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One of the Lords declared he thought this might be a reason of reducing their burgh tickets ; but as they were in possession of all the other rights of burghesses, their votes, while they continued so, behoved to be sustained.

THE LORDS, 15th January, Found the whole of the incorporated burghesses, whether coaliers or not, entitled to vote and poll in leeting Eight ; and repelled the objection to the coaliers' votes : And, on bill and answers, adhered.

A&t. Arch. Hamilton & W. Grant. Alt. J. Graham & Maitland. Clerk, Forbes.
Fol. Dic. v. 3. p. 99. D. Falconer, v. 1. No 171. p. 228.

1749. February 17.

No 8.

JAMES ANDERSON and other BURGESSES of Wick *against* MAGISTRATES.

None but those who are resident can be elected bailies ; but it is not necessary that the provost, or any of the counsellors, be resident burghesses.

THE TOWN of Wick was erected into a royal burgh by a charter from the Crown, *anno* 1589, containing regulations for electing the magistrates and council, in the following words : ‘ Cum speciali et plenaria potestate liberis inhabitantibus et burgensibus dicti burgi, et suis successoribus in futurum, cum expresso avisamento et consensu dicti nostri consanguinei *Georgii* Comitis de *Caithnes* et ejus hæredum et successorum, et non aliter, seu alio modo, præpositum et quatuor bailivos, dicti burgi incolas seu inhabitatores, una cum thesaurario, gildæ-decano, consulibus, burgensibus, serjeandis, aliisque officariis necessariis, intra dictum burgum, pro gubernatione ejusdem, faciendi, eligendi, constituendi, et creandi, eosque toties quoties expediens videbitur, pro causis rationalibus deponendi.’

Certain burghesses of the town finding a deviation from the charter in the later practice, and new regulations established by a set of the town made by the royal burghs *anno* 1716 ; and apprehending that this set tended to establish a foreign interest within the town, brought a process of declarator, for asserting the independency of their town, and for restoring their form of government to its original standard. The conclusions of the declarator are : *1mo*, In general, That the charter of erection 1589 containing regulations for electing the magistrates and town council, ought to be found and declared the rule, and that the set made by the royal burghs, *anno* 1716, ought to be declared of no force, so far as it differs from the charter. *2do*, In particular, That no person should be entitled to elect or be elected a magistrate or counsellor but burghesses and inhabitants, in terms of the charter.

The *answer* to the *first* conclusion was, That the old form of popular elections, universal in Scotland, was justly altered by the act 29th, Parliament 1469, because of the difficulties and confusion attending such elections ; an aristocratical form of election being introduced in place of the democratical, by appointing the old council to chuse the new : That the charter 1589, though granted long after the alteration, was probably made out by inadvertency in the old stile :

That the set 1716, by the Convention of burghs, proceeding upon the known inconveniencies of popular elections, was an alteration for the benefit of the town, no great deviation from the charter, and agreeable to the spirit of our law, as it now stands; and therefore that this set must be the rule, as the Convention of burghs is authorised to make regulations about this matter.

To the *second* conclusion, it was *answered* with regard to the electors, That though an honorary burghess, merely *qua* such, ought not to be admitted to a vote; yet honorary burghesses, who have property in the town, are entitled to be electors, both by the charter and by constant practice, though they may not be inhabitants: That these persons are also qualified to be elected, especially Sinclair of Ulbster, of whom the town holds most of its property, and to whom they pay a considerable feu-duty; and that country gentlemen who have property in the town, are perhaps more interested and better qualified to promote its welfare than many of the inhabitants: That whatever reason there may be for the bailies being burghesses and inhabitants, who must constantly attend the dispensing of justice, there is no such necessity that the provost should be a burghess or resider: That in fact a practice has prevailed in most of the small burghs of the kingdom, of chusing country gentlemen to be provosts; and that this practice is authorised by a judgment of the House of Lords in the case of Dumbarton, 19th February 1735*: And lastly, as to the counsellors, that neither the words of the charter, the practice of other burghs, nor reason, require that they be inhabitants.

The pursuers *replied* to the *first*, Where a royal burgh is erected without prescribing a form of government, or where the form of government is doubtful, by uncertain practice, it is the province of the Convention of burghs to adjust differences, and to ascertain the form of government by a writing called a set. But the Convention of burghs have no power to alter a set prescribed by the King, more than to deprive a royal burgh of any of its rights and privileges. Nor is there any pretext of an established usage or practice, past memory of man, contrary to the charter of erection. We find the popular election of magistrates was the form so late as the 1708; which no doubt continued till it was altered by the set 1716. And this alteration was not only made without any proper authority, but was really a partial and unjust deed by the Convention of burghs, founded upon a false and affected narrative of uncertainty in the form of election, brought about by the influence of the Earl of Breadalbane, without so much as allowing the town to be heard for its interest; and calculated to put the government of the burgh in the hands of the Earl, and of Sinclair of Ulbster, who derives right from him.

As to the *second* conclusion, it is extremely clear, from the charter, that none have right to vote but *liberi inhabitantes et burgenses*; and that none are qualified to be of the magistracy or council, but the same *liberi inhabitantes et burgenses*. The defenders admit this so far, as that an honorary burghess is not qualified to elect or be elected; and, consistently with this admission, how they can

No 8. plead for country gentleman, whatever property they may have in the town, if neither inhabitants nor burgesses, is what the pursuers cannot comprehend. Nay, the defenders further admit the authority of the charter to exclude any from being bailies but burgesses and inhabitants; and yet, with the same breath, they insist that a stranger may be provost, though the charter makes no distinction betwixt the qualifications of provost and bailies. And it is of no consequence what may be the custom of other burghs, when this burgh has its privileges upon the express condition of chusing no man for provost but a burges or inhabitant; and the same regulation is laid down with regard to all the other office-bearers, and also with regard to the counsellors.

As to the judgment of the House of Lords in the case of Dumbarton, the pursuers say that that judgment is not applicable to the present case. It was a reduction of an election upon this ground, that a country gentleman was chosen provost, who was disqualified by the statute law of the kingdom. The election being reduced by this Court, the judgment was reversed by the House of Lords upon the following ground, that a contrary usage had prevailed so far against the statutes, as put the town in *bona fide* to elect a stranger for a provost; and therefore that this particular election ought to be sustained, leaving the statutes to have their full force in time coming; which was really doing no more than what the Court of Session has done in this very case, by sustaining the elections of this town for the years 1745 and 1746, being *in possessorio*; reserving to the pursuers to ascertain the form of election in time coming by a declarator, as accords; nor more than what they have done in many similar cases, by sustaining informal sasines and executions, upon the force of consuetude; but declaring all such informal deeds to be null in time coming, and making acts of sederunt to that purpose.

It was further observed, that the charter of erection, confining the privilege of bearing office within this burgh to burgesses and inhabitants, particularly with regard to the provost and bailies, was no singular regulation, but copied from the public law of the kingdom. It was an old sore, distressful to the royal burghs, especially to the meaner sort, that they were constantly laid open to their powerful neighbours, noblemen and gentlemen; who, grasping at power and profit, wanted to get the government into their own hands. An ample remedy was provided for this sore by the act 26th, Parliament 1535; an effectual remedy at this day, when judges take care to put it in execution. The act proceeds upon this narrative, 'That the royal burghs are impoverished and almost ruined by the disuse of merchandize, occasioned by electing strangers for magistrates; who consume the common-good of the burgh, and aim at nothing but their own profit: Therefore enacted, that no man in time coming be chosen provost, bailie, or alderman, but an honest substantial burges, who is a merchant or indweller within the burgh.' And this statute is renewed and enforced by the act 8th, Parliament 1609.

The only answer that can be given to the charter of erection, and to the statutes supporting it is, that a contrary custom has prevailed through most of the

royal burghs in Scotland, and in the town of Wick in particular; of electing strangers to be provosts. But supposing this to be the fact, which is not admitted, the pursuers can find no foundation for giving a practice, however long continued, the effect of altering or annulling that very charter upon which the being of the incorporation is founded: If it be in force as to any one particular, it must be totally in force. And as the inhabitants of the town of Wick have no power, even by consent of the whole incorporation, to alter one article of their charter of erection; no practice of theirs can have that effect, which at best is but an implied consent.

And, as to the statutes now mentioned, the pursuers say, that laws touching the public police go not into desuetude: Some of our best authors are of that opinion; and the Court of Session was of that opinion, in the decision observed No 3. p. 1838. 27th Jan. 1681, *Jack contra Town of Stirling*. But, be this as it may, one thing is certain, that no contrary practice has been specified, to infer, that the statutes under consideration are in desuetude. And, because this proposition is of consequence to the nation in general, as well as to the pursuers in particular, the following considerations are suggested:—There are but two ways by which a statute can be abrogated; one is by a posterior statute, the other by a contrary custom, inconsistent with the statute, consented to by the whole people; for, if custom have the same force with a statute to make law, custom must have the same force with a statute to unmake law, or to unmake a statute. When we say, therefore, that a statute is in desuetude, the meaning is, that a contrary universal custom has prevailed over the statute; and so much is implied in the very term desuetude.

So far the matter is clear; the difficulty lies only in the application of the doctrine to particular cases, and in specifying such an universal contrary custom as to have the force of a new law; which will be readily sustained in some cases, and with difficulty in others. Statutes which have lost their utility, by change of manners and circumstances, will very readily go into desuetude, and the allegation of a contrary practice will be readily admitted without much proof: Nay, it will be presumed without proof; for example, Who is it that doubts of the following statutes being antiquated and in desuetude, *viz.* the act 122d, Parliament 1581, prohibiting horses to be kept at hard meat from the 15th May till the 15th October; the act 116th, Parliament 1581, obliging landed gentlemen to reside at their country-seats under a penalty; the act 84th, Parliament 1426, obliging all men going beyond seas, to take their bills of exchange from bankers within the country; the act 144th, Parliament 1436, that none be found in taverns after nine at night, &c. These, and such like statutes, however useful when made, have lost all their utility by change of manners and circumstances, and would be considered at present as so many idle restraints upon the liberty of the subject; and desuetude will be presumed from the nature of the thing, without necessity of any direct evidence.

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But statutes that are beneficial to the lieges at present, as much as when enacted, require a very special allegation of an universal contrary custom to prove them to be in desuetude. Their utility will always be a presumption in their favour; and, therefore, instances, however numerous, of their being encroached upon, will be just so many instances of illegal practice. To come to particulars: There is a statute prohibiting members of the College of Justice to purchase pleas, which certainly deserves to be in eternal observance. Let us suppose, that by the relaxation of discipline, such purchases had become frequent and general; the custom no doubt might excuse from the penalty, as introducing a sort of *bona fides*; but, would the Court find the statute in desuetude, upon specifying endless deviations for a considerable space of time? The Court would certainly give no such judgment; because particular instances, however numerous, can never comprehend the whole people, or the bulk of them. The Court, as in similar cases, would sustain such purchases *in præteritum*; but would declare, perhaps by an act of sederunt, that they will put the law in execution in time coming. And they would do the same with regard to their own acts of sederunt, prohibiting agents to be factors upon bankrupt estates, and appointing rankings to go before sales, if these salutary acts were broke in upon by any general practice to the contrary. There is a statute discharging the pulling bent growing upon sand-hills at the sea shore. This statute can never go into desuetude; for even ten thousand instances of a practice contrary to the statute, would be considered as so many transgressions deserving punishment, and not to be countenanced so far as to abrogate the law.

And this in effect comes to the same with what is said by writers upon the English law, which gives as strong an effect to custom as the laws of this or any other country do. The doctrine is laid down in the following words: ‘ But every custom which appears to have been unreasonable in itself, as being against the good of the commonwealth, or injurious to a multitude, though beneficial to particular persons, is void; nor can any continuance of such a custom give it a sanction, or make that good which was void in its creation.’

But, to prevent mistakes, the pursuers must observe, that though salutary statutes can scarce be annulled totally by disuse, they will yield to private rights established by prescription, or by immemorial possession. The statute 1455, discharging heritable offices to be granted, being introduced in favour of the Crown, may certainly go into desuetude, by numberless instances of heritable offices granted contrary to the statute; for the crown, as well as a private person, may renounce a benefit introduced in its own favour, and so many repeated instances may be justly considered as a virtual renunciation. But let us suppose that the statute was introduced for the good of the public: Upon that supposition, the numberless grants of heritable offices must be considered as so many transgressions of the public law, which will not infer that the law is in desuetude. Yet, as to the particular grants made by the crown, there is little doubt but they may be secured by prescription, or by immemorial possession.

To apply these considerations to the present case, the two statutes confining the privilege of bearing the office of provost, bailie, or alderman within burgh, to merchants who dwell within the burgh, are at present as necessary to the well-being of the royal burghs, as when they were made. And the grievance complained of in the preamble to the first of these statutes, would be as sorely felt by the burghs at present as ever, if an universal practice were introduced and supported contrary to these statutes. All the instances then that can be specified, of country gentlemen elected provosts of burghs, were they more numerous than they are, cannot be considered in any other light, than as so many encroachments upon the public law, which can never imply any thing like an universal consent, even of the royal burghs, to pass from the benefit of the statutes; especially as many instances that can be given, must be mixed with more frequent instances of burgesses being chosen provosts, &c.

But there is more to be said against the relevancy of such instances. Supposing a stranger is chosen provost without opposition, and consequently with the presumed consent of the whole community; this instance, and many such, do really prove no more, but that the burgh, upon some view of benefit from the person elected provost, has been willing to dispense with its privilege upon that occasion. And the dispensing with a privilege upon particular occasions, will never infer a passing from the privilege altogether; for it is inherent in the very nature of a privilege, that it may be exercised or forborn at the pleasure of the party privileged. And, as the instances are few, of reducing an election of Magistrates, because a stranger is chosen provost, this is legal evidence that the bulk of the instances where strangers are elected provosts, must have been by consent of the whole community; which proves just nothing at all. Such instances cannot bar that burgh, nor any other burgh, from exerting their privilege afterward, of being governed by their own inhabitants as magistrates.

Thus then the case stands. Instances of strangers being chosen provosts of burghs, by consent of the whole community, however numerous, cannot, in the nature of the thing, bar a burgh, or any single burgess within burgh, from exerting the privilege in any future election, by objecting to the nomination of a stranger to be provost; and, if the objection be once made, and brought before this Court, it ought to be sustained. But, at the worst, supposing these instances to be considered as a sort of custom established contrary to the law; yet such custom ought never to have any weight, except as to by-gones. If the effect be given to it, of supporting a stranger provost for the year of his election upon a *bona fides* acquired by custom; this is the utmost effect that ought to be given it. But then, as such custom can have no effect *ad futura*, it can never stand in the way of a declarator tending to regulate the elections in time coming.

And what strongly supports the declarator is, that there can be no *jur quasi-tum* to any single person to entitle him to stand up in opposition to it. Uibster, for example, though he and his father have been frequently chosen provosts of

No 8. this burgh, and have always had the interest, by virtue of the set 1716, to obtain themselves or their minions to be chosen provost; yet this same gentleman has acquired no privilege, whether by prescription or otherwise, to be perpetual provost or dictator of this burgh: Whatever illegal interest he may have, he has certainly no legal interest to oppose this declarator, more than any other gentleman in Scotland.

‘ Found, that in the election of a provost and bailies, resident burgesses, and heritors being also burgesses, though not resident, have a right as electors, and none others. Found, That none but those who are resident, can be elected bailies; but that it is not necessary the provost, or any of the counsellors, should be resident burgesses.’

N. B. The judgment concerning the counsellors proceeded upon this ground, that there is no law requiring the counsellors to be inhabitants. See *DESUETUDE.*

Fol. Dic. v. 3. p. 99. Rem. Dec. No 103. p. 192.

* * * Kilkerran reports the same case :

IN the declarator pursued by John Anderson, and others, against the present magistrates and town-council of Wick, it was *inter alia* sought to be declared, ‘ That in all time coming, the election of magistrates and counsellors ought to proceed in conformity to the charter of erection of the burgh in 1589,’ of which full mention is made, *voce PERSONAL and TRANSMISSIBLE*, 19th November 1748, and 17th February 1749; ‘ and particularly, *2do*, That no persons hereafter should be capable of being elected provost, bailies, counsellors, or other office-bearers in the burgh, or of voting in the election of these, but such only as are actual burgesses, inhabitants and residenters within the burgh.’

As to the first and general conclusion, the Lords took little notice of it; nor was it insisted on after the answer made, That charters of erection are intended to create a body corporate, and to endue it with the privileges which by law pertain to royal burghs in Scotland; but as to the manner in which these privileges are exercised, *v. g.* the election of their magistrates, which, whether expressed or not, would be implied under the erection itself, every thing the grant may happen to point out as to that matter, is not to be taken to be a condition of the grant. For, as to these matters, charters of erection are often receded from, in consistence always with the general scope of the erection, sometimes by long usage, sometimes by the act and deed of the Convention, which has power by law to that effect. Even the public laws made from time to time to regulate the election of magistrates go into desuetude, and charters of erection cannot be more binding than a public law.

But, as to the particular conclusions, the LORDS, upon the 19th November 1748, found, ‘ That in the election of provost and bailies, those only who are resident burgesses, or burgesses who are heritors, having property in the burgh, and none other, are entitled to be electors;’ and found, ‘ That in the election

' of bailies and counsellors, only those who are residenters can be elected ; but that it is not necessary that the provost should be a residerter.'

With respect to the qualifications of the electors, the Court was unanimous ; as they likewise were as to the qualifications of the bailies to be elected, that they should be burgesses residenters, being agreeable as to the public law, viz. the statute 1535 ; so to the law of this burgh by the charter of erection, *cum potestate liberis inhabitantibus et burgensibus dicti burghi, et suis successoribus in futurum, &c. præpositum, et quatuor balivos dicti burghi incolas seu inhabitatores, una cum thesaurario, gildæ decano, consulis, &c. eligendi* ; and to the reason of the thing, as the presence of the bailies, who are judges in burgh, is at all times necessary.

They were also unanimous with respect to the residence of the provost not being necessary ; for although his residence be also required by the foresaid public statute and charter of erection, yet the public law has, as to that, gone into desuetude, as was found in the last resort, in the case of Commissary Smollet, the provost of Dumbarton, whose election the Court of Session had reduced on the old statute, he being no residerter ; but which, on an appeal, was reversed, in respect it appeared to have gone into disuse ; and so far is plain, that the same reason does not occur for the constant residence of the provost, an extraordinary magistrate, whose attendance is only necessary on great occasions, as of the bailies : And as for the charter of erection of this burgh of Wick, the constant and immemorial usage of having a non-resident provost was admitted.

But as to the qualification of the counsellors, that they should be residenters, it was carried by a narrow majority, and was afterwards altered, as shall just now be observed ; and justly, as neither the public law, nor the law of this burgh, their charter of erection, require such qualification. On the contrary, when the one and the other require the residence of the provost and bailies, and not of the counsellors, it is in effect declaring it not necessary that they should be resident. And so also the practice of this Court has uniformly been these many years ; as *first*, in the case of Couper ; afterwards in the case of Nairn ; and more lately, in the year 1736, in the case of Dumfries, No 5. p. 1840. ; and, in 1743, in the case of Aberbrothock ; in all which it was found to be no objection to a common council-man that he was not a residerter, (*vide infra h. t.*)

THE LORDS, therefore, came to agree, that this part of the interlocutor was to be varied ; as indeed it would have been singular, if the old statute had just been reversed, the counsellors to be resident and the provost not.

But then a new question was stirred from the bench, Whether it should be left at large that any burgess may be a counsellor ? or, Whether it should not be so qualified, that at least the majority of the council should be resident ? And on this last also the Court gave cross judgments : For, upon advising the petition for the magistrates against the interlocutor of the 19th November, the

No 8. LORDS, upon the 31st January, found, ' That a majority of the counsellors ought to be resident burgesses.'

The thing was, by those who opposed it, not thought unreasonable in itself. But they thought, that, as there was neither any public law, nor any law or usage of this burgh, requiring that any common council-man, or any number of common council-men, should be resident, it required a legislative authority to establish such a regulation, and that it could not be done by way of judgement.

Accordingly, this interlocutor being reclaimed against, the LORDS, on advising petition and answers, on the 17th February 1749, found, ' That the town is under no restraint from chusing persons to be counsellors, although not residing within the burgh.'

But this interlocutor being again reclaimed against by the pursuers, it was found, in a full Court, on the 13th June 1749, by the narrowest majority, ' That the majority of the counsellors ought to be residenters,' (but with this extension) ' or proprietors, though not residing, but that in making the majority, the bailies, dean of guild, and treasurer, ought to be numbered and included ;' regulations which the minority were still of opinion the Court had nothing to do with ; which this new extension to heritors confirmed them in, as it shewed the whole to be an arbitrary regulation, no way falling under the power of the Court as Judges.

And last of all, the LORDS, by consent of parties, found, ' That the dean of guild and treasurer should be residenters.'

Kilkerran, (BURGH ROYAL) No 8. p. 110.

. D. Falconer reports the same case :

2d December 1748.

JOHN ANDERSON, and other burgesses of Wick, raised a declarator against the Magistrates and Town-council, for having the method of election of magistrates and counsellors regulated by the charter of erection ; from which they alleged the town had deborded ; and concluding, *inter alia*, that burgesses, not inhabitants, had, by the charter, no interest nor title to interfere in any election.

Objected : No process, all parties having interest, not being called ; in so far as the elections of this burgh were partly popular, and there were on the roll of electors several burgesses not residing within the town, whose right was sought to be cut off, and therefore they ought to have been called : Indeed the whole burgesses ought to have been specially called, as their rights were sought to be regulated by this declarator.

Answered : If the action disputed any person's right to an office into which he was chosen, that person behoved to be specially called ; but, as this was a declarator of the constitution of the town, the town itself was the proper party ; and was called, in calling the magistrates and council.

THE LORDS, 19th November, repelled the defence, that all parties having interest were not called, in respect the magistrates and town-council, as representing the community, were called : And refused a bill, and adhered.

February 17. 1749. King James IV. erected, 1589, the village of Wick into a royal burgh, granting special and full power ‘ liberis inhabitantibus et burgensibus dicti burgi et suis successoribus in futurum, cum expresso avisamento et consensu Georgii Comitis de Caithness, et ejus heredum et successorum, et non aliter seu alio modo, præpositum et quatuor balivos dicti burgi incolas seu inhabitatores, una cum thesaurario, gildæ decano, consulibus burgensibus, serjeandis, aliisque officariis necessariis intra dictum burgum, pro gubernatione ejusdem, faciendi eligendi constituendi et creandi ; eosque, quoties expediens videbitur, pro causis rationalibus deponendi ; dimidiam partem summarum per dictos burgenses pro suis in dicto nostro burgo libertatibus ad dictum nostrum consanguineum et suos successores in futurum spectandum ; et alteram dimidiam earundem summarum ad publicum bonum dicti burgi applicandam.’

The Earl of Caithness was superior or proprietor of the whole town ; and the Earl of Breadalbane having apprised his estate, obtained a charter 1694, comprehending *tenementa terræ in villa de Wick, &c. una cum omnibus officiis hereditariis, lie provostriis, privilegiis et libertatibus infra burgum de Wick* ; and this right was disposed 1719 to Sinclair of Ulbster.

In 1708, the set of the town of Wick, as attested by a bailie and four counsellors, was recorded in the book of the Convention of Royal Burghs ; in substance this, That the practice had been to allow the Earl of Caithness to be provost, and to chuse one of the bailies, and the town to chuse one other bailie ; and then the magistrates to nominate seven counsellors, of burgesses and heritors within the said town : But, since the Earl did not concern himself about the provosty, the town were in use to chuse their own provost, and two bailies, by the plurality of the poll ; and they to nominate seven counsellors, with a dean of guild and treasurer.

The Convention of the Royal Burghs 1716, on the petition of the commissioner for Wick, found this set to be disconform to the original charter, and that the express consent of the Earls of Caithness, and their successors, to the election of magistrates, was necessary ; and that a leet ought to be made of two for the choice of a provost, and four for two bailies, and presented to the Lord Glenorchy, as come in place of the Earls of Caithness, or his Sheriff-depute, in case of his absence out of Scotland, thirty days before Michaelmas ; and his approving thereof ought to be the rule of election in all time coming : And that the magistrates, when chosen, were to chuse seven counsellors, a treasurer, and dean of guild ; and authorised the present magistracy to proceed in this manner at the next election.

John Anderson, and other burgesses of Wick, raised a declarator against the magistrates and town-council, that the charter of erection ought to be the rule

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of election ; and consequently, *1st*, That there ought to be four bailies. *2dly*, That no persons should be capable of being chosen magistrates, counsellors, or office-bearers, or voting in their election, but burgesses inhabitants. *3dly*, That the counsellors, and other office-bearers, should be chosen by poll, and not by the magistrates. And *4thly*, That Sinclair of Ulbster, as come in place of the Earl of Caithness, had no right to have a leet presented to him.

Pleaded, on the *first* point, for the pursuers, The charter appoints four bailies to be elected.

Answered : It gives power to the burgesses to chuse four, but does not oblige them to have so many ; and they do not transgress their charter, if they keep within the number granted to them : There never have been more than two chosen, and two are enough for this small burgh.

On the *second* point, the charter confines the magistracy and office of counsellor, to burgesses inhabitants of the place ; in conformity to public law, act 26th, Parliament 1535 ; and act 8th, Parliament 1609 : As also is the right of electing confined to them.

Answered : The words of the charter are, *Præpositum et balivos incolas unacum*, &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 power of voting given to the burgesses inhabitants, cannot be understood to exclude the heritors, since the first election behoved to be made by them, there being no burgesses.

On the *third* point ; That the election ought to be by poll, is laid down by the charter ; and this being posterior to the statute James III. taking away poll elections in general from burghs, is not affected by it ; and is a method proper for this small burgh.

Answered : The grant to the burgesses to chuse, does not determine the election to be by poll ; but burgesses enjoy this right when their magistrates are chosen by the sets of their respective burghs.

On the *fourth* point *objected*, The pursuers have no interest to contest Ulbster's title.

Hereupon the Earl of Caithness appeared for his interest, and disputed his title with Ulbster.

Pleaded for Caithness : The right was not transmissible, being a personal privilege granted to the Earl and his heirs, who must be understood *his heirs in the dignity* ; especially considering it is not contained in any grant to him, but is only a mode of election imposed upon the town in their own charter.

2dly, If it were transmissible, it is not affected by the diligence which carried off the estate. Breadalbane's charter mentions indeed provostries ; but it is not a right of provostry, and the term of privileges is too general to comprehend it.

Pleaded for Ulbster: The Earl of Caithness was superior of the town, and had his estate, and a considerable influence, in the neighbourhood: It was, therefore, in his favour that the burgh was erected; and the right must be considered as annexed to the earldom, in the sense it signifies, the *estate*, not the *dignity*, and as going alongst with it, at least with the property in the burgh; at least it is affectable by express adjudication, as it contains a lucrative perquisite in a share of the entry money of the burgesses; and the terms in the charter are proper to comprehend it.

THE LORDS, 19th November 1748, ' Found, That the privilege granted by the charter 1589 to the Earl of Caithness, was not transmitted from, but still remained with him, and his heirs and successors in the dignity; and found, in the election of a provost and bailies, that those only who were resident burgesses, and heritors having property in the burgh, and none other, had a right as electors; and that a leet for the provost and two bailies behoved to be given and presented to the Earl of Caithness, and his heirs and successors, by the magistrates of that year, thirty days before the time of election, and be approven of by them; and that the election behoved to proceed by a poll of those having right to vote as above described. And found, that the magistrates had a right to choose the dean of guild, treasurer, and counsellors; also found, that in the election of bailies and counsellors, only those who were residenters could be elected, but that it was not necessary the provost should a residenter.'

13th January 1749, they ' Found the privilege granted by the charter 1589 to the Earl of Caithness was alienable, and ordained Sinclair of Ulbster to condescend on, and produce in the clerk's hands, the titles by which he alleged the said privilege was alienated; and adhered to their former interlocutor, finding that in the election of a provost and bailies, those only who were resident burgesses and heritors, and none others, had a right as electors; in respect it was understood that either resident burgesses, or heritors being also burgesses, were entitled as electors; and found, that a majority of the counsellors elected, ought to be resident burgesses.'

They adhered, in finding the faculty granted to the Earl of Caithness alienable. See PERSONAL and TRANSMISSIBLE.

June 24. 1749. IN the action at the instance of the Inhabitants of Wick against their Magistrates and Sinclair of Ulbster, for regulating the constitution of their town, the LORDS found, 19th November 1748, ' That in the election of bailies and counsellors, only those who were resident could be elected, but that it was not necessary that the provost should be a residenter.'

On this point, the arguments for the pursuers were, That the charter confined the magistracy and office of counsellor to burgesses inhabitants of the place, and this in conformity to public law, act 26th, Parl. 1535, and act 8th, Parl. 1609, and also to common sense; for it were absurd, that the burgh should be governed by a council who never resided there.

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 ?