

No 17. *singulis non debetur, nec quod universitas debet, singuli debent.* L. 7. § 1. *quod cuiusq. universit.* And as to such of them as were Magistrates in 1749, and were then charged, and are now present Magistrates, even though it should be admitted that execution could proceed against them, it could only be to compel them to make payment out of the funds of the corporation as to which they were already exonerated by consigning the foresaid disposition; and if more should be necessary, they were willing to comply with what the Lords should order; and so far did they carry the argument, that even the subscribers of the bond could only be liable to execution, to the effect to compel them to make payment out of the funds of the corporation.

But to this reasoning the LORDS had no regard; and 'adhered to the Ordinary's interlocutor.'

The granters of the bond were liable by the special conception of it; and the Magistrates charged were no less so by the public law, which empowers Magistrates to bind their successors in office. *Vide Voet, ad dict. tit. quod. cuiusq. universit.*; and Faber in his Code, *lib. 4. tit. 7. Def. 5.*; and so much our own act 1693 supposes. It may be true, that succeeding Magistrates, after they are out of office, cannot be charged upon such bond granted by their predecessors in office; but the charge, once given to the Magistrates in office for the time, will not fall by their going out of office.

Fol. Dic. v. 3. p. 141. Kilkerran, (COMMUNITY.) No 3. p. 132.

1774. August 6. JAMES LIVY against DAVID MUDIE and Others.

No 18.

Magistrates charged to pay a sum due by bond, granted by them in their corporate capacity, were found entitled to suspension without caution, on granting conveyance of, or security on, the town's funds; not being personally liable, except while in office, and while the funds are under their administration.

The above-named persons presented a bill of suspension of a charge of hording given them, in their respective characters of present and late Counsellors of the burgh of Arbroath, at the instance of James Livy, to make payment to him of the balance remaining due upon a bond granted by some of themselves, and others, as Magistrates and Counsellors of said burgh; which bill, they insisted, ought to be passed without caution, upon their lodging such conveyance of, or security upon the town's funds, as the Court should direct; for that, if they should submit to find caution for the sum now charged for, they would be exposed to the like distress for the whole of the town's debts, at the instance of the town's other creditors, to an immense extent, and so much beyond what they are capable to pay or give security for: And, in point of law, *argued*, It is the community itself who is the proper debtor, as it is only *virtute officii* that the Magistrates and Counsellors grant bond for the money so borrowed, binding them and their successors in office, and it is in that character the creditor transacts with them; and, how soon their offices expire, they cease to be personally liable, and the obligation transfers to their successors in office, as the representatives of the community, further than as they, and every other person, as members of that community, may be *subsidiarie* liable as so many individuals, after exhaust-

ing the community's proper funds: That it matters not whether the bond, or other security, is granted by the then Magistrates, or by their predecessors in office, were it ever so far back. It is the town's proper debt, and ought to be paid out of the town's proper funds, and *in subsidium* by the inhabitants; though, in order to come at these, as the diligence of law must always be directed against some person, the Magistrates for the time being, as representing the community, must be sued or charged for payment, though the bond was granted by their predecessors in office; for this plain reason, that the community itself can only be sued in the persons of the Magistrates and Council, its representatives. But it will not thence follow, that these Magistrates can either be distressed in their persons, or have their private fortunes directly attached for payment of the town's debts: To save them from which, was the sole object of the present bill of suspension, without presuming to say in what manner that relief should be given.

Livy, the charger, opposed the passing the bill without caution, both upon the specialities of the case, and likewise upon the general point of law; maintaining, that it is established, by various decisions, that Magistrates are liable to personal diligence for the debts of the community. But, independently thereof, there were specialties in this case sufficient to exclude the suspenders plea.

1st, That, in the transaction between him and them, the rules prescribed by the statute 1693 had not been observed; to which it was *answered*, Whatever claim the body corporate may have to be relieved of any of the debts in which the rules prescribed by the statute 1693 have not been strictly complied with, when challenged by any who have borne the office of Provost, Bailie, or Dean of Guild, within the burgh; as the interest of the creditor is not thereby affected in the smallest degree; and as there is here no question, as to the town's right of relief, against the granter of the bonds; that circumstance cannot have the least influence upon the question now at issue. It is the community itself who is the proper debtor; and if that claim of relief shall ever come to be the subject of question, the suspenders will be under no difficulty to make it appear, that the contents of this bond were truly applied for the necessary uses of the burgh.

The *second* specialty urged, was, These suspenders, whose party compose the majority of the Council of the town, and, contrary to its set, have been in office about twenty years successively, borrowed the charger's money at a time when they knew the community, for whose behoof they were borrowing, was altogether insolvent. This was such a fraudulent and improper conduct, as to bar them from obtaining the indulgence they now claim, were they otherwise well founded in demanding it. *Vide* Bankton, b. 4. tit. 19. § 2.

Upon the general point, the following authorities were mutually referred to on both sides: Durie, p. 97. 15th January 1624, Laird of Drumlanrig, No 13. p. 2509; Honeyman against Town of Dysart, Sir Pat. Home, MS.

No 18. January 1685, No 14. p. 2510. ; Lawson against Simson, &c. February 1686, No 15 p. 2510. ; Bowie against Wilson and other inhabitants of Culross, 7th February 1695, Fountainhall, v. 1. p. 667. No 16, p. 2511. ; and, for the charger separately, Town of Aberdeen against Lesk, &c. 11th January 1678, No 16. p. 1866. Bankton, b. 4. tit. 19. § 2.

Observed on the Bench, Where a bond is granted by Magistrates for the community, it is the community that, in such a case, is bound ; and the Magistrates for the time being are charged, in which case they suspend the charge, on making over the funds of the community, for they are not personally bound. The charge of *fraud*, which is another ground insisted on, will not do in the present shape, but by an ordinary action against them as individuals ; therefore the bill ought to be passed simply.

‘ Which the Court accordingly found.’

Act. *Elphinstone.*

Alt. *Dean of Faculty.*

Clerk, *Campbell.*

Fol. Dic. v. 3. p. 141. Fac. Col. No 133. p. 353.

1779. *November 18.*

JOHN ANDERSON *against* THOMAS MORTON and GEORGE ALEXANDER.

No 19.
Found in
conformity
with the a-
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THE weavers of Portsburgh, which is the burgh of the barony of Dalry, were erected into a society, by a seal of cause from the Lord of the barony, and are governed by a deacon and boxmaster, who are chosen annually.

Anderson acquired right to a bond granted by the office-bearers of this community ; and, in an action for payment, demanded a *personal* decret against Morton and Alexander, their successors in office ;—who *objected*, That societies not united into a body politic by the Sovereign, not being proper incorporations in the eye of law, their managers could not *ratione officii* be liable, personally, for monies borrowed by their predecessors in office ; and that the creditor in these monies could only attach the funds of the society in their hands as the servants of the community ; Kames' *Elucidations*, art. 54.

THE COURT admitted the distinction between lawful societies and incorporations properly so called ; and ‘ found, That no action lay against the present office-bearers of this company or incorporation, for subjecting them personally, or their own proper effects, to the payment of the bond pursued on, but only for the special purpose of affecting the funds of the company for the same.’

Reporter, *Lord Gardenston.*

Act. *Geo. Ogilvie.*

Alt. *Tytler.*

Clerk, *Campbell.*

Fol. Dic. v. 3. p. 141. Fac. Col. No 91. p. 176.