

It was REPLIED, That the exhibition and declarator was well founded, notwithstanding of the defence ; seeing tutors, being intrusted and nominated by the father, their oaths are receivable for proving the conditions or depositions of writs, as the father himself, if he had been alive, his oath would have been taken thereupon : for the law presumes that tutors will never swear any thing to the prejudice of their pupils ; and if they shall depone that they got the bond from Mitchell since the intenting of this cause, then, in law, his oath ought to prove the terms of the deposition ; otherwise the bond must be looked upon as an undelivered evident : neither can his having of the bond be attributed only to that reason, that he might take seaisine thereupon, seeing he being the writer of the bond and assignation, and of the disposition, which was the cause of the bond ; he was likewise clerk of the stewartry, and so might take seaisine whenever he pleased, without an express order. Likeas, in fortification of the summons and reply, the conditions of the deposition were offered to be proven by the communer's and witnesses' oaths, inserted in the bonds and writs ; and it was craved that the Lords would examine them *ex nobili officio*.

The Lords, having considered this case as being of consequence and difficulty, did refuse to examine witnesses *ex officio* to be a ground for taking away this bond from a pupil who was innocent and knew nothing of these transactions : and, as to the finding it relevant to be proven by the tutors' oaths,—the minor and tutors themselves declared, that they were content that it should be found relevant to be proven, by the tutors' oaths, that they had gotten the bond since the intenting of this cause, being clear to depone thereupon : otherwise the point of law had been very difficult to have been determined ; and it seems their oaths could not take away their pupil's bond : so that the only remedy in law was to make Mitchell, the depositary, liable for fraud and circumvention, in deceiving his trust in giving up the bond ; and the tutors, if they were *participes fraudis*, by taking indirect ways to get the same.

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1673. February 28. BAILIE JOHNSTON, FRANCIES KINLOCH, and OTHERS,  
Merchants and Tradesmen in Edinburgh, *against* SIR ANDREW RAMSAY,  
LORD ABBOTSHALL.

IN the reduction and declarator raised at the instance of the pursuers, who declared that they insisted in the declarator only *ad hunc effectum*, that, as to the future, it might be found and declared,—That the magistrates within burgh, and especially the burgh of Edinburgh, ought to be yearly changed ; and that no persons of a higher degree than a merchant should be capable to exercise the office of a magistrate within the said burgh ; and, consequently, that Sir Andrew Ramsay, Lord Abbotshall, being advanced to be a Senator of the College of Justice, and so of a higher quality and rank than a trafficking merchant, ought to be declared incapable to be elected in all time coming. Which declarator they founded upon these grounds and reasons,—That the privilege of the burgh of Edinburgh, being most ancient, and continued for many years,—that they should have the election of their own magistrates yearly out of such as

were of their own incorporation and society,—they were expressly secured therein by several Acts of Parliament, *viz.* by the 29th act, Parl. 3, Ja. III. ordaining officers within burghs not to be continued but for one year; and, by the 80th act, Parl. 6, K. Ja. IV. appointing all magistrates within burghs to be changed yearly; and upon the 25th act, Parl. 4, Ja. V. ordaining none to be chosen provost or bailies but honest and substantial burgesses, merchants, and indwellers within burghs; and upon the 8th act, Parl. 20, K. Ja. VI. renewing and ratifying the former statutes as to the election and quality of magistrates; as likewise, upon K. Ja. VI. his decreet-arbitral *in anno* 1583, whereby the election and continuance of magistrates is so fixed and determined as to the manner of the election, and quality of persons to be elected, that it should be the model and set form of government for the Town of Edinburgh in all succeeding ages.

It was ALLEGED for the Lord Abbotshall, present provost, and the magistrates, council, and deacons of crafts, who did concur with the provost, That this declarator could not be sustained, because the pursuers had no interest to insist therein; it being of its own nature a popular licence, and tending to sedition and scandal, thereby to bring magistrates in contempt with the inhabitants, so could not be the ground of an ordinary action: but, in the case of delinquency of magistrates, the same ought to be represented to the King or his Privy Council, who, after trial, might take order and determine thereuntil. *2d.* The Act of Parliament appointing the yearly change of magistrates could only be interpreted that there should be one yearly election; so that it should be in the power of the town-council and deacons, who had the power to elect, to make choice of new magistrates in place of the old, or to give a new commission or power to the magistrates who were last in place, to continue for the subsequent year; for the design of these Acts of Parliament being only to abrogate the former practice of election by the people without any set time but when they pleased: Therefore, the manner and time of election of magistrates within burghs, yearly, was appointed by the said Acts of Parliament, as being of a public concernment, that it should be in the power of burghs royal to make a new election of their magistrates, whose places and power was not to be continued but for one year only, and then to expire: and if this were not the meaning of these Acts of Parliament, but that there should be new persons yearly put in place, it were so far from being a privilege, that it would be a great prejudice, not only to their liberty, but to their interest in government; for thereby the most able and deserving persons would, of necessity, be removed when they became most able and active to prosecute the affairs of the burgh: and that the meaning of these acts is only that there should be yearly elections, which may appear from the constant and inviolable custom of all burghs royal, without exception; *et consuetudo est optima legum interpret.* As for the King's decreet-arbitral, it is so far from being a ground of this declarator, that it gives the defenders an unanswerable defence against the same, as being inconsistent with the pursuit; for, as it appoints yearly a new election of magistrates, and the manner thereof, so it expressly ordains, that not only the provost, but the dean of guild and the treasurer for the time, shall be put upon the leets every year; which necessarily makes them capable to be elected, and so is altogether inconsistent with the pretences of this declarator.

It was ANSWERED to the *second* ground, As to the quality of the magistrates to be chosen, it is so far from being a privilege to the burgh, that it is to infer a reproach and infamy upon the burgh, *viz.* That a provost of Edinburgh, *eo ipso*, is incapable of all offices of state, or to be Privy Councillors, or Lords of Session, albeit never so able or deserving; neither can the Acts of Parliament alleged upon make out this ground; seeing all that is ordained therein is, that magistrates should, by their education and breeding, be such as are knowing in the trade of merchandise, and in a capacity to be an actual trafficking merchant: but, when they attain to age, and such fortunes as render that employment a great trouble and vexation, that they may not leave off the same, and employ their wits and experience in the places of magistracy, is irrational, and contrary to the meaning of the said acts, which were only made to prevent the election of tradesmen, strangers, and great persons who had no interest in the burgh, to be elected; which, before these acts, was the custom, and was found to be a great oppression, and enslaving of the burgesses to their designs and interest. As likewise, this may appear from the constant practice and custom of the Town of Edinburgh, where not only Lords of Session, but such burgesses, have been ordinarily elected provosts, as never were actual merchants, or had desisted from the exercise thereof: but, that they should be necessitated to continue to traffick, as it is irrational, so it is against the express Act of Parliament, *viz.* 68th act, Parl. 5, Ja. V. where it is expressly declared, That the Lords of Session should be free from bearing of any office within burgh, or outwith, but with their own good-will and assent; which clearly evinces that they are not altogether incapable, but, if they please and consent, they may accept thereof. And, accordingly, Mr Francis Bothwell, Mr Adam Otterburn, Sir William Hamilton, and several other eminent lawyers, and Sir John Arnot, treasurer-depute, and the Lord Fythie, before he was Chancellor, being in these stations continued to be elected for many years: and Sir Andrew Ramsay, having been bred and exercised the trade of merchandizing within Edinburgh, and being still capable to do the same, as are all the other Lords of the Session, his case and condition falls not within the Acts of Parliament: and if this argument were sustained, it would encroach upon the King's prerogative in choosing of such persons as were able and deserving to be officers of state, or Senators of the College of Justice.

It was REPLIED, to the arguments adduced for evincing, That the Acts of Parliament did import nothing, but that there should be yearly elections, and that there was no necessity of changing the persons of all in office the preceding year: — That all these Acts themselves were opposed, bearing, in express terms, not only that there should be an election, but that none of them should be continued longer nor one year; which, in sense and grammar, can receive no other construction but that the present magistrates must be removed, and new ones put in their place; *quia statuta ad literam sunt accipienda*: and the reason of those acts could be no other but to prevent the designs of present magistrates to endeavour to continue themselves in office, upon the account of their own private interest and advantage, having thereby power to gratify their friends, and to oblige those who have power to elect.

And as to the king's decret-arbitral, albeit it ordains the present provost, dean of guild, and treasurer, to be upon the leets; yet, that being only a compliment,

and with no design that they should be continued contrary to law, can be no ground for that defence, nor the contrary practice nor customs ; which are so far from the taking away the force of laws, that, at most, they may excuse from the pain of contravention, where the laws are penal, but cannot abrogate the same. And, in many cases, as in registrations of seasines within Leith, and the observation of the udal laws in Orkney, and several other special customs of burghs, in which cases the Lords are in use, in respect of the said customs, to absolve from penalties or nullities, as to bygones : but, in all time coming, they ordain the laws and statutes to be observed, as not being thereby abrogated. Neither can these laws be said to be in desuetude, that magistrates should be changed yearly, seeing that, by a decision *in anno* 1668, the Lords did find, That the bailies of Queensferry, in respect thereof, were not obliged to accept of the magistracy, having been in office one year. And, to make it appear that the decreet-arbitral can be the ground of no defence against the yearly change of magistrates, it bears expressly, That they should be elected conform to the Acts of Parliament. And, as the provost, dean of guild, and treasurer, are ordained to be leeted, so are the deacons of the crafts ; yet, by constant practice, neither they nor the bailies do continue but for one year.

It was REPLIED, to what was alleged against the restriction of magistrates to be of the quality of actual trafficking merchants, That the reasons of the Acts of Parliament were so clear, and particularly the Act 1606, which is posterior to the decreet-arbitral, and must interpret the same ; as likewise, it is posterior to the election of many of these Lords of Session and lawyers to be provosts, who are named, in the defence, to make out a constant custom and practick,— That the being so recent, ought to cancel and take away the strength of all conjectural interpretation of prior Acts ; seeing thereby, King James the Sixth, who did pronounce the decreet-arbitral, does repeat and renew the restriction, of all provosts to be actual trafficking merchants and burgesses : and, by letters directed to the secret council from the king, there was an Act passed, that whoever should choose any other but actual merchants, should be severely punished, and the election should be null : and, upon that account, the burgh of Haddington and Kinghorn having contravened, were proceeded against as contemners of his majesty's authority. And Charles the First, by his letter to the council of Edinburgh, for recommending Sir John Hay, then clerk-register, to be elected provost of Edinburgh, which was in the beginning of the late troubles, did expressly declare that it was against the privilege of the burgh, and that the doing thereof should not be a preparative for the future, but that reasons of state, and his majesty's service, did occasion that recommendation ; which was contrary to law. Whereby it appears, that neither King James nor King Charles did ever intend that any nobleman, nor any of a higher quality than a trafficking merchant, should be elected provost, far less a Lord of the Session, whose employment is more than sufficient to take up a whole man, though ever so learned or industrious.

The Lords, finding both pursuers and defenders declare that they were willing that this debate should not take an end by a decision in law, seeing it might occasion great divisions in the town, who, for the most part, were all interested in the event of this plea, having desired them to name those to whom

they would submit; and, accordingly, they having nominated my Lord Chancellor and the President of the Session; who, after hearing of both parties, did ordain an act to be drawn and passed in the town-council, and to be yearly sworn to at every new election, whereby it was enacted, that no provost should continue in office above two years, but might be put upon the leets after he had continued one year in office. They did interpose their authority to this decret, and, in obedience thereto, the said act was passed in the council; and they did give their oath for observing the same at the next election, whereby there was no decision in the point of law, after so long a debate.

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1673. *June 10.* The LAIRD of CLACKMANNAN *against* MARGARET SYDSERFE, and MR MARK KER, her Husband, for his Interest.

THE said Margaret, and her husband, having obtained decret against Clackmannan for payment of the annualrent of three thousand merks, upon the ground that Mr Darleith, her first husband, by contract of marriage, was obliged to provide her to the annualrent of all sums of money that he should conquest during the marriage, did SUSPEND, upon this reason:—That the decret could not secure to make payment; because, by the bond, Margaret Darleith was fiar of that sum, and her father only liferenter; so that her bond ought either to be reduced, or a declarator intented against the said daughter, and the heir of her father, to hear and see it found, that, notwithstanding that the father had taken that bond in name of his daughter, in fee, yet that could not prejudice his wife of the annualrent thereof, the bond being dated after the contract of marriage.

IT WAS REPLIED, That that decret not being libelled in the terms of a declarator of conquest, but only concluding payment against the debtor, and albeit the children of Darleith, the father, were called, yet none of them compeared, being minors, so that the fee of that sum could not, *hoc ordine*, be taken away from the daughter to whom it was provided.

THE Lords, considering the case of a bond taken by a father in name of a child, for their provision, and all portion natural, if that should be interpreted conquest, which bears the right of fee to have been in the person of the defunct when he died; or, if the daughter be prejudged of the liferent of the fee, ought to have relief of the heir,—they did find the letters orderly proceeded against the debtor, against whom the decret was given, wherein both the heir and fiar were called, as being equivalent to a declarator of conquest; but suspended all execution until the fiar and heir were of new cited, as in a double pointing, that the point of conquest being decided in law, and the relief of the debtor and heir might be secured, and the interest of all persons decided by a decret, bearing compearance.

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