

ers, who should be injured by the defenders in the collection of the duty. Indeed, so far as the action is brought for reparation of the damage which the pursuers have already sustained, it is evident that the overseers have neither title nor interest to insist in it; and it seems equally clear that the pursuers are entitled, by a declaratory conclusion, to guard themselves against a repetition of the injury.

The objection, that a decree of absolvitor from this process would not avail the defenders in a similar action, at the instance of different pursuers, does not apply to that part of the libel which concludes for repetition and damages. And at any rate, this objection has been over-ruled in other cases; 9th August 1765, Merchants Company and Trades of Edinburgh against the Governors of Heriot's Hospital, *voce* HOSPITAL.

THE LORD ORDINARY reported the cause on informations.

THE COURT sustained the pursuers' title, and repelled the defences stated on this point.

Reporter, *Lord Dregborn.*

Act. *Dean of Faculty Erskine, Monypenny.*

Alt. *Lord Advocate Dundas, Neil Ferguson.*

Clerk, *Menzies.*

R. D.

*Fol. Dic. v. 3. p. 142. Fac. Col. No 90. p. 201.*

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## SECT. VI.

### Powers of a Box-master.—Liability of Interim Magistrates.

1664. *June 24.* HAMMERMEN of EDINBURGH *against* STEWART.

THE Hammermen of Edinburgh, in *anno* 1641, obtained from the King a gift of mortification of certain feu-duties belonging to the bishoprick of Dunkeld; and thereupon having charged Sir William Stewart of Innernytie, for payment of a feu-duty for certain byrun years, resting before the restitution of the bishops, he suspended upon this reason, That there being certain feu-duties resting by old Garntilly, the suspender's father, for which the suspender was charged as executor to his father, he did truly pay the same, and not only obtained a discharge thereof, but also of the same feu-duties yearly in time coming; which discharge was subscribed by the deacon, box-master, and their factor.—It was *answered*, That the discharge could not be respected, as to any further years than were truly satisfied; because, it being a mortification to the use of poor beedmen, the subscribers of the discharge had no power to subscribe the same, without true and real payment made thereof, unless they had

No 34.

No 35.

The office of box-master to a trade, being annual, the Lords found that this officer could discharge only the duties, due during his inumbency; unless the trade had given him an express warrant for discharging future duties, upon a just and one-rous ground.

No 35.

an express warrant from the beedmen and whole craft; and that an answerable satisfaction should have been made therefor: Nor could they give a discharge of future years, their charge being only annual, as deacon and box-master.—*Replied*, The discharge was opposed, and that the beedmen should seek their relief off the craft, whose deacon and box-master have power to uplift any thing belonging to the incorporation.

The Lords found the answer to the reason of suspension relevant, and did only sustain the discharge for the years truly satisfied; and found, that the clause for the future was either adjected by error or by fraud; which could not pre-judge the beedmen nor the incorporation, unless there had been an express warrant for it, upon a just and onerous ground.

*Fol. Dic. v. 1. p. 158. Gilmour, No 107. p. 80.*

1761. March 6.

ELEGNORA MUTTER *against* The MAGISTRATES of Linlithgow.

No 36.

Interim Magistrates were found liable for the escape of a prisoner. Action of relief was reserved to those who were not guilty, against those who were guilty.

ON a double election of Magistrates in the burgh of Linlithgow, both were reduced by a sentence of the Court of Session; and for some years the burgh remained without a legal magistracy.

During this interval, a prisoner for civil debt in the tolbooth of the burgh had presented a petition to the Court of Session, setting forth, That he was destitute of subsistence, and that there were no Magistrates in the place to whom he could apply for an aliment; and therefore praying, that the Court would appoint certain persons named in the petition to execute the powers of the act 1696, commonly called the *Act of Grace*, ay and until a legal magistracy should be established in the burgh. Upon which petition, the Court, on the 11th of December 1755, pronounced the following deliverance: 'Having heard this petition, they authorise and appoint Thomas Smith writer, Robert Clark, and Henry Gillies, merchants, and Robert Jamieson writer, who were Bailies of the burgh of Linlithgow preceding Michaelmas 1754, or any of them, to act as Bailie of the said burgh *ad hunc effectum* to modify an aliment, and execute the other powers committed to the Magistrates of royal burghs by the act 1696; and to continue in the exercise of the said office, ay and while a legal magistracy shall be chosen,' &c.

Eleonora Mutter soon after imprisoned John Ferrier, her debtor, in that tolbooth. The Magistrates received him, imprisoned him, decerned an aliment for him; but, after some weeks, unwarrantably discharged him; after which he continued in the town.

In discharging the prisoner, Gillies and Clark had no active hand.

Eleonora Mutter pursued the Magistrates for the debt.

*Pleaded* for the Magistrates; This is a penal action to make them liable for Ferrier's debt. All penal actions are strictly to be interpreted. Now, the Ma-