordingly so served by the Sheriffs; and, particularly, it is a constant form in most of the royal burghs, to issue a proclamation, through the town, fifteen days before the day of appearance in Exchequer, warning the inhabitants to appear there at the day named, to make their objections against the public accompts of the town; and, to give them access to frame objections, the book and compts are laid open, for these fifteen days, to be inspected by all the inhabitants. No 21.

What is done in Exchequer, in obedience to this brieve, the defenders know not. Possibly this matter may be carried on as slovenly as many other articles of public police are. And if private burgesses, after being invited, do not think proper to appear in Exchequer, and enter their complaints, the Barons are not to blame for not inspecting these books. But, as every private burgess is yearly invited to make his complaint in Exchequer, where he must be heard summarily and *de plano*, without the expense of a process, no man can complain of the want of a remedy, when so direct a one is at hand, nor pretend that a popular action is necessary, as if no other remedy were competent.

The Judges will also attend to an inconveniency that must follow the sustaining a popular action in this Court; no private burgess, nor number of burgesses, by bringing a popular action in this Court, can deprive the other burgesses of a privilege established to them by statute, to have the management of their Magistrates examined and controuled in Exchequer. It may happen then, that when a popular action is depending in this Court, other burgesses will follow the established method of complaining in Exchequer; and it may happen, that the Court of Exchequer approves of what is condemned here, or *e contra*. What must follow upon such contrariety of judgment in two Sovereign Courts? The matter is rendered inextricable by this new invented popular action.

'The advising the reclaiming petition for the Magistrates was superseded. The pursuers, despairing of success, have not thought proper hitherto to press for a judgment; and probably we shall hear no more of it.' *See* PROCESS.

Rem. Dec. v. . No 101. *p.* 181.

1752. *June* 30. JAMES CATHIE *against* MAGISTRATES of Musselburgh.

MAGISTRATES of a burgh of regality have the same power with magistrates of a royal burgh, to grant feus of the common good of the burgh. This was the unanimous opinion of the Court. No 22.

Fol. Dic. v. 3. *p.* 140. *Sel. Dec. No* 10. *p.* 12.