

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-

gistrates were appointed by the Court *ad hunc effectum* only, to execute the powers committed to the Magistrates of royal burghs by the act 1696. They are subject to all the consequences of the abuse of these powers, but not to any other consequences relating to the powers of Magistrates; for, except *quoad* the powers contained in the act of Parliament 1696, they are not Magistrates. The present action is not competent against them in strict law, as they were not properly Magistrates, and ought not by interpretation to be extended against them, as it is of a penal nature.

Separately it was *pleaded* for Gillies and Clark, That as they had no active hand in discharging the prisoner, Jamieson and Smith only ought to be found liable.

THE LORDS found 'all the defenders liable conjunctly and severally for the debt, reserving action of relief to Henry Gillies and Robert Clark against William Jamieson and Thomas Smith, as accords.' See PRISONER.

Act. Millar, *J. Dalrymple*. Alt. Lockhart, *Montgomery*. Clerk, *Gibson*.  
*J. M.* Fol. Dic. v. 3. p. 142. Fac. Col. No 30. p. 58.

Powers of Magistrates—Corporations. See BURGH ROYAL.

Who entitled to pursue a reduction of an election of Magistrates. See TITLE TO PURSUE.

Powers of administrators of an hospital. See HOSPITAL.

See Keith against Graham, No 2. p. 2256. Jaffray against Duke of Roxburgh, No 69. p. 2340.

Taylor against Trades of Aberdeen, 17th July 1716, *voce* PUBLIC OFFICER.

Charteris, &c. against Pringle, &c. 27th February 1757, *voce* PROCESS.

COLLEGE—PUBLIC BURDEN—PUBLIC POLICE—APPENDIX.