

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-

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 burgh of Ir-
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 Reversed
 on appeal.

and council of the said burgh, made by Provost Cumming and others, at Michaelmas 1756, upon the following ground, among others:

That, by the set of the said burgh, recorded in the books of the Convention of the royal burghs in 1708, " the council is to consist of fifteen merchants, including the provost, two bailies, dean of guild, and treasurer, and two trades, making in all seventeen ;' And that, notwithstanding this set of the burgh, six persons, all tradesmen, and members of several incorporations of crafts, had been elected merchant-counsellors at the said Michaelmas election.

This article of the complaint was founded upon the act 12, 1466, act 107, 1487, act 80, 1503, and act 52, 1555. From these statutes, it was *argued*, That there was an absolute incompatibility betwixt the character of a merchant and tradesman, and that they cannot both subsist in the same person at one time ; and, consequently, that these six tradesmen could not be elected merchant-counsellors ; and that this was contrary to the immemorial practice, as well as to the set of the burgh, and the above-mentioned acts of Parliament.

Answered for the defenders, *1mo*, Our statute-law is subject to be altered by desuetude, or contrary custom ; and it is certain, that, for many years past, craftsmen have been allowed, in this and all the other burghs in Scotland, not only to import the materials of their several manufactures, but also to export and import all sort of commodities, without necessity of a previous renunciation of their crafts, as required by the above statutes. And if the law is in desuetude, with respect to the incompatibility of being both a merchant and a member of a craft at the same time, it must certainly be also in desuetude with respect to what is only consequential, viz. the privilege of such person's being elected into the council as a merchant. *2do*, The statute of James III. above quoted, ordains, That the person who is both craftsman and merchant, *shall either forbear his merchandise, or else renounce his craft*. Therefore he may forbear or renounce either the one or the other, when objected as a disqualification against him. *3tio*, These six persons objected to are truly not craftsmen, but merchants ; which will appear from a particular examination of the several circumstances of their trade. And, at any rate, an innocent mistake, arising from former practice in electing any one or two of these six persons, not properly qualified, cannot have the effect in law to reduce and vacate the whole election of magistrates and counsellors. It can go no further than to make void the particular election of the unqualified persons. *4to*, The objection ought to be repelled *in possessorio*, in regard that, by the practice of the burgh, the strict letter of the set, founded on by the complainers, has been departed from in a multitude of instances precisely similar to those of the six persons objected to, as appears from a search into the council-records ; and therefore, upon the present complaint for reducing the election of the defenders, when no such election was made by the complainers as can be supported by the judgment of the Court, in opposition to it, it would be very improper, and grievous to the burgh, to throw

it into anarchy, till a poll could be obtained; and very unjust to subject the respondents personally to the penal consequences of the complaint, for having done no more than followed the practice of the burgh, and the example of those very complainers in many instances during their former administration of the burgh. If the practice has been erroneous, it may be corrected in the declaratory action now depending in Court at the instance of the complainers, allowing the present election to subsist.

Replied for the pursuers, *1st*, By the above statutes, which are agreeable to the original and still subsisting constitution of the burghs, a material distinction is introduced between the merchants, or members of the guildry, and craftsmen. It is a mistake, to say, that these acts of Parliament have gone into desuetude. The law is still the same; although illegal acts do sometimes pass unchallenged.

2dly, No craftsman can use merchandise, unless he obtain a liberty so to do, not only from his craft, to which, at his entry, he became engaged to bear a share of all their burdens and taxations, and from which he could not be released but by their consent; but also from the merchants, upon whose peculiar province of merchandise he cannot encroach, without their consent, and being by them, upon renouncing his craft, admitted into the guildry. It would destroy the very principles of the burgh-laws, if the same person were allowed to be a craftsman and a merchant at the same time, or to assume either of these characters as best suited his present purpose; and would create great confusion in burghs, in which the different orders established by law cannot be confounded without overturning the whole system.

3dly, The defenders were appointed, in the process of declarator between these parties, to confess or deny, whether these six persons were not actual craftsmen. They have been held as confessed, and the term circumduced against them; therefore they cannot now be allowed to plead against what is thus judicially concluded against them. But further, upon examining the circumstances of each of them, it is evident, that they are properly craftsmen, incorporated with and enjoying all the privileges of their respective crafts. And although they may have practised merchandise by tolerance sometimes, yet this was an abuse, and can never justify their being chosen as merchant-counsellors, contrary to law and the set of the burgh. The objection arising from their incapacity must be fatal to the whole election; because these six tradesmen, being elected into the new council, made the majority, and had the decisive voice in all the subsequent steps of election. If that step was illegal, every thing that was founded upon it must fall to the ground.

4thly, The set of the burgh is explicit, and makes a peremptory distinction betwixt merchant-counsellors and trades-counsellors. Nothing can destroy the express terms of the set, but an uniform contrary usage. But no such thing can be pretended in this case; and the few exceptions specified by the defen-

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ders tend only to confirm the general rule. In a period of near fifty years, the defenders have only, after diligent search, been able to specify five tradesmen elected into the merchant-council, and these two at different periods: but the general usage of the burgh has been agreeable to the set. There are often illegal proceedings at elections, which pass unobserved or unchallenged; but so soon as such abuses come to a height, as in the present case, and are complained of to the Court, they ought to be redressed, and not allowed to pass with impunity.

THE LORDS found, That the election of six tradesmen as merchant-counsellors was contrary to the set of the burgh; and therefore found the election void and null.—(Reversed on appeal.)

Act. *A. Pringle.*Alt. *Miller.*Clerk, *Kirkpatrick.**G. Cockburn.**Fol. Dic. v. 3. p. 99. Fac. Col. No. 25. p. 42.*

1761. February 3.

JAMES RODGERS and Others, members of the Town Council of Selkirk, *against*
ANDREW HENDERSON and Others.

No 12.
Minors, tho' members of an incorporation, are not entitled to vote at a burgh election.

THE five incorporations of the borough of Selkirk have each of them a deacon and a colleague, who represent them as members of the council. At the annual elections, each of these incorporations sends a leet of four to the council, who return a short leet of two, one of whom must be the chosen deacon, and he chuses a colleague to himself.

James Rodgers and others, members of the town council of Selkirk, complained of certain irregularities committed in the annual election of that borough for the year 1760; and, among other things, it was *objected*, That two minors who had been admitted members of the incorporation of taylor, had voted in adjusting the long leet transmitted by that incorporation to the council; and that this was contrary to law, as no person under the age of 21 can have a vote in any step of an election, whether of deacons, magistrates, or counsellors, in a borough, or in meetings of freeholders in a county.

Answered, 1mo. The objection was not instantly verified when the persons complained of took their votes. *2do.* A minor may be admitted a member of an incorporation, and when once admitted, he is of consequence entitled to all the privileges competent to any other member. The law secures minors against being hurt, but does not deny them the exercise of their civil rights, which can be attended with no lesion or disadvantage. It is indeed true, that a minor cannot vote in the election of a member of Parliament; but that is by special statute, which supposes that they are not disabled at common law; and though the legislature has not thought proper to instruct them in a matter of so great importance as the election of a member of Parliament, there appears no reason why they should not have a vote in the election of a deacon.