1768. *November* 18. MAGISTRATES of GLASGOW *against* WILLIAM MACDOUGALL of Castle-Semple.

COMMUNITY—BURGH-ROYAL.

Magistrates may alienate the common good for the advantage of the borough.

[*Faculty Collection, IV.* p. 328; Kaimes's *Select Decisions*, p. 336; *Dict.* 2,525.]

MONBODDO. As to the general point, I do not think that the Magistrates and Town-Council of a royal burgh are no more than mere administrators, like tutors and curators. They are the borough, the head, the wisdom, the council, of the borough. As soon as a borough is without magistrates and council, it is no longer a borough. No general law restrains them from alienating. The only restraint is by statute. Craig, in laying down the doctrine as to the power of alienations, makes no difference between that of bodies politic and that of persons. He indeed makes a distinction, as to boroughs, which the law does not make. He refers to the statute, which says nothing of alienation, and only respects the power of granting leases. Besides, his authority goes no farther than to the subjects originally granted by the king. As to the second question, which is special to the present case, I think the Magistrates have a power of selling, notwithstanding the charter 1669 and the ratification in Parliament. If one should entail a barony, and afterwards acquire another barony, and unite it to the first, would the entail of the one have any influence on the other? Certainly not. The ratification might be effectual against the Crown, but can never touch the interest of third parties. There are precedents of the Court for my opinion; the power of feuing out is more than the power of selling the feu-duty. The Town of Aberdeen has been in use to feu out, and then to sell part of the feu-duty.

AUCHINLECK. My opinion, as to the first point, is different from that delivered. When the king, for the public good, makes a grant of lands to burgesses, and inhabitants, to be held by them *more burgi*, under an obligation to watch and ward, &c.; from the nature of the thing this grant is qualified for a particular purpose, and cannot be alienated; for that alienation would disappoint the trust. Every statute speaks this to be the case. There are acts restraining the granting of leases beyond three years. If the subject could be sold, why make such a restraint? It argues that the Magistrates and Town-Council had no more than a year of administration. There are many grants upon record, whereby the king gave to magistrates a power of feuing. This question is a matter of great consequence. There may be magistrates who are bad managers. Every proprietor in a borough has his property liable for the debts of the town. The magistrates contract debt, drink the money, sell the common good. *Who* is to pay the debts? If the question was, Whether the Town of

Glasgow might sell its tolbooth, I should think not. But the present case is different. The particular purchases made by the magistrates, out of their savings, must remain at the disposal of the magistrates. I do not think that the annexation was intended to hurt the buyers. The annexation only meant that the subject should be inseparable from the borough as long as the borough remained proprietor. An alienation makes a separation, and then there is an end of the provision. The ratification makes no odds: that passed in course, and did neither good nor harm.

GARDENSTON. Magistrates and Town Councils are the representatives of the boroughs, in this sense,—that they have a certain power of administration and of jurisdiction. I think that magistrates have no power of disposing of the original patrimony; but they have as to an estate bought by their predecessors. The charter, 1669, only meant that the lands, while they remained with the borough, should remain inseparable from the borough. But they might have resigned the lands over again, and left out the clause: the same power is still in them.

PITFOUR. I have no occasion to lay hold of specialty, for I am clearly of opinion that the magistrates have the power of alienation. It is agreed that they may feu, and that is a higher power than the power of alienating a superiority is: every subject, unless restrained, must be *in commercio*. There is no law which puts the common-good of burghs *extra commercium*. If, indeed, the king should grant a charter, prohibiting alienation, this will be effectual, regulating the mode of the right. In Craig's days, burgage-holdings were a species of ward-holdings, and, consequently, could not be alienated without the authority of the superior. If the magistrates contract debt, the subject may be adjudged; why then prohibit to sell? Shall a legal, and not a voluntary sale, be effectual? If any thing is inseparable from the town, as the tolbooth, fairs, and the like, it cannot be alienated. It is objected, that here is a total alienation, which is not in a feu. But, by feuing, you may give away the substance and retain a trifle: here you sell feu-duty, which is unimprovable, to gain a sum of money which is improvable: in the same way a barren muir may be exchanged for an improvable subject.

HAILES. I have observed, in the deliberations of this Court, that, when a case may be exhausted by determining one point, no judgment uses to be pronounced upon other points. I am now satisfied, from what I have heard, that the subject in question may be sold, as it was bought; and that neither the charter 1669, nor the ratification in Parliament, stands in the way of the sale. This is a case which will seldom occur; for royal boroughs will have occasion to sell lands which have been purchased by saving of the public revenues. As to the general point, I have still great difficulty: When the *Iter Camerarii*, and our other ancient books, are examined, no trace of any such power in the magistrates can be discovered: it has been found that they may feu; but still this is less than alienation. It is, perhaps, owing to my want of apprehension; but I am still to seek how the retaining the *dominium directum* can be a higher exertion of property than the alienation of the *dominium directum* as well as *utile*.

KAIMES. It is hard to say whether the Kings of Scotland originally meant to give a feu or a grant in perpetuity to the corporation. I think that, as to the

common good, the burgh is the proprietor: The magistrates, indeed, are the hands; for the burgh, being only a name, cannot act. Thus the burgh can contract debt *by* the magistrates: this proves the property to be in the burgh: the inhabitants, burgesses, are liable in payment. Although a man be a proprietor, he may be fettered from alienating. A prelate might not alienate without the King's consent: this implied that he had the abstract power of alienating; that he had the property in him, though the King might check him. Magistrates cannot alienate unless *auctoritate prætoris*, just as is the case with tutors in regard to their pupil's estate. As to the second point; if I saw an estate come from the King, under the condition of not alienating, I would think the magistrates *in pessima fide* to alienate. But here there is no third party; it is not a grant by the King, but only a resolution by the burgh, which may be altered at pleasure.

JUSTICE-CLERK. If this question had occurred, touching the alienation of any part of the subjects and estate contained in the original charter of Glasgow, I should have had great difficulty. I learnt from the civil law, and from all our books, that there is no occasion for a law to prohibit magistrates from alienating the common good of the burgh. But the subject in question is no part of the common good of the burgh: It was originally purchased out of the savings of the common good; it may be alienated, but still profitably, as to which there is here no question. This idea of the unalienable nature of the common good has sunk deep into the minds of the nation; for we have no example of magistrates and town council ever taking upon them to make an absolute sale of the common good; they always feu, and thereby retain a constant revenue. Were you to determine magistrates to be proprietors of the common good, you would have the lands of the burgh converted into a sum of money; and what security will you have against the dilapidation of that sum?

PRESIDENT. I am of opinion that, in this case, the magistrates had power to sell. As to the general point, it is unnecessary to determine it. At the same time I cannot agree to the power here claimed for magistrates. Royal burghs hold of the Crown for the service of watching and warding: the subjects thus held have never been allowed to be alienated. It is said that, in some cases, this rule may be hard; but nothing is hard that is legal. I will not agree to overturn the common law for the particular advantage of any corporation. If the magistrates are proprietors of the common good, why may they not alienate the fairs and the markets? Besides, I doubt as to the power of this Court to rectify the wrongs done by magistrates in selling at an under rate, if they have a power to sell at all: if this power is anywhere, it must be in the barons of Exchequer, as come in the place of the chamberlain. If burgage lands are to be feued, I desire to know how they are to be held; is the King to lose his service of watching and warding? We have entered into a disquisition unnecessary for determining this cause.

On the 18th November 1768, the Lords found that the lands purchased by the magistrates and town council of Glasgow in 1669 are alienable by their successors; and therefore repelled the reasons of suspension.

Act. H. Dundas, J. Montgomery. *Alt.* A Bruce, A Lockhart.

Hearing in presence after Justice-Clerk's report. Lord Advocate, in his

pleading, said, that *apud nostrates* in Craig meant *with our ancestors*: that this was but a conjecture, for that he had looked in the Dictionary for *nostrates*, and could not find it there. The President said, "Lord Advocate, you have a very bad dictionary." But the Advocate's dictionary was not to blame, if the search was made for *nostrates* instead of *nostras*. A Greek dictionary may be a good one, though it does not contain in the plural number.

1768. *November* 23. MR ROBERT HUNTER and OTHERS, *against* The DUKE of HAMILTON.

COMMONTY.

Possession of an uncultivated Commonty by pasturage, and casting feal and divot, on a title of part and pertinent, infers a right of common property.

[*Faculty Collection*, p. 142; *Dictionary*, 2481.]

PITFOUR. A right of servitude will not give a property, neither will a right of common pasturage; and still less will a grant of *parts and pertinents* give property, without prescription; *quod minimum est* must be presumed. If a feuar is once made a joint proprietor, the superior cannot give a servitude on the muir to any other person. Why give a share greater than the feuar has occasion for? If such is the construction of the grant, I do not see that prescription can make any odds; for there is just the same sort of possession there would have been, had there been only a servitude. The grant now contended for by the feuar, is what he had no right to ask, and what no wise man would give. The distinction made in the case of *Biggar* was so slender, that I could never lay hold of it. The case of the *Mearns Muir* is not in point; for there the feuars had expressly granted to them a proportional part of the muir.

ELLIOCK. According to the doctrine now laid down, all the common muirs in Scotland ought to be divided anew.

GARDENSTON. I am moved with this argument, that, if *part and pertinent* implied property, no feu after the first could be granted without the consent of the first feuar.

AUCHINLECK. A whole muir is possessed in common by the tenants of my barony: I give off a farm to one, and his share of the common; will that hinder me from giving off other farms, and a share of the common, to each?

PITFOUR. The 5th Act of the 16th Parliament, James VI., implies that though the ground about muirs was feued out, yet still the property of the muirs themselves was reserved.

PRESIDENT. That Act of Parliament seems to have no relation to the present controversy: it relates to the King's property actually reserved. The decision of *Biggar* is a leading case often quoted and often followed. There may be