

The pursuers laid their challenge, *first*, upon the circumstances of the case, and the very consequence in point of precedent, if it shall be understood henceforth to be a rule, that a corrupted set of magistracy, in connivance with the corrupters, may defend every challenge, and maintain themselves in possession, right or wrong, at the expence of the burgh. *2dly*, That even if Mr Robert Alexander could be considered as a third party, unconnected with the burgh, the power of magistrates to borrow money, or to lay it out for the community, of which they are no more than administrators, is limited by the nature of the thing, and by express statute, act 28th Parliament 1693.

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At advising the cause, the two points stirred were, *imo*, Whether it was proved that Robert Alexander was in the knowledge of the stipulation that was made on his behalf? And, *2do*, Supposing that he was in the knowledge of it, whether that was sufficient in law to reduce the bond?

The Court were satisfied upon the first point, that there was no full evidence of Mr Alexander's being in the knowledge of the said stipulation, and likewise of the conclusions against the signers of the bond, when he advanced the money, for the special purpose of defending *them*, and not the burgh; and, upon all these grounds,

Found, That the community was not liable for the contents of the bond in question, and reduced the same, so far as relates to the community; and found the defenders liable in full expenses; reserving to Robert Alexander action against the signers of said bond, and to them their defences, as accords.'

Act. *Ilay Campbell.*Alt. *M'Laurin.*Clerk, *Gibson.**Fol. Dic. v. 3. p. 140. Fac. Col. No 127. p. 339.*

1775. February 21.

JAMES WILSON and Others, *against* JOHN STORRY, Merchant in Paisley, and the MAGISTRATES and TOWN-COUNCIL of Paisley.

THE magistrates and council of Paisley, on behalf of the community, having some years ago made a purchase of certain lands in the county of Renfrew holding of the Crown, and valued at upwards of L. 400 Scots in the cess books, a transaction was entered into between them and Alexander Skeoch, who was then town-clerk of Paisley; in consequence of which, and for the agreed price of L. 45 Sterling, they disposed to the said Alexander Skeoch in liferent, and to themselves, as representing the community, in fee, the superiority of the said lands, and the feu-duties and casualties payable out of them; and Mr Skeoch, as liferenter of the said lands, was admitted upon the roll of freeholders, and stood there during his life without objection.

Mr Skeoch died about six years ago; and the liferent being thereby at an end; in consequence of an offer made to the council by the defender Mr Storry, a burgess in the place, and who had long been a member of the council and

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The magistrates and town-council of a burgh found entitled, for an adequate consideration, to sell the liferent of a superiority, without setting it up to public roup, although informed of an intended competition.

No 26. magistracy, of purchasing the superiority for his life at the same price which had formerly been given by Mr Skeoch, the magistrates and council, by an act of council of date November 1. 1773, bound themselves for the sum of L. 45 Sterling, to dispoise the said lands to Mr Storry in liferent, and to themselves, and their successors in office, in fee ; which was accordingly done ; and Mr Storry made payment of the agreed price, and his right was completed by charter and infeftment.

Prior to this transaction, James Wilson, writer in Paisley, had given notice, in writing, to the council, that he was desirous to purchase this superiority, and was willing to give L. 80 for his liferent of it. His second letter upon this subject was dated October 25. 1773, and concludes thus : ‘ As a burges of the town, I considered myself on a level with any burges who may offer to purchase these superiorities ; and I dare say it will readily occur to you, that, as guardians of the town, you are in duty bound not to prefer any other person to the purchase who does not make as high an offer as I have done ; and I hope I may depend on your informing me before the superiorities are disposed of, that I may be upon an equal footing with any other person who shall propose purchasing them.’ But the council having disregarded the proposal, and the disposition having been made out in favour of Mr Storry, an action was brought before this Court in name of Wilson himself, and his two brothers, William and John Wilsons, ‘ as burgeses of Paisley,’ calling for production of the said act of council, and of all conveyances or rights following thereon, in order to be reduced, upon the following special grounds :

The foresaid superiorities are part of the public revenue belonging to the community, under the administration of the defenders as magistrates and town-council ; and, by the conveyance thereof to Mr Storry, the defenders were guilty of a manifest breach of trust, and act of dilapidation of the town’s subjects ; or at least, under the cover of a simulated sale, dispoised away their subjects at a great undervalue, to the extent of L. 80 Sterling at least. The said superiorities yielded an annual revenue to the town of Paisley of upwards of L. 5 Sterling, besides the casualties ; for a liferent right, to which, the pursuer James Wilson, prior to the conveyance in favour of Storry, did, by a letter addressed to the defenders, offer them the sum of L. 80 Sterling, which the letter shows was not even his *ultimatum*, and craved a fair competition with any other offerer that might occur. Notwithstanding which, and without calling a public roup, as was usual, and their duty, or without allowing him to be heard, the defenders, in a private and clandestine manner, bestowed this purchase upon one of their number, for the simulated price of L. 45 Sterling, whereby it falls under the same predicament as a tutor acquiring right to the estate of his pupil ; and, consequently, the defender, as being then chief magistrate of the burgh, and convenor, and præses of that very meeting of council where the purchase was conferred upon him, is a *mala fide* purchaser.

The defenders, in the *first* place, *maintained*, That neither the burgh in general, nor any individual within it, were injured by this transaction in any legal or proper sense, and consequently, that these pursuers, *qua* burgesses, are not entitled to insist in this action.—But, whether they have a title or not, the challenge is altogether groundless upon its merits.

Upon this head it was *observed*, That the feu-duty payable out of the lands to the superior was just L. 5 : 2 : 6d. per annum ; and there is no chance of any benefit from casualties, two thirds of the lands being the property of the burgh ; of the other third, one half belongs to a vassal younger than Mr Storry, and in the remaining part the casualties are taxed. When Mr Skeoch got this liferent from the town, it was calculated, that L. 45, being within a trifle of nine years purchase of the feu-duty, was the full value of it : And indeed, what shows that this was the case is, that Mr Skeoch was a loser by the transaction, having really and truly paid his money, and having died before he was indemnified by the profits of the superiority ; nor did his family ever get back a sixpence of what he thus lost, though he had long been a servant of the town.

As to Mr Storry ; he being about 54 years of age, the price, which he has *bona fide* paid, is an adequate and full value for the subject. But this is not all ; for, upon calculation it turns out, that the price which he has paid is higher than that offered by Mr Wilson, respect being had to the different ages of the two persons, as well as to the apparent difference of sums. Mr Wilson is a young man about 34 years old, and the price offered by him was L. 80, for a right during his life. Mr Storry, at the age of 54, offered L. 45 for his liferent. This last was accepted of ; and the calculation produced will show, that it was clearly better for the town, in point of pecuniary profit, considering merely the article of feu-duties, independent of casualties ; which last Mr Wilson had likewise a greater chance of drawing than Mr Storry, because he had the prospect of living a greater number of years.

At the same time, the defenders can by no means agree to the doctrine, that in all such cases the transactions of a community are liable to be challenged, if it can be proved, that the highest price was not obtained, or that the smallest addition could have been made in point of pecuniary value. The question in such cases is, whether the administrators of the community have been guilty or not of an act of wilful mismanagement and dilapidation ? If they have, perhaps it may be competent to the private burgesses, on account of the remote interest which they have in the funds of the community, to challenge such act, and to make the administrators liable for it. But if it shall appear, that there was in reality no dilapidation of the property of the burgh, but a fair and proper act of administration, though perhaps by ways and means a higher sum might have been raised, the defenders are confident that this would not be listened to in a Court of law as any sufficient cause of challenge, so as either to set aside the transaction itself, or to make the administrators liable in reparation to the burgh.

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In the present case, Bailie Storry had offered a reasonable price for the subject; and it appeared obvious to the council, and to all concerned, that the proposal made by Mr Wilson was such, as could not, with any decency, be accepted of, being calculated singly for the purpose of procuring a vote to, and promoting the political interest of a gentleman, who was notoriously then one of the candidates for the county. Had the council agreed to prefer Mr Wilson, they would have been guilty of a very improper act, and for which they might justly have incurred the censure of their fellow citizens.

And as to the argument for setting aside this right in favour of Mr Storry, that he himself was chief magistrate of the burgh at the time, and was both a disponent and disponee,

The answer to this is, That, though Mr Storry was present as one of the members of council, and gave his concurrence in that character, yet no such concurrence was necessary, because the whole other members of the magistracy and council were parties to the transaction, and signed the disposition. It was the unanimous act of the council. And, at any rate, the challenge here pointed at does not seem to be competent to these pursuers, however competent it might be to the community of the burgh, or, which is the same thing, to the present magistracy and council, if they were to challenge the transaction in the name of the burgh; which, however, they do not propose to do; on the contrary, they think it their duty to acquiesce in it.

Wilson the pursuer *replied*, That he had made the offer fairly for his own behoof; but he admitted, that after the process had gone some length, the gentleman alluded to having heard of it, did say that he would be at the expense of carrying it on. He likewise asserted it was plain, on the other hand, that the transaction with Storry was, from the beginning, a job to serve the other candidate, from the council refusing to give him a hearing, for fear he should outbid Storry.

‘ THE LORDS repelled the reasons of reduction, and found expenses due.’

Reporter, *L. Justice Clerk.* Act. *M'Laurin.* Alt. *Ilay Campbell.* Clerk, *Tait.*
Fol. Dic. v. 3. p. 141. Fac. Col. No 160. p. 38.

* * The Magistrates of a royal burgh cannot accept of a composition from any having property within the burgh, for his share of the public taxes. See 21st February 1758, Agnew against Magistrates of Stranraer, *voce* PUBLIC BURDEN.

See BURGH ROYAL.