we sustain compensation *here*, we ruin commerce. When I grant a bill, in order to procure credit to a man, what can that mean but to allow him to make whatever he can of it? If I can plead compensation, I undo the credit which I gave. As to what I formerly observed, that Mr Crosbie had still L.400 due, with which he might be permitted to cover his bill for L.300, I observe that the L.400 was due *ab ante*, and therefore cannot affect the credit for the L.300 given to Sherriff.

GARDENSTON. The plain import of the transaction was, that the bill should pass for money: the consequences of sustaining compensation would be to put an end to the commerce of this country. Balancing of accounts does not alter the nature of the credit. If the merchant in London had made further payments, the account would have been current. What difference can it make that the merchant in this country has made the further payments.

On the 22d February 1775, "the Lords repelled the defence of a compensation, and found the letters orderly proceeded."

Act. J. Montgomery. *Alt.* A. Wight. *Reporter*, Gardenston.

Diss. Monboddo. Pitfour, on the second point, came over to the general opinion of the bench.

1775. *January* 24. JAMES ANDREW and OTHERS *against* The MAGISTRATES and TOWN COUNCIL of LINLITHGOW.

BURGH-ROYAL.

Found that non-residence was no objection to the election of a burgh-councillor.

[*Faculty Collection, VII. p.* 16; *Dictionary*, 1883.]

HAILES. The complainers, in their argument, take it for granted that *Alderman* means councillor, and consequently that the old statute requires the residence of councillors. But they should not have taken for granted what may be contradicted from ancient writings. In the Chartulary of Aberdeen there is a grant *aldermanno*, ballivis, et communitati. *Aldermanno* here means the chief-magistrate. The statute which mentions "provost, bailies, and aldermen," means the chief magistrates, however they are denominated. Much in the ancient system of burghs is misunderstood. From ancient writings I see that there were sometimes more than one *præpositus* in a burgh, and that sometimes the bailies were considered as the bailies or deputies of the provost. There are grants "præposito et ejus ballivis." All this might tend to illustrate the old statute, were there room for such inquiries. But I think that the practice here must determine the question *in possessorio*. It seems evident that the practice of this burgh has been to choose councillors who do not reside.

JUSTICE-CLERK. The constitution of burghs depends on custom—custom may abrogate a set. *Here* the set does not limit the election of councillors to

residents. There has been a long usage of electing people who were not residenters. The three councillors complained of were unanimously elected. All the complainers have, at one time or other, voted for the very persons of whom they now complain.

MONBODDO. If there was any Act of Parliament requiring councillors to be resident, or if the set of this burgh were so provided, I should inquire a little further as to practice. But I do not see any express statute, and the set of the burgh requires no such thing. This is not the same case with that of *Wick*; besides, the question here is not whether the majority of the councillors ought to be resident.

GARDENSTON. A burgh is a place having certain privileges conferred on the inhabitants within the territory. They who reside without the territory have no such privileges. In the cases of *Miller* and the *Town of Brechin*, the Court went on this principle to oppose this—There must be a habitual contrary usage, not an occasional breach of the law.

PRESIDENT. As to the principle itself, with the aid of another lawyer, now a judge, I obtained the first interlocutor in the case of *Wick*; but I was better taught by the second interlocutor, which was generally approved of. The question here is not as to the residence of magistrates. The complaint here is as to the election of three councillors elected at Michaelmas 1774. They have been long in the Council; they have been elected from year to year; no protest taken; but, on the contrary, the very persons who now complain, formerly approved and concurred in the election. Shall we, when a community has acted *bona fide*, overturn their whole proceedings? If there be any abuse, it may be corrected by a declarator, but not in this summary way.

COALSTON. It is dangerous to attempt innovations in any point already established, particularly dangerous as to political causes. There is neither statute nor decision which requires residence of every councillor. It is a point equally clear that a set may be altered by usage.

AUCHINLECK. I would not even reserve declarator in the interlocutor, for this would be like encouraging the complainers to proceed in that way. I think that the judgment in the declarator would be as much against them as in the summary complaint.

PRESIDENT. I also disapprove of the reservation; for I see what use will be made of it. It will be said that the Court of Session could not give redress merely from a strict adherence to form.

On the 24th January 1775, "the Lords dismissed the complaint, and found expenses due."

Act. J. M'Laurin. *Alt.* H. Dundas.

1775. *March* 1.—COALSTON. It is proved in the petition that no one can be a burgess unless he resides; and, if so, that he cannot be a magistrate or councillor. I doubt whether the usage here would be sufficient to alter the law were we in a declarator, not a summary complaint.

PITFOUR. I have always understood that residence is necessary in office-bearers, but not in councillors. This rule is supported by universal practice.

MONBODDO. The papers are well written on both sides: they contain the best collection of the law of burghs that I have seen. I am of the opinion of the interlocutor. There is no proof of an invariable practice of choosing none but residents. This is the thing which the complainers ought to have proved.

AUCHINLECK. The answers are satisfying. I am a councillor in the city of Wigton, and have been so ever since I was Sheriff of Galloway, although I never resided. It might be a proper thing to fix the set of burghs: meanwhile I think that it must be regulated by usage.

HAILES. If you sustain this complaint you will set aside all the elections of the Magistrates and Town Council in Scotland, except perhaps four or five in the greater burghs, so universal is the practice of choosing non-resident councillors. I will not say that originally non-residents could have been elected, for there was great strictness in the rules of burghs. Thus, in old times, I believe that a man could not be a burgess, and at the same time have a house in the country where he might occasionally reside. Practice has often gone contrary to what in reason might be supposed to be the constitution in burghs. One would have expected that the Provost, who is the chief office-bearer, should have been a resident from the earliest times; and yet we know that he was frequently some great man, neither resident nor merchant. Thus, after the battle of Flodden, the Earl of Angus was Provost of Edinburgh; the Earl of Gowrie was Provost of Perth when he was slain in 1600. There are many other examples of the same kind. In this case it has been a practice to elect non-residents. I go no further than to the example of *G. Glen*: it is said that he resided in the Palace of Linlithgow, which *may* be within the burgh. But this is impossible, for the palace of Linlithgow is situated within the Castle. That castle was built by Edward I. Linlithgow was made a royal burgh by Robert I. We cannot suppose that Robert I. meant to comprehend his castle within the burgh. The conduct of the complainers is extraordinary: they concurred in voting the non-residents *in;* and perceiving that the election for a member of Parliament went at sixes and sevens, they now concur in attempting to put them *out*.

JUSTICE-CLERK. The objection to the title is not sufficient. If the set was contrary to the practice there might be ground for a complaint, even summary. Persons who have resided in a burgh are naturally, and not unreasonably, continued as fit councillors, although no longer resident. *Here* there is a list of precedents respecting persons of such a rank and in such circumstances that it was impossible that the councillors complaining should have voted from ignorance. The conduct of the complainers is the strongest confirmation of what the practice has been. *This* is sufficient in a possessory action.

On the 1st March 1775, "the Lords dismissed the complaint;" adhering to their former interlocutor, 24th January 1775.

Act. A. Lockhart. *Alt.* R. Cullen.