

1716. July 4. JOHNSTON of Corhead *against* JOHNSTON of Newton.

No 40.

IN a declarator of non-entry, the superior, for his title, produced a charter under the Great Seal, dated 1648, with a precept furth of the Chancery the same year, but without any infeftment till the year 1714, that the pursuer established a right to the said precept by a general service, and thereupon infeft himself by virtue of the act of Parliament 1693, giving force to precepts of sasine after the granter's and receiver's death. It was *objected* against this title, That the precept was fallen *non utendo* by the 40 years prescription. *Answered*, That it being *meræ facultatis* for the obtainer of a precept to take infeftment thereon or not, precepts cannot prescribe, which was sustained.

*Fol. Dic. v. 2. p. 98. Bruce.*

\*\*\* This case is No 6. p. 3170, *voce* DEATH.

1731. December 7. Lord DUN *against* TOWN of MONTROSE.

No 41.

A RIGHT of constabulary which had been long in desuetude, and not exercised by any one act of jurisdiction for many more than 40 years, was found to fall by the negative prescription, and that it was not *res meræ facultatis*. See APPENDIX.

*Fol. Dic. v. 2. p. 99.*

1747. January 21. Lady INVERAW *against* Earl of BREADALBINE.

No 42.

THE right to reduce a deed on the head of death-bed, does not prescribe, so long as the deed itself is saved from prescription by interruptions.

*Fol. Dic. v. 4. p. 92. D. Falconer.*

\*\*\* This case is No 16. p. 6560. See Kilkerran's report of it, *infra, h. t.*

---

## S E C T. VI.

Cess.—Discharges.—Annual prestations.—Exceptions.—Intrinsic objections.

1710. July 30.

THE MAGISTRATES and TOWN-COUNCIL of PAISLEY *against* Their VASSALS.

No 43.  
Forty years  
use of pay-  
ment by Ma-

THE burgh of Paisley, and the lands within its territory, being valued in the cess-books of the shire of Renfrew, to L. 1077 : 6 : 8d; and the Magistrates

having been, for many years, in use to pay out of the revenue of the burgh the whole *quota* of the public cess due for the Vassals' lands, as well as for the Town's property, did at length raise a process against their Vassals, for repetition of what had been formerly paid on their account; and to have it found and declared, that they are liable in time coming for a proportion of the cess effeiring to their lands and tenements.

*Alleged* for the defenders; They ought to be assoilzied; because, *imo*, Any payments made by the Magistrates out of the patrimony of the burgh in which every member of the community has an interest, were rational acts of administration; and the stock of the burgh could never be better applied than for defraying the common debt of the burgh and its burgesses. *2do*, The defenders have prescribed an immunity from payment of any part of the cess, or relieving the Town thereof, and have so long possessed their properties paying a feu-duty *pro omni alio onere*, conform to their charters, July 22. 1634, Forrester *contra* Feuars of Bothkenner, *infra, h. t.*; so that the Town have subjected themselves to the payment of the whole *quota* of the cess by their use of payment upwards of 40 years.

*Replied* for the pursuers; The patrimony of the burgh ought not to be applied for defraying the private debts of heritors or other burgesses, but only for supporting the public exigencies of the burgh, in relation to the magistracy, jurisdiction, and other general concerns of the community; as the payment of minister's and schoolmaster's stipends, repairing the streets and public works, &c. And the Magistrates, who are but administrators, could not misapply it to any other end. *2do*, Prescription cannot be obtruded in this case, because, *imo*, The community who are in the case of minors cannot be prejudiced by the administrators's undue application of the public money in favours of one set of burgesses, when all are alike concerned therein. *2do*, The defenders cannot prescribe a right of immunity from cess against the Town their superiors; partly because that cess is of the nature of an annual prestation, being imposed from year to year; partly for that a vassal cannot prescribe exemption from payment of his feu-duty, the superior's right being acknowledged *in gremio* of the vassal's; and though the *reddendo* of a feu-duty *pro omni alio onere*, may found the negative prescription as to all other casualties of superiority; yet cess being no casualty but *debitum fundi* established by public law upon all lands not expressly exempted; and the superior's payment of the vassal's proportion being *meræ facultatis*, the defenders can never prescribe upon such use of payment against the community; nor is the decision betwixt Forrester and the Feuars of Bothkenner to the purpose; since no argument can be drawn from prescription of immunity from the duties of an office of forrestry, which are not exempted by law from the general rule of prescription, to the prescription of immunity from a land-cess, which was never thought to fall under the negative prescription.

No 43.  
gistrates of the whole cess due for their vassals' lands, as well as the town's property, not a sufficient ground of immunity to the vassals from paying cess in future.

No 43.

THE LORDS found the defenders liable for cess in time coming, and remitted to the Ordinary to hear them upon their exemption for bygones.

*Fol. Dic. v. 2. p. 102. Forbes, p. 426.*

\* \* \* Fountainhall reports this case :

1710. July 21.—THE burgh of Paisley is valued to L. 1077 in the books of the shire of Renfrew, according to which valuation they bear burden, and pays cess, supply, and other public dues to the Crown with the other freeholders of the shire. The town being a burgh of barony and regality, erected by King James the IV. were in use to pay the Queen's cess out of their common good and property-lands, without burdening the feuars and vassals, heritors of houses within the town or acres about it; but their trade decaying, and being ready to sink under the burden of their minister's stipends, schoolmaster's fees, repairing their streets, hospital, and bridge on Cart, the community were not able any longer to subsist, unless they were relieved by their vassals taking a proportional share of the cess; and the Justices of Peace and Commissioners of Supply having made a cast and sub-division on the feuars, Glassford, Parkhill, and others of them raised a declarator of exemption and immunity, that they, past memory of man, never paid any more than the feu-duties contained in the reddendos of their charters, and which bore the clause *pro omni alio onere*. Answered for the Town, That cess is a *debitum fundi*, to which the *prædium* itself is subject, and to which the vassal having the *dominium utile*, is liable, and so the feuars must not only relieve the town of a proportion for bygones, but likewise bear a proportion effeiring to their properties in time coming. And as to the prescription *non utendo, esto*, it were true, the most it can amount to, is to cut off all years above the 40, but cess being an annual prestation it can never prescribe for the future, as was found in the case of a tack betwixt two Glasgow men, 10th March 1627, No 54. p. 10749; and as to the clause *pro omni alio onere*, that signifies nothing, for if that argument were good, it would exeem them from paying any cess at all, which is ridiculous; and as to their bygone lenity and forbearance, it cannot prejudice the burgh; for they are only administrators, and their negligence can no more be obtruded than if they were minors. Replied, That the Magistrates had past memory paid the cess, and it was mere oppression in them to cast a subdivision of it on their poor feuars, seeing the tradesmen and other inhabitants of the burgh had hitherto assisted them. And prescription was not only good to liberate from all years preceding 40, but likewise in time coming, as was found by the LORDS, 22d July 1634, Forrester *contra* the Feuars of Bothkenner, *infra, h. t.* THE LORDS found the town's vassals liable to relieve them of a part of the cess in time coming; but as to bygones, allowed them to be heard, in respect of the clause in the second act of Parliament 1706, declaring heritors and collectors not liable in cess after three years, unless denunciation or other diligence has been

used within that time, which is a privileged prescription in favours of the subject against the Crown.

No 43

*Fountainhall, v. 2. p. 590.*

1712. June 24.

ROBERT SINCLAIR of Quendal *against* DAVID MURRAY of Clarden.

IN the action of compt and reckoning at the instance of Robert Sinclair against David Murray, the defender proponed compensation upon two receipts, whereby Captain Andrew Dick, the pursuer's author, acknowledged the receipt of money from the defender's father, and obliged himself to allow the same to him at compting.

*Replied* for the pursuer; The two receipts are prescribed.

*Duplied* for the defender; Though obligations, upon which action may be raised when the creditor pleaseth, be *temporalia quoad agendum*, and do prescribe; yet discharges or receipts affording ground of defence, which the receiver cannot found on till he be pursued, are *perpetua ad excipiendum*, and cannot prescribe.

THE LORDS found, That the exception on the two receipts is perpetual.

Thereafter, 10th July 1712, the pursuer proponed recompensation upon other two sums due by the defender's father to Captain Dick.

*Alleged* for the defender; *1mo*, These debts are prescribed. *2do*, He hath right to apply the indefinite receipts upon which he founds his compensation, to any sums wherein he is debtor to the pursuer, conform to the rule *electio est debitoris*; and doth apply them to extinguish other effectual debts not prescribed, 13th February 1680, M'Rieth *contra* Campbell, No 3. p. 680r.

*Replied* for the pursuer; *1mo*, The receipts founded on by the defender to instruct his ground of compensation, *laborant eodem vitio* with those produced to prove the recompensation; therefore if the one be perpetual *ad excipiendum*, the other must be also perpetual *ad replicandum*; and albeit regularly in payments *electio* be *debitoris*, yet if he make not his election when he pays, *electio est creditoris*, L. 8. C. De Solution. The defender cannot be heard to quarrel the recompensation upon any ground that was not competent to him at the time when these two receipts were granted to the pursuer's author; and, as prescription could not have been objected then, neither can it now. Besides, as *reus excipiendo fit actor*; so by proponing recompensation the first pursuer turns defender, and gets the power of election how to apply the payments.

THE LORDS found that the reply of recompensation was also perpetual.

*Ed. Dic. v. 2. p. 99. Forbes, p. 605.*

No 44

An exception on receipts and discharges to extinguish a debt pursued for, is perpetual and not liable to prescription, and a reply of recompensation to elide such an exception is also perpetual.