

No 67.

The Lords found themselves competent judges in a process at the instance of burghesses against Magistrates of a burgh for malversation; though the act 28th Parl. 1693, appoints, in such cases, a special commission to be named by the King.

1707. July 8. AINSLEY, and Others, *against* PROVOST SCOT, and Others.

AINSLEY of Blackhill, and others, burgesses of the town of Jedburgh, *contra* Provost Scot, and others, the present Magistrates of that burgh, to make count and reckoning of their management, administration, and disposal of the town's common-good; and to hear and see it found and declared, that they have malversed, mismanaged, and contracted great debts unnecessarily; whereby they had incurred these two certifications by the 28th act of Parliament 1693; *Imo*, Of relieving and disburdening the town of these debts, and paying them out of their own proper estates; *2do*, Of deprivation and removal from their offices, they having enhanced the magistracy into the hands of a few particular persons, who transmitting it from one to another, make it a circular magistracy, and so debar more worthy and deserving citizens, who, as the reward of their pains and industry, may expect to bear office in their burgh by turns. *Alleged* for the defenders, That by the foresaid act 28. 1693, there is a special commission to be named by the King to take trial of the malversations and embezzlements of the common-good of the royal burghs, and therefore the Lords are not competent judges thereto; which they do not propound as doubting the Lords, or fearing their doing justice, but only to redeem themselves from a vexatious, groundless, and calumnious plea; that the malversation of Magistrates did of old belong to a particular officer of the crown, called the chamberlain, as appears by the *iter camerarii* in the books of *Regiam Majestatem*; but that falling into desuetude about King James Vth's reign, when Sir George Forrester of Corstorphin had the office, then it devolved on the Lords of Treasury and Exchequer; and they neglecting it, a special commission was designed for that particular affair, in regard the burghs were generally decaying for want of trade; and therefore they desired to be relieved of this emulous and invidious process, calculated for no other design but to bring in a faction into the government of the town, who were not well affected to the present establishment both in church and state. *Answered*, Whatever might have been pleaded, if such a commission had taken place and been named, yet never having been prosecuted, the Lords are undoubtedly judges competent to such a trial and cognition; and *esto* it had been named, or that the Exchequer may meddle in such cases, yet it may very well be doubted if any of their powers be more than cumulative, and not privative and exclusive of the Session's jurisdiction, unless they were expressly debarred. THE LORDS found themselves judges competent to all such processes. Then the pursuers insisted on a particular condescence of their malversations, that, in 1693, the town's debt was only 14,000 merks, and they had swelled it to the double, viz. 28,000 merks, notwithstanding they had a common-good sufficient to have paid the annualrents of the debt, and defrayed all their incident charges besides. *Answered*, This pursuit, though it be *actio popularis*, yet *non competit cuivis*, but only to such as have borne office be-

fore in the magistracy, which some of these pursuers had not, and so no process can be sustained at their instance. *2do*, *Esto* the debt be now greater than it was in 1693, yet they can rationally exculpate themselves by a great many emergent burdens the town has fallen under since that time, as an augmentation of their quota and proportion of the tax-roll, laid on by the convention of burghs; *item*, Their missive dues, the expenses in a debateable election, the reparation of Ancram bridge, and many other incidents, which has drawn them into so much debt. *Answered*, This can never palliate their smuggling-trade of preying upon the town's common-good; for they offer to prove, beside their constant revenue, they had their mills and ladle-custom to defray all these extraordinaries; and though the present Magistrates brag they have not enriched themselves thereby; yet it is all one, if by drinking, squandering, or negligence, they have drawn the town into unnecessary debts; for, by the title *D. De administrat. rer. ad civitat. pertinen.* it is evident Magistrates are liable not only *pro dolo et lata culpa*, but likewise *pro leve, et negligentia*; and the common-good of burghs coming from the crown, they are, by sundry acts of Parliament, to make yearly count how they have employed the same, as appears by act 36. 1491, and act 26. 1535. THE LORDS thought the point of general concern to all the royal burghs of Scotland; and therefore named some of their number to examine the accounts, and endeavour to settle the two contrary struggling factions in this burgh.

Fol. Dic. v. 1. p. 496. Fountainhall, v. 2. p. 379.

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1735. February 14. MONCRIEFF of [Reddie against PATRICK MAXTON.

THE right to a stipend is a civil right, and therefore the Court of Session has a power to cognosce and determine upon the legality of the admission of ministers, *ad hunc effectum*, whether the person admitted shall have right to the stipend or not. See APPENDIX.

Fol. Dic. v. 1. p. 495.

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1741. Feb. 19, & June 17. NEWLANDS against NEWLANDS.

IN a complaint at the instance of Barbara Newlands against Alexander Newlands, for a very heinous offence, no less than subornation of perjury on a commission from the Lords to London, the said Alexander having absconded; a question occurred, under what certification the Court could appoint him to appear, and in what manner? And the Lords Elchies and Arniston, to whom it was remitted to look into the books of sederunt for precedents, having reported and pointed out to the Court several cases, in which parties had been appointed to appear under pain of rebellion and being put to the horn; the

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A person having absconded upon a complaint against him for subornation of perjury, the Court granted warrant for citing him to appear under pain of rebellion and putting to the horn.