No 6.

and annexed thereto, as a part of their common good, no inhabitants within the burgh are thirled to these mills, except such as have voluntarily astricted themselves, Earl of Morton *contra* Feuars of Muckart, *voce* THIRLAGE; or against whom a right of thirlage is acquired by prescription; neither of which can be pretended in this case. Nor, 2*do*, Can burgesses be restricted in their trade, without their consent, by the Town Council, but only by the laws of the nation. Magistrates, who are but administrators for the good of the inhabitants, may better their case, but cannot make it worse; more than they could exact two pennies for the pint of ale without a public law. And burgesses owe obedience to Magistrates only, when they are executing the Queen's laws, as Sheriffs in that part, and acting for the well or good government of the place; and not when they would limit and burden private persons' property by unwarrantable acts; For otherwise any Sheriff might at the same rate impose upon all within the shire.

THE LORDS repelled the defences; and found, that the tenement possessed by the defender is thirled.

Fol. Dic. v. 1. *p.* 156. *Forbes, p.* 278.

1711. *February* 13. Ross *against* The MAGISTRATES of Tayne.

No 7.
By statute, magistrates who grant bonds *virtute officii* without the warrant of a previous act of council, are bound to relieve the town, without prejudice to the right of the creditor. A bond by magistrates to the provost, without the warrant, found not actionable, until proof shown of the onerous cause.

WALTER Ross being provost in 1694, he gets a bond from them for L. 602 Scots. Elisabeth Ross his daughter confirms this sum, and with concourse of her husband, pursues the present magistrates for payment. *Alleged*, 1*mo*, The bond is null, because not only by acts of the convention of the royal burghs, but also by the 28th act of Parliament 1693, all things relating to the alienation of their common good, or contracting debts, (which may be a ground to affect them by diligence,) must be done in a full convention of the town council, both ordinary and extraordinary, with their deacons of crafts, and a previous act made, bearing the causes and uses for which it is borrowed; but so it is, this bond is not signed by the whole council in a full convention; nor is there any previous warrant; and which is the more necessary, that it was done in favours of one who was actually provost and chief magistrate at the time. *Answered*, This bond is signed by nine of the town council, which is the plurality, the whole consisting but of fifteen; and the certification of the act of Parliament is not the nullity of the deed, but that the subscribers shall be personally liable for the debt themselves, but prejudice of the creditor's right. *Alleged*, 2*do*, This bond is still null; for the narrative and the obligatory part are wholly discrepant and contradictory. The narrative bears, that the town was owing 700 merks to one Hew Bayne, whose right Provost Ross had acquired; and yet the bond is granted for L. 602, being 200 merks more. *Answered*, This is a pure mistake in the writer, by not mentioning the annualrents, which truly made up the L. 602. *Alleged* 3*tio*, We must have compensation; for the Provost, while

No 7. in office, intromitted with more of the town's money than this came to; and craved a diligence to prove this reason, being *in facto*. *Answered*, Ought to be repelled, as not instantly verified, as the act of Parliament 1592, requires. *Replied*, This does not hold in administrators; as for instance, tutors and curators cannot pursue their pupils for any debt owing them till they count; so no more can a magistrate *ante redditas rationes:* and though, in large burghs, the town-treasurer intromits, yet in petty burghs, the provost is the main administrator, manager and intromitter. The LORDS thought there was a great difference betwixt a bond granted by a town to an extraneous person, and to one actually in office at the time, who should have been more exact in seeing the same legally done; and therefore found the Provost's daughter, now pursuer, must yet prove the onerous cause of contracting that debt, and that it was *in rem versum*, and converted to the town's utility and profit: For law had restrained them from gratifying their magistrates by unnecessary donations beyond their expenses in managing their business; otherwise it might encourage them to mispend the town's common good in taverns, or other extravagant compliments: And thought that the certification of the act of Parliament, reaching the granters of such bonds more than the receivers, took not place here; because he was upon the matter one of the granters himself, being provost at the time, and so both debtor and creditor; and the onerous cause behoved to be instructed: And were of opinion, if he had any intromission with the town's common good, the same might be taken in here, to found a compensation, and would not put the town to seek it by way of action. For *quod statim potest liquidari pro jam liquido habetur*.

Fol. Dic. v. 1. *p.* 156. *Fountainhall, v.* 2. *p.* 636.

*** Forbes reports the same case:

ELISABETH Ross, as executrix to Walter Ross provost of Tayn, having charged the magistrates of that burgh for payment of L. 602 : 13 : 4d. Scots, contained in a bond, granted May 26. 1694, by the then magistrates and major part of the town council of Tayn to the said Walter Ross, their provost; the magistrates raised a suspension; at the discussing whereof, the LORDS found, That the bond charged upon being granted without a previous act of the town council, to a magistrate for the time, doth not, by its narrative, prove the onerous cause thereof; and therefore can be the ground of a charge against the town, in so far only as the onerous cause for granting the same to the utility of the burgh is instructed. Albeit the certification in the act 28th of the Parliament 1693 is, that the magistrates and others who should contract debts and grant bonds without a previous act of the town council fully convened, shall, and their heirs, be personally liable to relieve and disburden the town of such debts, without prejudice always to the right and security of the party-creditor. For the LORDS thought that the provost who (had the bond been granted to

any extraneous creditor) would have been liable to relieve the town thereof, could not, by taking such a bond to himself, subject the town to pay it, except in so far as he or his representatives did instruct an onerous cause, and that the money was *in rem versum* to the community. No 7.

Forbes, p. 495.

1735. *December* 16.

M'Ghie and Others, *against* Magistrates and Town Council of Edinburgh.

No 8.

In a reduction of a tack of the town's impost duty, set by the magistrates or town council of Edinburgh, upon this ground, that it was for an undervalue without a public roup; the Lords found, that the magistrates were not obliged to set the tack by way of public roup; and found, that the tacksmen having taken the tack from the magistrates, who had power to set the same to them, the reasons of reduction were not relevant against them, and therefore repelled the same, and assoilzied the tacksmen; reserving to the pursuer to insist against the magistrates for mal-administration as accords.

Fol. Dic. v. 1. *p.* 156.

1742. *January* 11. Cumming *against* Walker.

No 9.
The office-bearers of a corporation which has no power to borrow money, are not liable to execution for the debts that happen to be contracted.

James Cumming, being chosen deacon of the butchers of Edinburgh, was charged with horning for payment of the sum in a bond, which had been granted some time before by the office-bearers of the corporation to James Walker, in the following terms: 'We the said Archibald Brown, *&c.* bind and oblige 'us, and our successors in office, conjunctly and severally, thankfully to con-'tent and repay to the said James Walker.' In a suspension of this charge, the case was considered with regard to two different sorts of corporations; one, where there is a power to borrow money, the other where there is none; and, with regard to both, the reasoning was as follows: When a set of men are incorporated in order to traffic, with express powers to borrow and lend, there is no doubt that the present office-bearers, as representing the incorporation, may be sued for payment of money borrowed by their predecessors in office. The reason is obvious; that there is no form for bringing a corporation into a process, but by citing the office-bearers. And, for the same reason, when a bond is granted binding the office-bearers, and their successors in office, the successors may be summarily charged upon the bond; a charge being the only compulsion provided by law to oblige the corporation to do justice to the creditor. But, even in that case, the proper effects of the office-bearer will not be affectable by such a diligence; all that can be done is, to throw him into jail, as representing the incorporation. The effects of the incorporation may be attached