

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

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

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these latter statutes seem only to relate to the election of magistrates, yet they plainly show the sense of the legislature, and that the nature and constitution of the burghs disallow of admitting strangers to be even common counsellors, or to have any hand in the administration of the burgh. And the reason why there is no particular act of Parliament discharging those who do not reside in the burgh to be chosen counsellors, is, because this deviation from the rules and constitution of burghs, and the encroachments of strangers into the office of counsellors, has only taken place in later times; but, as the same principle and reason apply in both cases, the analogy of these statutes, as to the magistrates, requires the same determination as to counsellors; and it is the duty, and in the power of the Court, to apply the remedy pointed out by the legislature, now that this abuse or grievance has crept in. And, as it is clear, that none but residing burgesses can carry on trade or merchandise in a burgh; that none but residing burgesses can exercise a craft within burgh, as was found 1738, in Macduff's case, (*infra b. t.*); and that none but residing burgesses can be magistrates or officers; so it must follow, that residence is a necessary quality in counsellors, who have the whole administration of the funds and affairs of the community entrusted in their hands, and who are justly supposed to be more attentive to the interest of the burgh, and more capable to manage its concerns than strangers.

Answered for the defenders: The texts of the civil law referred to by the pursuer, do not apply; and a contrary rule is established by *l. 29. ff. Ad municip. l. 1. C. De. Municip.* and *l. ult. eod.*

The acts of Parliament founded on are in desuetude, particularly such of them as require, that the provost should be an inhabitant-burgess, as was found in the case of the burgh of Dumbarton.* And although they were still in force, they no way concern the qualifications of common counsellors; and it is beyond the power of the Court to extend these acts to cases which they have not provided for. On the contrary, as the aid of the legislature was necessary to confine the office of magistrates to inhabitant-burgesses, so nothing less than the legislative power is sufficient to confine the office of counsellors to inhabitant burgesses, and to exclude other burgesses from that privilege. And so this question was decided in the cases of the burghs of Dumfries, No 5. p. 1840.; and Aberbrothock; and in the case of Wick, No 8. p. 1842.; and the practice of most of the burghs in Scotland is agreeable thereto; and particularly of this burgh of Forres, in which, as far back as the records go, there appear to have been almost constantly some members of the council who were not residing burgesses.

Replied for the pursuers: The acts of Parliament are only appealed to, as tending to shew the nature of the policy and constitution of the burghs. As they regard the public police of the country, they cannot in general go into disuse; and were, on the contrary, expressly renewed by a royal proclamation in 1626; and again, after the restoration, by a proclamation of the privy council. As to the decisions referred to, when an argument proceeds upon the pub-

* Case of Commissary Smollet, *infra*, Sec. 3.

lic law of the country, it is submitted, how far a decision of a Court is a proper answer, as no Court, however supreme, is superior to the law, or can have a power to abrogate it; but, more particularly, the decisions in the cases of Dumbarton, Dumfries, and Aberbrothock, as they appear marked in the Dictionary, were founded on specialties, and do not apply here; and the decision in the case of Wick cannot have great weight, as the Court varied in their judgment upon it; and even the last judgment given, finding, that at least a majority of the counsellors behoved to be residenters, must have proceeded, so far as it went, upon the principles here pleaded, which do not allow us to stop short, but plainly require residence in every counsellor. With regard to the general practice of burghs, it has been various in different places, owing to the abuse complained of. In the burgh of Forres, the instances have been few, and are far from amounting to a fixed or immemorial custom.

Observed on the Bench: Our public statutes may go into desuetude; in which respect we differ from the law of England. And although the essence of the constitution of a burgh was originally, that it was to be governed only by its own members, residing within the burgh; yet, in the later times, this has been departed from; and, as the law of elections is consuetudinary, the practice of every burgh must be the rule. The set of this burgh does not limit the election of counsellors to residents. And there is no redarguing the set of a burgh, unless by proving immemorial custom contrary thereto.

'THE LORDS found, That there is no necessity for the counsellors of Forres to be resident burgesses; and therefore assoilzied from the declarator.

A& A. Pringle.

Alt. Ro. Bruce.

G. Cockburn.

Fol. Dic. v. 3. p. 99. Fac. Col. No. 7. p. 11.

* * * Lord Kames reports the same case:

In a reduction of the election of the magistrates and town-council of the burgh of Forres, Michaelmas 1754, the LORDS, *inter alia*, found, 'That there is no necessity for counsellors to be resident burgesses.'

Sol. Dec. No 125. p. 178.

1757. March 11.

JAMES BOYLE of Montgomeryston, Esq; and Others, Late Counsellors of the Burgh of Irvine, *against* JOHN CUMMING, Provost, and Others, Magistrates and Counsellors of the said Burgh.

JAMES BOYLE of Montgomeryston, and others, who were counsellors of the burgh of Irvine for the year preceding Michaelmas 1756, gave in a petition and complaint to the Court, complaining of an undue election of the magistrates

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Found that tradesmen could not be elected mer-