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It was found that a town, as a community, can be bound only by the deeds of its Council; but a community was found to be liable for the obligations of a set of Magistrates, whose election was reduced; because it appeared these Magistrates had been in the exercise of all the acts of magistracy, and in possession of the town's revenue.

1748. June 30. JOHN MUIRHEAD *against* The TOWN of HADDINGTON.

JOHN MUIRHEAD of Breadisholm, as executor to his brother George Muirhead, writer in Edinburgh, pursued the Magistrates and Council of Haddington, as debtors to him in an account for debursements and pains in their affairs, as their agent in carrying on a reduction of the magistracy chosen at Michaelmas 1722, at the desire of several of the burghess, which was prevailed in, and a poll election ensued in consequence of, so that the expence was *in rem versum* of the town; and after that in their business, till Michaelmas 1730, in which he was employed by the Magistrates and Council; and in defending the election made 1730, in a reduction brought against it, in which the pursuers prevailed; as he was employed by the Magistrates in possession, whose interim acts behoved to be sustained binding upon the community.

*Pleaded* for the defenders, That by the pursuer's claim, burghs would be in very bad circumstances, when a reduction was brought of an election, in being obliged to pay the pursuer's expenses as *in rem versum*; and the defenders' as bound by the acts of the magistracy in possession: That, supposing a defect in an election, it was not always so much the interest of a town to have it overturned, as to oblige them therefore to pay all the money laid out for that purpose. This remedy would often be worse than the disease, and sometimes it would be more their interest to continue under a magistracy in whose title there might be a defect, than to have it overturned, though it cost the town nothing, at the hazard of getting another, that with a better title would be worse managers; or, if as good, at the hazard of introducing division into the community: That the account which he claimed, as employed by an uncontroverted magistracy, was not vouched, and in whole, or in several articles, prescribed, act 83d, Parl. 6th, James VI.; and the last part of his account was for supporting an election which was reduced, and the Magistrates then chosen never obtained sole possession; the other party having from the beginning contended with them about it.

*Pleaded* for the pursuer, It is certainly very much for the interest of any burgh that they be not tyrannized over by a set of people who have no title to rule them; and it is not possible to say any thing is *in rem versum*, if that be not so which is laid out to free them from usurpation. Prescription cannot be objected to his accounts, as not falling under any of the particulars subjected to it by the act; besides, they are founded on writ, in so far as there is an act of Council, 13th November 1723, appointing one of their number to consult with George Muirhead and the town's lawyers, about drawing answers to a bill of suspension, which proves he was their agent; and another, 10th December 1730, narrating the reduction of the election 1722 carried on by him, and appointing him to be paid all his reasonable debursements in former processes, and one then depending; and 16th April, empowering the treasurer to advance him L. 20 on receipt: Which acts, though made by a Council afterwards reduced, must be

sustained, as they were then in possession of the government; at least, as good interruptions of the prescription, being equal to a process for that purpose at George Muirhead's instance, which he must have executed against the Magistrates in possession.

THE LORDS found, That the Magistrates, Town Council, and Community of the burgh of Haddington, were not liable for any of the articles in the account pursued for, debursed at, or preceding the poll election 1723, reserving action therefor to the pursuer, against the particular persons by whom George Muirhead was employed; but found the Magistrates, Town Council, and Community of the said burgh liable for George Muirhead's accounts of debursments from and after the time of the said poll election, till the election of Michaelmas 1730; and repelled the defence of prescription, but prejudice to the defenders to be heard upon the objections, if any they had, to the particular articles of the account in the aforesaid period; and before answer to the pursuer's claim for the account of debursments from and after Michaelmas 1730, they remitted to the Lord Ordinary to enquire whether that set of Magistrates by whom George Muirhead was employed, or the other set of Magistrates, pursuers of the declarator then raised, were in possession immediately after the election, and at the time of raising the said declarator, and what acts of possession either the one or the other had, and particularly which of them were in possession of the town's revenue, by setting, disposing or uplifting of the same, and which of them did keep the courts or councils, or exercise acts of authority within the said burgh, and report the facts to the Court as they should appear.

*July 12. 1749.*—In this action against the Magistrates of Haddington, at the instance of the Representatives of the town's agent, wherein part of the claim was for debursments and pains, laid out by authority of a set of Magistrates, whose election was afterwards reduced, in supporting the said election, the LORDS having granted a proof, as is observed 30th June 1748, of which set obtained possession of the magistracy, and continued it during the process; and it being proved and acknowledged that the agent's employers had the possession:

Found the town liable.

Reporter, *Strichen.* Act. *Smollett.* Alt. *G. Sinclair.* Clerk, *Gibson.*  
*Fol. Dic. v. 3. p. 139. D. Falconer, v. 1. No 268. p. 360. v. 2. No 85. p. 91.*

\* \* \* Kilkerran reports the same case:

A process was brought at the instance of Muirhead of Breadisholm, as executor to George Muirhead his brother writer in Edinburgh, against the town of Haddington for his brother's account, as agent in several processes carried on from the year 1720 to the 1731, amounting to above L. 10,000 Scots.

The accounts claimed were of three classes: The first was of the debursments in a reduction at the instance of the deacon convener and his brethren, for reducing the election of magistrates and council made in the year 1719, and

No 12. in which the pursuers prevailed, which produced a poll election in 1723: And as to this the Court was unanimous that the town was not liable for the expense of it, as the town can only be bound by the deed of the council; and the pretence *in rem versum* could not be hearkened to, not only as that is never pleadable where expense is laid out against the will of the person or community alleged to be liable; but that no body could say, Whether or not the town as to its pecuniary interest was profited by the change.

The second class was of debursements when employed by the magistracy and council that were chosen at the poll election; and as these were in the undisturbed possession, there was no doubt of the town's being liable. All the question was, Whether the account was prescribed? As to which it was doubted, if prescription could at all run in such a case, as it is not an absolute prescription, but admits resting owing to be proved by the party's oath; and that it does not appear how that can apply to a town where no such oath is competent: And the Lords came to agree in this, that in the case of a town, the account must be held as due, unless in the treasurer's accounts it should be stated as paid; and as that could not be here pretended, the town was found liable.

The third class was in debursements in defending against the process for reducing the election of magistrates and council in 1731, carried on by another set of magistrates and council, who pleaded to have been the magistrates and council duly elected, and which went against the defenders Mr Muirhead's employers. And in the question, Whether or not the town was liable in these debursements, the Court was divided.

It was by some argued, that the town was liable, as the defenders were the magistracy and council for the time in possession, and therefore the town was liable on the same principles as in the preceding case; and that it would be of bad consequence for burghs in general should it be found otherways; for no agent would be found to undertake the defence of a magistracy in possession howevea groundlessly attacked, were he to depend for payment of his account on the chance of prevailing.

On the other hand, it was said by others, that the difference between the two cases lay in this, That in the case in question, the possession of the magistracy quarrelled was not a légal possession, but a possession *vi et precario*, whereof the decree of reduction and declarator following upon a process immediately pursued was full evidence; that the inconvenience alleged was in itself nothing, as whoever should pursue reduction, would be supposed to have as much credit as to defray the expence of it; and that the inexpediency to burghs would be much greater, should a burgh in such a case where the pursuers of the reduction prevailed, be liable to the expence both of the pursuers and defenders.

Before determining this point, THE LORDS 'remitted to the Ordinary to enquire and report what sort of possession of the magistracy the defenders in that process had, and which of the contending parties was in possession of the town's revenue.'

And on the Ordinary's report, on the 12th July 1748, of the possession of which the pursuer's employers had at the time; THE LORDS 'found the town liable.' See PRESCRIPTION, TRIENNIAL.

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*Kilkerran, (COMMUNITY.) No 2. p. 130.*

## S E C T. II.

Whether Magistrates are liberated by expiry of their office.

1624. *January 15.* L. DRUMLANRIG *against* BAILIES of Hawick.

THE Laird of Drumlanrig having obtained decret before the Secret Council against the Bailies of Hawick, then being in office, and the clerk, decerning them as having no right by virtue of their infestment, to impose any taxes upon their neighbours by their acts of court, to desist from doing of the same in time coming; and that decret being transferred in the Laird of Drumlanrig's person, as succeeding to his right, who recovered the sentence; charges the Bailies, against whom the decret was first given, after the expiring of their office, and after that new Bailies were placed, and their clerk, to obey the decret, which was suspended. In the discussing of the which suspension, THE LORDS found, that the said decret of Secret Council might have execution, seeing the same was transferred as said is, by letters of horning and summary charges, without any other transferring, or longer process against the Bailies, and next succeeding magistrates, or any others bearing office before them, they being an university, and the first sentence being given against the defenders therein as Bailies; for albeit their office ceased by the new yearly election, whereby they could not be further charged as representing the body of the town, yet it was not reason that the execution and force of their sentence should be frustrated; but the LORDS found the succeeding magistrates stand subject to obey the same, and that the said sentence ought also to have execution against the same persons against whom it was first given or transferred, *ad hunc effectum, viz.* to cause themselves desist and obey the sentence, but not to take the burden for the body of the town; and also found, that the clerk was not a member, to be repute of the council, or as a magistrate, against whom any charges could be execute upon such decreets given against the magistrates; and therefore suspended the letters and charges executed against him; and in respect the said decret was given by the Lords of Secret Council against the party then compearing; the LORDS of Session would not discuss the nullity, alleged against the same by way of sus-

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Magistrates of a burgh against whom a decree is taken as representing the town, cease to be liable after expiring of their office, but diligence may be followed forth against the succeeding magistrates, the same way as if the decree had been taken personally against them.