

1669. *June 23.* PEARSON of Balmadies *against* The TOWN of MONTROSE.

No 12.

Whether the Magistrates of a burgh are liable for the acts of their predecessors in office?

PEARSON of Balmadies being Collector of two of ten and the sixteenth penny imposed by Parliament *anno* 1633, and the Magistrates of the Town of Montrose having written a letter to him, promising count and payment *in anno* 1637; some few days after the letter, he made count with Orbiston, General Collector, and charged himself with the whole taxation of Montrose as received; and *in anno* 1654, obtains a decret against the then Magistrates, holding them as confessed upon the quantities of taxation of their burgh. They now suspend on this reason, That the decret was in absence, and the Magistrates only holden as confessed, and they are now content to depone that they never had any stent-roll of the said taxation; and by the charger's count produced, he acknowledges the proportion of Montrose received: And further *allege*, That there being neither warrant from King nor Parliament, there should be no charge or pursuit sustained for these old taxations, especially of money, where the most part of the monied persons liable then are now insolvent, and the Town cannot get their relief; but as for the land taxation, the King has given warrant to lift it and is still secure, being *debitum fundi*. The charger *answered*, That he being neighbour to the Town, did, upon their desire, delay to distress them, and held count for them, as appears by their letters produced; and therefore it will not infer that charges may be used upon the act of Parliament only, unless parties had given writ theréfor; and the Magistrates were obliged by the act of Parliament to have uplifted the taxation *debito tempore* and paid it to the Collectors; and it must be presumed they did so, or if they did not, it was their fault in the discussing of this cause. It occurred to the Lords, that this taxation not being imposed upon the Town's common good, but upon the inhabitants severally for their money, and that the Magistrates were not countable to the Town for the taxation of money, nor were they liable for their Magistrates, who had not this power of collection by their office, but by the commission of Parliament therefor;

THE LORDS found the Town and present Magistrates not liable, but prejudice to the pursuer to insist against the then Magistrates, their heirs and executors.

*Stair, v. 1. p. 622.*

No 13.

A Commissary Clerk not obliged to relieve the Commissaries of the contribution money due to the Commissaries of Edinburgh.

1676. *July 18.*

The COMMISSARY of GLASGOW *against* The CLERK and FISCAL.

THE Commissary of Glasgow being distressed by a decret against him, at the instance of the Archbishop of Glasgow, for relieving the Archbishop, and paying the proportional part due by the Commissaries of Glasgow, of contribution payable to the Commissaries of Edinburgh, to whom the confirmation of all

testaments exceeding 100 merks did belong, and were communicated to all the Commissaries, for which all the Commissaries in Scotland pay a contribution yearly to the Commissaries of Edinburgh; and seeing the benefit of the confirmation of these testaments redound, not only to the Commissaries, but to the Clerks and Fiscals, who, by the injunctions agreed upon by the King's warrant, recorded in the books of Sederunt, have the benefit of the third of all confirmations, with the burden of furnishing of wax, paper, and chamber-mail; therefore, as they have a benefit by the communication of the larger testaments, they ought to bear a proportional part of the burden; the defender *alleged*, Absolvitor; because the said injunctions bear expressly, that the inferior Commissaries shall pay the contribution to the Commissaries of Edinburgh, and that their Clerks and Fiscals shall have the third of the benefit of all confirmations, beside the quot, with the burden of the chamber-mail, wax, parchment, and paper; so that the Commissaries are only charged with the contribution money, and are free of the charges of chamber-mail, wax, and paper; and, therefore, the Clerk and Fiscal must be free of the contribution money.

Which the LORDS found relevant, and assolizied the Clerk and Fiscal therefrom.

*Stair, v. 2. p. 452.*

\* \* \* Gosford reports this case :

THE Commissary being decerned to relieve the Archbishop of Glasgow of the sum of L. 224 yearly, as contribution money paid to the Commissaries of Edinburgh, did pursue the Clerk and Procurator-fiscal of the commissariot of Glasgow, to relieve him of the equal half of the said sum, and that it might be declared, that all succeeding in these places should relieve the Commissary for the time of the half of the contribution money; it was *alleged* for the defenders, That the pursuit was altogether groundless; because, by the decret-arbitral 1609, the contribution money is expressly laid upon the Archbishops and Bishops, who, by their instructions to their respective Commissaries, *in anno* 1666, and ratified by his Majesty, they burdened only the Commissaries for their relief; and, as to the Clerk and Procurator-fiscal of inferior commissariots, there is a special burden put upon them, for payment of fifteen shillings for each testament confirmed, where the dead's part exceeds L. 120, which they are to pay to the commissariot of Edinburgh, and which they were to pay during their lifetime only; which clearly imports, that no burden could be imposed upon any succeeding Clerk or Procurator-fiscal; likeas, by the injunctions 1610, the Clerks and Fiscals of inferior Courts are ordained to relieve the Archbishops or Bishops of the duties payable to the Clerks and Procurators of the commissariot of Edinburgh; but, as to the contribution money due to the Commissaries, there is no mention at all thereof. It was *replied*, That, by the last injunctions, imposed *in anno* 1666, the whole benefit of the Commissariot Court being divided,

No 13.

viz. two parts to the Commissary, and a third part to the Procurator-fiscal and Clerk, and the compositions of testaments being equally divided amongst them, their burdens should be accordingly proportioned, and each of them have their own share, conform to that general maxim in law, *quem sequitur commodum eundem et incommodum*.—THE LORDS did consider this case as a leading case to all commissariots; and, in respect that the decreet-arbitral, and injunctions ratified by his Majesty, were inserted in the books of Sederunt of the Session, whereby the contribution money was only stated to be due by the Commissaries, without making any mention of relief by the Clerk of the commissariots, who had their own distinct burdens; therefore, they found that they ought to be assoilzied from this pursuit; and that their case should not fall under that general maxim of law, which can give the rule to decide only in societies, or *in re communi*, where the profits were never divided by law, or statute, or agreement betwixt the parties; whereas, the proportions of burdens, in this case, were distinguished by injunctions, decreets-arbitral, ratification, and universal custom, which left no place to a new division, answerable to every member's pain and employment, which could produce inextricable trouble and uncertainty.

Gosford, MS. No 883. p. 564.

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1676. July 18.

The EARL of KINGHORN *against* The TOWN of FORFAR.

No 14.

Rights of an  
heritable  
Constable.

THERE being mutual declarators between the Earl of Kinghorn and the Burgh of Forfar; the Earl pursuing declarator of his right, as Heritable Constable of Forfar, and the Town their privilege, as a free burgh within their own bounds; the LORDS having appointed either party to produce all evidents they could make use of, and to adduce such documents and testimonies as they would make use of, for clearing the possession; the Earl insisted on these particulars, and produced an ancient infeftment by the King to the Lord Gray, containing the office of Constable of Forfar, *cum feodis et divoriis ejusdem*; he did also produce a commission to the Provost and Bailies of Forfar, for uplifting the customs of St James's Fair, and the fines of transgressors at that time, and some acts and scrolls, shewing the Constable had used jurisdiction at the said fair, and at other times; and *insisted*, That it might be declared, that he had right to the office of Constable of Forfar, with power to proclaim and ride their fairs, and to hold Courts, and to punish all transgressors within the bounds of the burgh, and to uplift the customs of their fairs, and that he had right of property to the Castle hill of Forfar. It was *alleged* for the Town, *imo*, That the Earl's right, being general and antiquated, could have no effect, unless it were established; for the ground of that right being as Constable of the King's Castle