

plained of had been elected, without any objection, at Michaelmas 1774, so it was not competent to set aside, by a summary complaint, an election made by the unanimous voice of the electors, and entirely agreeable to the practice of the burgh upon former occasions; 4^{to}, That the three persons complained of did all reside within the burgh when they were first chosen into the council; and that although, for some years past, they had left Linlithgow, and resided elsewhere, yet they had since been elected every year into the council, by the unanimous voice of the whole electors, and their election concurred in by these very complainers themselves, (though they seem now to have got a new light at a critical time,) who were therefore *personali exceptione* barred from challenging their election, more especially when attempted by this mode of a summary complaint. If non-residence was an objection founded either on the law of the land, or the constitution of this burgh, it might still be competent to employ the well-known and regular remedy of a declaratory action, to prevent, in time coming, the continuance of this erroneous practice.

The Court pronounced judgment in general terms, which was afterwards adhered to.

‘THE LORDS dismiss the complaint, with full costs of suit.’

Act. Blair, Al. Lockhart.

Alt. Cullen, M^e Queen.

Clerk, Campbell.

In considering this case in its present shape, what seemed chiefly to weigh with the Court, were the following particulars: 1^{mo}, That the residence of counsellors was not necessary by the set of the burgh; 2^{do}, That the instances given by the respondents of the practice in this particular burgh, *retro* to the year 1722, to elect non-residing counsellors, which went as far back as could be expected in a matter not of record, (however in part contradicted by the complainers, and whether available or not in a declarator) were at least sufficient in this possessory action; and the rather, that some of these instances, viz. in the case of the three respondents now objected to, were remarkable, being persons whose situation could not but be known; and it was added, that the complainers own conduct heretofore was the strongest confirmation, upon their own evidence, of what the practice had been: All which put the council *in optima fide* to go on at the last election agreeably to their former practice.

Fol. Dic. v. 3. p. 101. Fas. Col. No 152. p. 16.

1781. January 31.

JAMES HUNTER BLAIR, and Others, *against* ROBERT PHINN.

IN September 1780, Phinn was, by the incorporation of waulkers of Edinburgh, elected their deacon. Against this election, Mr Hunter Blair, and other members of the town council, in a complaint preferred to the Court,

No 27.

A craftsman, though not resident within the burgh,

No 27.
found entitled
to be elected
a deacon.
This man's
trade required
a stream
of water.
He paid all
town burdens.

Objected: Mr Phinn, whose occupation mostly consists in the scouring of blankets, resides not in Edinburgh, nor within its liberties, but in the village of Collington, about three miles distant from the city. It is implied in the constitution of all royal burghs, that the privileges belonging to burgesses, and members of incorporations, can be enjoyed by those only, whose residence within their district subjects them to a share of the corresponding duties and taxations. This rule of common sense and justice, is established by several statutes, and by many acts of the Convention of royal burghs: And, with respect to Edinburgh in particular, it is likewise founded on enactments of the town council; and on decisions of the Supreme Court, especially that in the case of Millar and Nicolson 1763, in which it was found, that Millar, by his residing only a few yards beyond the walls of the city, was disqualified for being elected a deacon of the corporation to which he belonged.

Answered for Phinn: As the vicinity of a stream of water is necessary for the exercise of his trade, his residence must be chiefly in the country. If, however, this circumstance were sufficient to create such a disqualification, the consequence would be, to deprive all persons of the same profession, of their right of becoming members of the town council; a right, which they derive from the set of the burgh, which has ever been acknowledged, and which is nowise inconsistent with justice. For he does not consider himself as exempted from any burden to which the other burgesses are liable, nor in particular from the payment of stent, agreeably to the decision of the Court in January 1677, No 38. p. 1896.

The usage of the burgh has given to non-residence no such effect as is alleged by the objector: And to its uniform tenor the respondent appeals; though, in fact, he is not properly non-resident, having a kind of ware-room in town for the use of his trade. Nor, at any rate, is the single decision in the case of Millar to be held as conclusive against him; especially as Millar's non-residence could not be justified by the nature of his occupation, which was that of a glazier.

Observed on the bench: The corporation has in this election proceeded upon a *bona fides* founded in the usage which had prevailed in similar cases. Though, therefore, the election had not, in itself, been well founded, it could only have been overturned by means of a formal declarator.

The circumstance of the ware-room, being trifling, or ambiguous, seemed to have no influence on the Court.

THE LORDS *dismissed* the complaint.

Act. *Maclaurin, Arnot.*
Stewart.

Alt. *R. Sinclair, Hay.*
Fol. Dic. v. 3. p. 101.

Clerk, *Tait.*

Fac. Col. No 23. p. 44.