

No 8.

For the defenders ; The words of the charter are, *præpositum et balivos incolas una cum, &c.* ; so that in no construction does the restriction extend to the counsellors and other office bearers, nor indeed to the provost ; and it has been customary in most burghs to elect a neighbouring gentleman provost, which was sustained by the House of Peers, in the case of Dumbarton. The Lords of Session cannot make a constitution for the town, nor extend any prohibitions, for reasons of polity, further than the charter and practice have done.

THE LORDS, 20th January 1749, ' found that a majority of the counsellors elected ought to be resident burgesses.'

17th February they ' found that the town was under no restraint of choosing persons to be counsellors, although not residing within the burgh.'

14th June, they found that a majority of the counsellors elected, ought to be residenters or proprietors, although not residing ; but found, that in making out the majority, the bailies, dean of guild, and treasurer, ought to be numbered and included. And this day adhered.

July 4. 1749. THE LORDS, in this case, of consent, found that the dean of guild and treasurer ought to be residenters in the town.

Act. H. Home & Dundas. For Sinclair, H. Home. Alt. W. Grant & Lockhart.
Clerk, Gibson.

D. Falconer, v. 2. No. 17. 58. 73. & 77. p. 19. 58. 79. & 82.

1753. March 10.

PROVOST JOHN BUCKNAY, BAILIE THOMAS SMITH, and Others, *against* JOHN FERRIER.

No 9.

Found, that it was no objection to the choosing of a person a guild counsellor of a burgh, that the Court of Session had declared him incapable of exercising the office of a judge, on account of extortion.

THE town council of Linlithgow having elected John Ferrier to be one of the guild counsellors, Provost Bucknay and others suspended, and brought a reduction of the election ; setting forth, that by a sentence of the Court of Session, John Ferrier had been found guilty of an illegal extortion of a sum of money while he acted as a judge ; and therefore declared incapable to exercise the office of a judge in all time coming : And they *insisted*, That he was thereby disabled from being elected a counsellor ; *1st*, Because a counsellor may, in some sense, be called a *judge*, as he is intrusted with the administration of the burgh ; and must give his opinion with regard to the direction of the public affairs thereof : *2dly*, Because, by the set of this burgh, the provost and four bailies, who are judges in the strictest sense, are chosen out of nineteen guild counsellors ; as therefore these counsellors are the great leet, out of which the provost and bailies are elected, none can be a counsellor but who is capable of being elected into these offices. If one incapable may be chosen a counsellor, so may all the nineteen ; and then how could the election of the provost and bailies proceed ?

Answered for John Ferrier : That penal sentences are never to be extended ; he was only found incapable of being a judge, but is as capable of any other office as ever. Had he been declared incapable of public trust, there would be some foundation for the suspenders argument ; but a counsellor is not a judge : And, though the provost and bailies are elected out of the guild counsellors, it does not from thence follow, that none can be a counsellor but who may also be a provost or bailie, for these may be chosen out of the remaining counsellors ; and, according to the suspenders argument, Mr Ferrier could not be a burges, because the magistrates are chosen out of the burgesses ; but, as it must be admitted that he remains a burges, so he also may be a counsellor.

' THE LORDS repelled the reasons of suspension ; and assoilzied from the reduction.'

Reporter, *Lord Elshies*. A& R. *Dundas & R. Bruce*. Alt. *Williamson & Jo. Grant*.
Clerk, *Gibson*.

Bruce. Fol. *Dic. v. 3. p. 99*. Fac. *Col. No 74. p. 112*.

1757. *January 7.*

SIR WILLIAM DUNBAR, and Others, Burgesses of the Burgh of Forres, *against* CAPTAIN JOHN MACLEOD, Younger of Macleod, and Others, Magistrates of the said Burgh.

AT the Michaelmas election 1754, a double election having been made in the burgh of Forres, by opposite parties, mutual complaints were preferred to the Court, founded on the acts of the 6th and 17th of his present Majesty, respecting elections.

At the same time, as Captain Macleod and his party had chosen several country-gentlemen, who did not reside in the burgh, to be counsellors, Sir William Dunbar, and his adherents, brought a reduction of the election made by Captain Macleod and his party, and a declarator, That none but burgesses, residents in Forres, could be counsellors.

In this declarator, the pursuers *insisted*, That by the maxims of the Roman law, as well as of the law and practice of the modern nations in Europe, it was established, That the common affairs of the community should be committed to the sole direction and administration of such as were actual inhabitants and members of the burgh ; *Domat. l. 1. tit. 16. § 4. ; l. 1. C. Quemad. civ. munic. ; l. 14. § 3. ff. De mun. et honor. ; l. 24. ff. Ad municip. et de incolis.*

And that the like general policy anciently took place in the constitution of burghs in Scotland, appears from the *leges burgorum*, and many of our acts of Parliament ; and it was specially enacted by particular acts in later times, that none but inhabitant-burgesses could be elected into the offices of magistrates or officers of burghs ; act 108. 1487, act 26. 1535, act 8. 1609. And although

No 10.

Found, that non-residing burgesses may be elected counsellors of a burgh royal.