

1706. *July 17.*The TOWN TREASURER of DUNBAR *against* JEAN PRINGLE, Relict of GEORGE RUTHERFORD, Merchant there.

No 12.
Baillies of a burgh competent to judge concerning debts due to the burgh.

JEAN PRINGLE relict of George Rutherford raised advocation of a process commenced before the Bailies of Dunbar, at the instance of their Treasurer against her as representing her husband, for payment of a debt due by him per bond to the pursuer, upon this ground; That the action was for a debt resting to the Town treasurer upon the Town's account, and the Magistrates, who are administrators of the public stock of the burgh, could not judge in a cause concerning the subject of their administration, for which they are accountable; no more than a tutor can be judge in his pupil's cause.

THE LORDS repelled the reason of advocation, and remitted the cause: There being an express act of Parliament allowing deputes to be judges in the principal's causes; and the Bailies are but the Town's deputies, and may competently judge upon debts due to the Town. Nor doth the case of a tutor or curator meet; these being reputed as parties themselves; whereas magistrates of a burgh are not so considered in the concerns of the community.

Fol. Dic. v. 1. p. 230. Forbes, p. 124.

1711. *January 12.*PATERSON *against* The TOWN of EDINBURGH and JOHNSTON.

No 13.
In a process against a burgh, concerning a contract made with them, a declinator given in against one of the Lords, as being uncle to him who was town treasurer at making the contract, though now *functus*, was repelled.

THE TOWN of Edinburgh being in great debts, contracted on many public accounts, our Kings, from time to time, for supporting the metropolis, granted them an imposition of two pennies on every pint of ale brewed and imported within their precincts; and in 1693, King William, with advice and consent of Parliament, renewed this gift for 15 years and longer, but so as it should not exceed 30 in all. There being 13 years of this imposition yet to run, they enter into a transaction with Mr William Johnston of Sheines, Mr William Bogle and others, by which they were to assign them to the benefit of the said gift, on their engaging to pay the sum of L. 530,000 Scots, being the town's debt, and to recover and report sufficient discharges thereof in that 13 years time yet to run of the gift. This agreement taking vent before it was signed, Mr Alexandre Paterson, Bailie Gordon, and several other burgesses, applied to the town council, and offered L. 20,000 Scots more, and took instruments at the council-house door, in regard access was refused them; and finding Mr Johnston and his partners preferred to them, they raise a process of reduction and declarator against the Magistrates, and their tacksman foresaid, calling for production of the foresaid rights, to be declared void, unformal, partial and illegal; and that

they, as the highest offerers, ought to be preferred, as being most to the advantage and interest of the town.—*Alleged*, The pursuers had no title nor interest to call the Magistrates to an account for this act of their administration, seeing, by the gift and act of Parliament, the imposition is granted to the Magistrates and Town Council, as representing the whole community; and being given for paying the town's debt, it certainly empowers the Magistrates, to ingather and apply it in the way most suitable to the end for which it was given; and it bears an express clause, that they may collect it termly, weekly, monthly, or otherwise, as they see fit; which puts it in their arbitrament, either to manage it by way of collection, tack, assignation, or roup. There is indeed a restraint upon them in the appropriating clause, that they shall apply singly for payment of their debts, and that at the sight of some of the Privy Council, &c.; but that relates only to the case of misapplication, and nowise affects the clause anent their management and administration, which is left absolutely free, and in their discretionary power, as circumstances shall direct them; and are nowise bound up to expose it to a roup; and think they have made a much better choice in preferring Mr Johnston and others already much versant and known in that business, and who have shown much tenderness toward the brewers; and *esto* the pursuers offer were greater than the town's assignee's, yet all being weighed, it will truly be found to be less; for they not only undertake to sink the town's whole debt, but principal sums and annualrents, with their ministers stipends, and two French ministers, during these 13 years; so it is every way better than any thing offered by these pursuers, which was only a rash and inconsiderate act of envy and emulation against their neighbours.—*Answered*, Their title to pursue can never be quarrelled; for they have a double interest; *first*, as burgesses, who being a part of the community are concerned to see to the right administration of the common good, and so much the more that if it should be deficient in paying the town's debt, their houses would be *subsidiarie* liable to make it up; *2do*, As the highest offerers; and though the Magistrates might have kept it under collection, yet being resolved to lay aside that mode of ingathering, there was no other left them but to expose it to public roup, and not by such barefaced partiality to prefer them who offered least. And in the process against Sir Andrew Ramsay about the Provostry in 1673, the Lords sustained the citizens interest as sufficient to quarrel the election, and found it *actio popularis*; and if it were not for this check, Magistrates might malverse and do what they pleased. And though the oversight was committed to the Privy Council, the Lords of Session as *boni viri* come in their place. And they do not quarrel the paction in so far as they are to pay the town's whole debts in that space, but that the town has refused a considerable superplus to augment their revenue, only to gratify private men. And the ease of the brewers is but a sham pretence, for they would have been as kind as ever these men have yet shown themselves to be; and these are only amusements to cover their bad designs.—THE LORDS considered there was a great difference betwixt the ad-

No 13. ministration of that impost, and the misapplication of the money. In the last case, the citizens might have an interest to call the Magistrates to an account, but not in the first, where they are invested with a discretionary arbitrament to manage to the best advantage they think fit. As also, there was a disparity betwixt the Magistrates setters, and the assignees who *bona fide* entered into a contract with the town, by which there was a *jus quæsitum* to them, which could not be taken away by others offering more; for however that might affect the Magistrates, it could not touch them, especially seeing, that though it be the time of war, and fear of infection and dearth, and that the consumption is now less in Edinburgh by the Union, there being neither Parliament nor Council now, yet they had taken their hazard of famine, dearth, pestilence and war, and renounced the craving any abatement on these accounts.—THE LORDS refused to sustain process at these pursuers instance, as having no sufficient title to quarrel the way and method of their administration of that gift, as being left to the Magistrates arbitrament and discretion; but did not determine what interest citizens might have to question misapplications; and they thought the tacksmen in a stronger case by their *jus quæsitum*, which could not be taken from them. In this case a declinator was given in against one of the Lords, That he was brother-in-law to Gavin Plumber, who was Town Treasurer at the time of this agreement, and one of the contractors; but this being only *ratione officii*, and as an administrator, and now out of place, they found it did not fall under the act of Parliament anent declinators of judges.

July 27. 1711.—THE cause mentioned *supra*, 12th January 1711, Paterson *contra* the Town of Edinburgh was advised, and the declinator there proponed against one of the Lords being of new given in, and reasoned, they divided equally; and the President by his vote rejected it.

Then the LORDS entered on the cause; and it being stated whether the Town was obliged to set their impost by a roup only, or might do it by way of assignment, it carried by a plurality of seven against six, that by act of Parliament in 1693, giving it, they were at liberty in the managing and administration of it, and not tied precisely to expose it to a roup. Whereupon Mr Paterson instantly protested for remeid of law to the British Parliament. See APPENDIX.

Fol. Dic. v. 1. p. 231. Fountainball, v. 2. p. 625. & 667.

1712. January 31. CALDER *against* OGILVIE.

No 14.

In a question, whether one of the Lords might be declined in a cause where one of the parties had married his niece?—THE LORDS found that he might be declined in a cause carried on immediately by his niece, but not in her husband's concerns that were not derived from her.

Fol. Dic. v. 1. p. 230. Fountainball.

* * * See This case, No 12. p. 197.