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as this incorporation have a seal of cause, and are united *ad hunc effectum* only to bar any person from exercising that trade, without paying them a composition; and they have no power to contract debt *qua* incorporation; so that if any person lends them, he can have no action, but in so far as he proves that it was *in rem versum* of the society.

Duplied; The holding lands of the Crown, or a subject, can give no privilege to contract debt; and, that the having or wanting an heritable subject, will not in the least alter the obligation to repay; and so the present question will not depend on that principle. None of the royal burghs have a power in their charters to borrow money; and if they had, it would not be good, without it were confirmed by parliament. Such power does not depend on their grant, but on the members themselves: For a proof of this, the instance given by the charger, of a company incorporating together to carry on trade, and to borrow or lend, will suffice. The charger will not take upon him to say, there were any such express powers in this case, but the same thing has been done tacitly, and as effectually. Their giving authority to borrow, either by a sederunt in their books, or by their signing the bond, and continuing such a practice, is *tantamount* as if each had signed a formal contract, empowering their office-bearers to borrow.

THE LORDS passed the bill, upon the suspender's consigning a disposition to their effects.

C. Home, No 256. p. 412.

1744. *February* 28.

CAMPBELL of Carquhine, *against* The MAGISTRATES of BANFF.

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The Magistrates of Banff being pursued as representing the community, for damages sustained by the culpable neglect of former Magistrates, who had refused to restrain a mob from pillaging a ship in the harbour, and carrying off a valuable cargo of meal; the Lords assoilzied, as there was no law

CAMPBELL of Carquhine, *&c.* having purchased a quantity of victual from Ogilvie of Rothiemay, to be delivered at Portsoy or Banff, sent a vessel to receive it. Accordingly it was delivered, and shipped on the 8th, 9th, and 11th of May 1741: But, on the said 11th, a number of the inhabitants of Banff convened in a riotous manner, secured the men on board the ship, and took away part of the victual; and which they repeated next day, carrying then off a greater quantity. When the ship was unloaded on the 11th, the master intimated to the Magistrates the violence he had suffered, and that he dreaded the like attempt next day; which accordingly happened; but no measures were taken to stop the mob; nay some of the rioters were taken and put into the Magistrates' hands, but were thereafter dismissed. Upon which the owners of the victual brought an action against the Magistrates on account of their neglect, to have them liable for damages.

The defence offered, was, that there was no law making the Magistrates, *&c.* of a town liable for the delict, or negligence of persons formerly in the magistracy, *&c.* and which ought only to affect those that were guilty,

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making a community liable for a breach of duty of its Magistrates.

THE LORD ORDINARY sustained the defence. The pursuers reclaimed, and *pleaded*, That, though it was a maxim in law, that *noxa caput*, &c. and, therefore, innocent Magistrates should not be found liable; yet there were many cases where criminal facts and delicts committed by those representing an *universitas*, affected the community. The pursuers don't mean to say, that if Magistrates, as private men, break the law, in such a case the community would be answerable; but if the offence or failure consists in the discharge of the trust reposed in them, in such a case the community is answerable for them. It is true, that several lawyers lay it down as a rule, that, before an university can be made liable, the offence to be done should be committed *concilio congregato*, &c. But this admits of many exceptions, particularly where it consists of many repeated acts, (as in this case) which in law is always constructed to be an ratihibiton, and approbation thereof, if no measures were taken to prevent it; especially if means can be condescended on, by which the suffering might have been prevented. 2*dly*, Where goods are violently seized, if the Magistrates forbear, or neglect to take proper means of recovering them out of the hands of those who retain possession. 3*dly*, Where Magistrates can be proved to have refused, or neglected to take proper measures offered to them for stopping the violence used to the members of their community. Now where all these circumstances do concur, as the pursuers offer to prove they do in this case, it is believed the present set of Magistrates, as representing the community, ought to be made liable. *See* Gomesius in his *Resolutiones de Delictis, cap.* 1. *No* 52. and *sequen. Mascardus de probationibus con.* 1421. And *Farinacius de Delictis, lib.* 1. *tit.* 3. *No* 120.

THE LORDS refused the petition.

Fol. Dic. v. 3. *p.* 140. *C. Home, No* 262. *p.* 420.

*** Kilkerran reports the same case:

THE present Magistrates of Banff being pursued as representing the town and and community, for the damage suffered by the pursuers, through the negligence and wilful breach of duty in the former Magistrates, in having refused to use any means to restrain a mob, who in the face of the sun had carried off a valuable cargo of meal from the pursuers ship in the harbour, upon this ground, That where Magistrates transgress their duty by omission or commisson, not merely as private men, but *qua* Magistrates in the discharge of their trust, the community is answerable: THE LORDS 'assoilzied the defenders.'

The only case in which a community is liable for the delict of their Magistrates, is that of their suffering a prisoner to escape; which is founded upon this reason, that the burgh is by law bound to have sufficient prisons, and consequently is answerable for the keepers thereof.

Kilkerran, (COMMUNITY.) *No* 1. *p.* 130.