No 93. otherwise, yet they could not be brought under the cognizance of the supreme Court in the first instance.

The majority of the Judges were of opinion, that this being a matter of police, the action was incompetent. They were, however, clear, that the journeymen should be allowed the hours they asked; the statute 8th Geo. I. c. 17., gave that indulgence to the journeymen taylors in London and Westminster, and regulated their hours of working to be from six in the morning to seven at night, with the interval of one hour for dinner; and they thought that the rule here should be the same.

17th November 1770. An interlocutor was accordingly pronounced, "Superseding farther procedure in the cause till the first Tuesday in February next, without prejudice to the pursuers, in the mean time, to apply to the magistrates of Edinburgh for redress of the several articles complained of in their summons."

The journeymen made an application accordingly; and the masters having consented, the magistrates made an act, appointing the hours of work to be the same as in England, viz. from six in the morning to seven at night, with the interval of an hour for dinner.

Lord Ordinary, *Monboddo*. For the Journeymen, *Maclaurin*. For the Masters, *Lockhart*, *Rae*. Clerk, *Ross*.

R. H. *Fac. Coll. No.* 46. *p.* 133.

1771. *March* 5.

David Gilchrist, John Aitken, Robert Baxter, and Others, Burgesses and Inhabitants of Kinghorn, Pursuers, *against* The Provost, Magistrates, and Town Council of Kinghorn, Defenders.

No 94.
Action for a general accounting, and for a general inspection of the accounts of the common good and revenue of a borough, at the instance of private burgesses, incompetent before the Court of Session.

The pursuers, in the year 1769, brought an action against the defenders in the Court of Session, containing a variety of conclusions relative to the management of the affairs of the borough. Those particularly deserving of consideration were as follows: *First*, "That it should be found and declared, that Robert Hamilton (the present Provost) is not eligible Provost at Michaelmas next; and that no person shall be capable of holding the said office for above two years at once in all time coming." The next was, "That Provost Hamilton should be ordained to exhibit an account of the fund, called the sinking fund, and to make payment to the said treasurer of the borough, for behoof foresaid, of the whole sums arising from that fund, with interest thereof periodically from the respective periods at which the same came into his hands. *Lastly*, That the said defenders, and their successors in office, are bound and obliged, for the space of eight days, in the month of November, once every year, to exhibit their books and whole accounts of the revenue of the

borough to any one or more burgesses, who have borne the office of magistrate within the borough, in order that they may inspect the same, and take notes or abstracts thereof, if necessary." No 94.

The Court, as to the *first* of these conclusions, " ordained the defenders to give in a condescendence of the practice of other boroughs, as well as of Kinghorn, of the Provost having been in use of being re-elected and continued in office for more than two years running;" and as to the other two articles, " ordained both parties to give in memorials *hinc inde*, upon the competency of the action before the Court, so far as concerns these two conclusions."

Upon the *first* point, the ineligibility or continuation of the Provost in office for more than two years following;

The pursuers *pleaded*,

The present action was founded both on expediency and the public law of the land. If particular persons were allowed to perpetuate themselves in the government and in the management of the funds of any community, very bad consequences would unavoidably ensue. The legislature had early foreseen and guarded against this evil; first, by the statute 1469, c. 29. limiting the officers and council of boroughs to one year; thereafter, by statute 1487, c. 108. which ratified the former, and declared that elections " shall not be by partiality or mastership, whilk is undowing of boroughs;" and lastly, by st. 1503, c. 80. which provided, " That all officers, provosts, bailies, &c. be changed yearly." These acts were express; and it was not in the power of the magistrates of any borough in the kingdom to repeal the positive enactments of the legislature.

The construction the defenders put upon these statutes, that they imported no more than that there should be an annual election, but not an annual change of persons, was adverse to the spirit and intendment of the legislature. Partiality and mastership was the evil dreaded; which could only be guarded against by prohibiting the continuance of the same person in power for a longer period than that prescribed, whether upon the footing of his first election into office, or under colour of a new one.

These statutes had not gone into desuetude; and the contrary usage in particular boroughs in Scotland was not sufficient to abrogate laws relating to the public police and good of the kingdom. The argument of desuetude had been used in the case, Stair, 27th January 1681, Jack *contra* Town of Stirling, No 3. p. 1838.; but the Court " repelled the defence of desuetude and prescription, and found the statutes founded on, not concerning private right, but the public good of the kingdom, to stand in vigour." The same doctrine was laid down by Bankton, B. 4. T. 19. par. 4. The decision in the case of Wick in 1749, No 8. p. 1842. did not apply. The question there was, If the Provost must be a residenter? And as it was found that the bailies and a majority of the council must, it was of little consequence whether the Provost was or not.

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The argument as to the consuetude observed in the borough of Kinghorn was erroneous. Though from the 1710 to the 1730, it appeared that Lord Balgonie and Alexander Leslie had been annually re-elected, the first for ten, the second for eight successive years, the borough had thereafter returned to the annual or at most biennial election; and in 1734, an act of council was passed, declaring, that the Provost, two Bailies, and Treasurer, should only be continued in office for two years. This act had been observed for ten years down to 1744, when an innovation was made by Robert Bruce being continued for a third year; which, though it paved the way for what had since taken place, was insufficient of itself, as in like manner was the act of council 1759, by which the act 1734 was reversed, to establish, that an inveterate practice had been constituted, adverse to the set of the borough, and the positive law of the land.

The defenders *pleaded*,

The pursuer's argument proceeded entirely upon a misapprehension of the statutes 1469, c. 29, and 1503, c. 80.; which did not require that there should be an annual change of the persons of the Magistrates, but merely that there should yearly be a new election; and Sir George Mackenzie, on stat. 1469, c. 29. observed, that in the case between the Town of Edinburgh and Sir Andrew Ramsay, such was the opinion of the Court. These statutes had, at any rate, gone completely into desuetude. The distinction noticed as to those which respected the public police, and those which did not, had no just foundation either in law or practice; and if these obsolete acts were revived, it would be productive of such a change in the law of the country, as would be attended with the most serious consequences. It would overthrow the constitution of all the royal burghs in Scotland, who, either by their charters of erection, or by immemorial usage, had acquired particular sets confirmed by positive prescription.

The decision in the case of Wick, in its principle, shewed that the statutes referred to were no longer in observance; and as to the case of Jack against Town of Stirling, it had gone upon a specialty, there being a standing act of Council, that Magistrates should be elected for no more than two years together; at any rate, it was but a single decision, and the contrary practice shewed it had not been regarded.

Usage was the great governing principle as to the constitution of boroughs, whether it related to all the boroughs in general, or was particular as to one. The usage had accordingly been inquired into. Of the whole boroughs in Scotland, being 66 in number, the sets of 29, as to the period which the Provost might be continued in office, were silent; and in the others, the Provost's continuance in office was either limited or specified by an act of council or set of the borough. Those who composed the first class had always understood they were at liberty to continue their Provost for any number of years, and had uniformly done so without challenge. Those in the second class observed their

own regulations, which were extremely various, and afforded good evidence that an annual change had not for a long time been understood to be the law of the country. No 94.

The set of this particular borough in 1710, put an end to the question. It declared that the bailies should not continue in office longer than two years; but as there was no declaration as to the Provost, it could admit of no other construction than a power to continue him during pleasure. Such had been the almost uniform practice for sixty years. Lord Balgonie was continued by re-election for ten years, Alexander Leslie for eight; and though the act of council 1734, had been observed for ten years, it was from necessity departed from, and at length repealed. Robert Bruce had, in the year 1744, been re-elected for a third, and thereafter for a fourth year; the present Provost had been first chosen in 1746, was continued for three succeeding years, elected again in 1752, and had been continued in office to the present time.

Upon the *competency* of the declarator, by which the defenders were called upon to give an account of their management of the *sinking fund*, as also to give a general inspection of the account of the town's revenue, &c.

The pursuers *pleaded*;

1*mo*, By the antient law, separate and distinct jurisdictions, both civil and criminal, belonged to the boroughs of this kingdom. These, in the first instance, were exercised by their own Magistrates, whose decrees were reviewable by the Chamberlain in his court of the four boroughs, and from whom lay no appeal. *Mod. tenendi cur. Burg.* c. 17. The Chamberlain had, besides, a very extensive jurisdiction in matters relating to the police of boroughs, which he exercised in the Chamberlain Air; and it would appear, that *auditing* the borough's accounts was one of those matters which fell under his decision. *Iter Camerarii*, c. 1. 39. § 45. This jurisdiction was recognised by stat. 1491, c. 36. which declared any misapplication of the revenues of boroughs to be cognizable in the Chamberlain Air. As the Chamberlain became remiss in the exercise of his authority, it became expedient to lodge a cumulative jurisdiction, relative to the funds of the royal burghs, in the Court of Exchequer, stat. 1535, c. 26. The Chamberlain's jurisdiction had, besides, received a severe blow by the stat 1503, c. 95. entitled, 'Of the Process of falsing of Dooms,' by which appeals from all inferior Magistrates up to the supreme authority were regulated; but as that process was extremely troublesome, the lieges preferred an immediate resort to the Daily Council established in 1503, in place of the Lords of Session, and thereafter to the College of Justice; when, by stat. 1537, c. 36. that court was fully established as supreme, final, and without appeal. The whole civil jurisdiction of the kingdom, by reviewing the judgments, or correcting the malversations of inferior Magistrates, came in this way to be gradually vested in the College of Justice; the jurisdiction of the Chamberlain was, of course, included with the rest; and all the civil actions, accordingly, that had formerly been competent only to that court, were transferred, and came

No 94. uniformly to be pursued before the College of Justice or Court of Session. When every other species of civil jurisdiction competent to the Chamberlain was thus vested in this court, it was impossible to conceive that the single point of civil jurisdiction, relative to the misapplication of the revenues of boroughs, should be made the only exception from so universal a rule.

The defenders' argument from the stat. 1693, c. 28. that the power of judging in matters of this kind not being a point of ordinary jurisdiction, but belonging to the royal prerogative, did not of course fall under the ordinary civil court, proceeded upon a mistaken idea of the enactment. That these matters were truly of ordinary jurisdiction, and in that view originally vested in the Chamberlain, was evident from the preceding account; and it did not occur how their nature could be changed by the statute. That act took its rise from the necessity of the times: One of the grievances in the claim of right was the 'subverting the rights of the royal boroughs;' and, upon the revolution, accordingly, this matter was inquired into. The mischief that had been done required an extraordinary exertion of authority; but though the statute said that the enquiry was made by virtue of the prerogative-royal, it did not from thence follow that the controul of the public good and revenue of boroughs was exclusively vested in that power. The intention of the statute was to redress an evil; which being once accomplished, matters returned to their former course, to the ordinary jurisdiction of the supreme Court. And that such was the meaning of the act, was evident from stat. 1693, c. 39. where, in introducing an extraordinary remedy to a case which required it, the same words 'prerogative-royal,' were used.

The argument drawn from the same statute, that the Exchequer was in view of the Legislature, as the Court, where all matters of that kind were to be tried, had no solid foundation. When it was declared that the act of the commission should have the strength and effect of the sentence of the Exchequer, no more could be in view than the *mode* of carrying the act into execution, by adopting the *inducicæ* incident to that Court as the most expedient and proper. The last clause of the statute, which rendered Magistrates and others borrowing money, andg ranting bonds, obliging their successors, amenable to the jurisdiction of the Court of Session, could have proceeded only on the idea, that as all other matters concerning the common good of boroughs fell to be extricated there, it was expedient that this also should be subjected to the same jurisdiction.

2*do*, The exercise of this jurisdiction in the Court of Session was absolutely necessary for the welfare of the boroughs. The stat. 1535, c. 26. while it authorised the Exchequer to audit the accounts of boroughs annually, conferred no power, in case of malversation, to give redress. The Magistrates and administrators of a community, in their capacity *qua such*, could not be brought before an inferior court; so that unless action lay in the Court of Session, it could not be brought at all. The authority of the Exchequer, therefore, being in this case so very feeble, it had gone totally into disuse; and though a brieve

was annually issued from Chancery to the several boroughs, requiring them to send in not only their accounts with the Crown, but those relating to their own common good, it was well known that the latter part of the requisition was never complied with, nor was any penalty ever exacted for the neglect. No 94.

3*tio*, The pursuers had a manifest and radical interest in the funds of the borough; both freemen and inhabitants derived immediate benefit from the proper application, were immediate sufferers when misapplied, and were hence entitled to see that they were usefully managed. The stat. 1535, c. 26. authorised 'all they quha likis to cum for the examining of the saidis comptis, that 'they may argunne and impugne the samen as they please.' The brieve issued from Chancery implied the same; and as it had been shewn that the Court of Session had a cumulative jurisdiction with the Exchequer in auditing and comptrolling what related to the common good and revenue, it followed, that whoever was entitled to have appeared in Exchequer, was equally entitled to come forward for the same purpose in this Court.

The opinion of Sir George M'Kenzie, in Observ. on stat. 1535, c. 26. would have little weight, when it was recollected that he was the advocate to James VII. and most probably the adviser of the very measures relative to the boroughs, which were overturned at the revolution. As to the stat. 1693, c. 28. which allowed an action, in certain cases, against Magistrates, &c. *only* to a burgess who had borne the office of Provost, Bailie, or Dean of Guild, within the borough, it would be observed, that the action thereby allowed related to a particular instance of omission and misconduct, was strictly of a penal nature, and on that account given to those only who, from their former situation, were best able to judge of the case; but it never could be meant, that by this particular limitation, the administrators of a community should be enabled to escape the consequences of mal-administration in every other respect. Three of the pursuers also were burgesses, and had all borne the office of bailie; so that the title to insist was in every respect complete.

The defenders *pleaded*,

That the action was incompetent at the pursuers' instance; that the Court of Session had no jurisdiction; and in support of their argument maintained,

1*mo*, By the common law of Scotland, a popular action was unknown, except in some very particular cases authorised by special statute. As there was no statute, in the present instance, that could be founded on, the pursuers could not maintain the action, unless they could condescend upon a title and interest *tanquam privati*, or as having a patrimonial interest in the subject matter of the action. The ground pleaded, That as the private fortunes of the burgesses in every borough were *subsidiare* liable for the debts of the corporation, they must therefore have a right to inquire into the management of the funds, was by much too remote an interest to warrant an action of this nature, and had neither principle of law nor authority of decisions to support it. Another ground, That as the common good belonged to the collective body of burgesses, every

No 94. individual was to be considered as a *socius pro indiviso* in that estate, and consequently entitled to pursue, was equally ill founded; and the proposition, though admitted, could not draw after it the conclusion. Though the burgesses were to be considered as *socii*, still they had no interference in the management, but were in the situation of minors, who could not call in question the particular acts of administration of their guardians till after the expiry of their office. The idea of being *socii* in the common good had no foundation in law. By the Roman code, as well as by our own, the property of a corporation was distinguished as a very different thing from the private property of individuals in a society. L. 6. § 1. Inst. *De Rer. Div.*; L. 7. § 1. *D. Quod cujus Univers.* Agreeable to these principles, the analogy of the law could be traced in other respects. It had been repeatedly decided that burgesses could be witnesses for a corporation in a question concerning the common good, which was directly adverse to their being considered as having such an interest as could intitle them to pursue. Balfour, Town of Leith against Kinghorn, *voce* WITNESS; 13th June 1662, Inverness against Forbes, IBIDEM; 13th Jan. 1679, Lord Hatton against Town of Dundee, IBIDEM; 14th June 1709, Marshall against Town of Inverness, IBIDEM; 36th Nov. 1716, Moncrief against Town of Perth, IBIDEM. Hence there was a fixed distinction betwixt the interest of burgesses *tanquam privati*, and their interest as members of the body corporate; and the common good of a borough was not the property of individuals, but of the corporation. The pursuers' argument involved them also in absurd consequences. It was admitted, that an action lay at the instance of the present set of Magistrates, to call their predecessors in office to account for their administration: Such right could not be taken away by any action at the instance of an individual; so that Magistrates would not only be exposed to an action at the instance of every factious burgess, but liable to have the attack repeated upon the same medium by those who had the proper and legal interest; and if, on the other hand, it was to be held that the *exceptio rei judicatæ* could arise from an absolvitor in an action at the instance of a private party, it would be in the power of every corrupt Magistrate to sopite enquiry by a collusive action in the name of his friend.

2*do*, The argument, that unless a popular action was allowed, many wrongs would be without a remedy, proceeded upon a mistaken notion of the case. The law was not defective in a variety of remedies much more effectual than the action proposed. An action lay at the instance of the succeeding Magistrates against their predecessors; and if they should prove negligent, an action was competent at the instance of the servants of the Crown. Balfour, c. 3. 'anent the disposition and alienation of the common good.' Nor was provision wanting, even in the most ancient periods, for securing the patrimony of the royal boroughs, every matter of that kind being submitted to the Chamberlain, who, whilst his office subsisted, had the only competent jurisdiction. Stat. Gulielm. c. 35. *Iter Camerarii*, c. 38. 39. 45. M'Kenzie's Criminal Law.

3*tio*, Whatever jurisdiction the Court of Session might have when the action was brought for rectifying the particular acts and deeds of Magistrates, either by a person having a proper title and interest, or by succeeding Magistrates, or the officers of the Crown; that jurisdiction went no farther, nor did it admit of any action of count and reckoning, or for an exhibition of accounts, such jurisdiction being exclusively vested in the Court of Exchequer, the King's proper Court in revenue matters, or the patrimony of the Crown, which the law had expressly declared the common good of boroughs to be. This was sufficiently evident from the different statutes, from the act 1535, c. 26. 'of the chusing 'of officers in boroughs, and bringing of the accounts of their common goods 'yearly in the Exchequer;' wherein, as the title indicates, the jurisdiction of that Court, in matters of this description, was expressly established. Had there been any doubt, the point was confirmed by stat. 1693, c. 28, which, *in terminis*, declared that the care, oversight, and controul of the public good and revenues, and of the administration of boroughs, did undoubtedly belong to their Majesties by virtue of their royal prerogative, an idea perfectly inconsistent with the supposition of a popular action; and as the remedy of abuses, both statutes declared, that a general accounting of the common good and revenue of boroughs should take place in Exchequer. No 94.

The idea of there being a cumulative jurisdiction in the Court of Session had no foundation. It could not have been so unless it had been declared; and the words of the statute expressly pointed to the Exchequer as exclusive, declaring that the acts and sentences of the commissioners appointed should have the strength and effect of the acts and sentences of the Exchequer. The argument, that this method of annual accounting in Exchequer and convocating of the burgesses having gone into desuetude, the jurisdiction must now be competent to the Court of Session, proceeded altogether on a misapprehension of the fact. In pursuance of the statutes mentioned, a brief was annually issued from Chancery, which was regularly served upon the boroughs, among the greatest number of which, it was a constant form to send a proclamation through the town fifteen days before appearance in Exchequer, warning the inhabitants to appear there on the day named, and state their objections, if they had any, against the public accounts. Having thus an easy and obvious remedy, the pursuers were not entitled to say that they had none, or to insist that this Court, because they did not chuse to follow the mode prescribed, should disregard the rules of law and acknowledged sense of the Legislature.

The Court was of opinion, That where individuals complained of a particular wrong, the action would be sustained, and redress given in this Court; but that a general action for accounting, or a general inspection of accounts, at the instance of each burgess, was absurd, and could not be listened to, and that all accounting relative to the common good and revenue of boroughs could take

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place only in the Exchequer. The grounds of decision, in other respects, were specified in the judgment, which was in the following terms:

" Having considered the condescendence preferred on the part of the defenders, with respect to the election of a Provost, article first of the report, in respect of the practice specified in the said condescendence, and not controverted by the pursuers, assoilzie the defenders from that conclusion of the libel; and having also considered the mutual memorials of parties with respect to the sinking fund, and with respect to the general exhibition of the town's books and accounts demanded by the pursuers, find the several conclusions referred to in these two articles not competent before this Court, and assoilzie the defenders therefrom, and likewise from the hail conclusions of the libel."

The pursuers thereafter gave in a petition for expenses; which having been remitted to the Lord Ordinary, were found due; and a petition against that finding, after being answered, refused.

Lord Ordinary, *Justice Clerk.* For Gilchrist, &c. *Macqueen, Crosbie.*
Clerk, *Campbell.* For the Provost, Magistrates, &c. *A. Lockhart, Sol. H. Dundas.*
R. H. *Fol. Dic. v. 3. p. 341. Fac. Col. No 86. p. 251.*

1772. *June* 16.

Mr JOHN SNODGRASS, Preacher of the Gospel, GEORGE STEEL, JOHN BEATSON, and Others, *against* Mr JOHN LOGAN and Others.

No 95.
Where the patronage of a kirk is lodged in a collective body, which having differed in choice, divides into two parties, and each party gives a separate presentation, the Court is competent to decide which shall be preferred.

BY decree of the Court of Session, pronounced 3d August 1759, it was found, 'That his Majesty has no right to the patronage in question; and found, 'in respect it is agreed that the pursuers, (the Incorporations of South Leith, 'being the shipmasters, maltmen, trades, and traffickers), and the kirk session 'of Leith, have been immemorially in the use to concur in presenting the second minister of Leith; that thereby these two bodies have secured to themselves the right of patronage of the said benefice, jointly, and that they fall to 'exerce that right jointly in time coming; and found that, in time coming, 'the said right shall be exerced as follows, viz. the two Magistrates of Leith for 'the time being, shall each, *ex officio*, have a voice, and that the judge-admiral of the town of Leith, appointed by the Council of the city of Edinburgh 'for the time, shall also have a vote, and that each of the four incorporations, 'the pursuers, shall chuse four delegates, making in all sixteen, for representing the incorporations, and that the kirk session shall chuse fifteen delegates, 'who, with the colleague minister, who is to have a vote *ex officio*, shall represent the session; and found, that the right of presenting shall be vested in the 'said thirty-five persons, or major part of them, at a meeting to be held for 'that purpose, the time and place of their meeting to be publicly intimated.