

For the complainers it was

Pleaded: As it is necessary that the persons elected into the office of baillie shall be resident in the burgh, this is no less essential to the nomination of such as are put in the list out of which that magistrate is to be chosen, the right of the electors being equally infringed, by presenting persons altogether unqualified, as by abridging the number of those from among whom the choice is to be made. Indeed, by multiplying that abuse, so as only to leave three of the presentees eligible, the persons already in office, who may be included in the list, might ensure to themselves for ever the government of the burgh. In this manner the election of the bailies being vacated, the nomination of the office-bearers chosen by them becomes, consequently, ineffectual.

Answered: It would not follow, because the bailies must reside within the burgh, that those persons are altogether ineligible, who are not resident at the moment of their election; nothing being farther requisite to validate their appointment, than that they should, during their office, have their abode in the town. If, therefore, the exception here urged could not have prevented the election of non-residents, it assuredly cannot have the least influence on the choice of those who were preferred to them, and to whom the objection is not applicable. In fact, however, this circumstance is not rigidly attended to, either in this or in almost any other burgh in Scotland.

THE LORDS considered residence as an indispensable qualification, if not departed from by inveterate usage; and they reduced the election *in toto*.

Act. Crosbie. Alt. Wight, J. Anstruther junior. Clerk, Menzies.

Craigie.

Fol. Dic. v. 3. p. 101. Fac. Col. No 203. p. 318.

* * This judgment reversed *ex parte* in the House of Lords, 28th April 1785.

1789. July 29. JOHN LAMB against ROBERT HIGH.

JOHN LAMB, in terms of the statutes, 16th Geo. II. and 14th Geo. III. complained to the Court of Session, that at the annual election of magistrates in the town of Kinghorn, in 1788, Robert High had been admitted as deacon of the tailors, whereas he himself had the only right to that office.

The circumstance on which he rested his argument was, that the magistrates had unduly rejected, on account of non-residence within the burgh, two persons as voters, whose votes would have been decisive in his favour.

Pleaded: After a franchise has been once constituted in favour of any class of men, nothing can debar the exercise of it, but either express statute, or immemorial custom. Neither of these however can be stated, in order to exclude non-residing burgesses or freemen from their right of voting in the election of the town's officers, any more than it could prevent them from resuming their several occupations within the town, as soon as they found it convenient. Accordingly, although it has been specially provided, that the magistrates should be

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rule, in regard to any particular office, had been established by usage. Reversed *ex parte* on appeal.

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Found, that non-resident freemen have no right to vote, in the election of a deacon.

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indwellers, no such provision has been made as to the other citizens ; and in many instances it has been found, that a non-residing burghess might enjoy the important office of counsellor, when the matter had not been otherwise fixed by the constitution of the burgh. Some determinations which may be resorted to in the case of Edinburgh are not applicable, these having been given in consequence of the peculiar set of that town, as regulated by a decret-arbitral pronounced by Lord Ilay, and confirmed by the subsequent practice : Act 1487, c. III. ; 1535, c. 26. ; 7th January 1757, Burgesses of Forres *contra* the Magistrates, No 10. p. 1855. ; Burgesses of Wick, No 8. p. 1842. ; 1775, Magistrates of Linlithgow.

Answered : The privileges belonging to burghesses and freemen have not been bestowed on them individually, but as inhabiting a certain territory, and in consideration of their peculiar usefulness to their fellow citizens. As soon, therefore, as a burghess or freeman ceases to reside within the burgh, he is not permitted to exercise any of his former rights. In the election of the town's managers, it would be very inexpedient to give any influence to those who have no longer any interest in the welfare of the community. Hence it has been found, that a non-residing burghess had not the privilege of taking apprentices. In another case it was expressly determined, that a tradesman residing in Canongate could not be elected a deacon in the town of Edinburgh ; and this was held to be law in a subsequent question ; 1st December 1738, Macduff, (*infra*) ; 31st January 1764, Millar *contra* Nicolson (not reported) ; James Hunter Blair *contra* Phin, No 27. p. 1885.

' THE LORDS dismissed the complaint.*

For the Complainers, *Alex. Fergusson, C. Hay, et alii.*
Craigie.

Alt. Hope, et alii.

Fol. Dic. v. 3. p. 101. Fac. Col. No 81. p. 146.

1789. July 29.

JAMES DONALDSON and Others, *against* The MAGISTRATES of Kinghorn.

No 31.
In a complaint with regard to the election of a deacon, it is necessary to summon only the Magistrates and Council, not the members of the particular corporation.

JAMES DONALDSON, who had been chosen deacon of the bakers in the town of Kinghorn in September 1788, complained to the Court of Session, in terms of the statutes 16th Geo. II. and 14th Geo. III. that he had been prevented from voting in the election of the magistrates for the ensuing year.

To this complaint the provost, bailies, and other members of the town council, were made parties, without taking any notice of the members of the corporation of bakers, and also without summoning one Thomson, who, as *old deacon* of the taylors, had been present when the complainer was rejected by the magistrates.

An objection on this ground was stated by the magistrates and town council to the formality of this complaint ; in support of which they

* The same decision was given in a similar question from the town of Kirkaldy.