

then, on the other hand, it is proved against Captain Haldane, that he also had been guilty of bribery.

No 25.

In advising this proof, the Judges were unanimously of opinion, *imo*, That bribery can have no further effect than to disqualify the bribers and those who are bribed. *2do*, That where force is used, as there are no means for ascertaining what influence it has upon the election, Judges must either give it no effect at all, which never can be right, or give it a total effect to reduce the election *funditus*. Upon this ground, the Court had no difficulty to reduce totally the election of the Admiral and his associates. As to Captain Haldane's election, several of the Judges inclined to support it. For, laying aside the members of his party who either offered bribes or were bribed, it appeared that a sufficient number remained to constitute a magistracy and council. Though Captain Haldane, elected provost, was disqualified by bribery, yet the election might stand, because there was no objection to the other office bearers; and there remained of counsellors untainted more than is required by the set of the burgh. And supposing the provost to be a necessary member, there was no difficulty to elect a provost *de novo*, precisely as where a provost duly elected happens to die during his office. But the plurality, impressed with a hatred to bribery imperceptibly working in their minds, refused to sustain the Captain's election. And by that means the town was left to a poll-election.

Sel. Dec. No 179 p. 145.

1775. January 24.

JAMES ANDREW, and Others, Merchant-Counsellors of the Burgh of Linlithgow, and THOMAS HENDERSON, Deacon of the Incorporation of Weavers there, *against* HENRY GILLIES, Provost of Linlithgow, and Others.

No 26.

THE set or constitution of the burgh of Linlithgow, approved of by the Convention of the Royal Boroughs in 1709, declares, 'That the whole number of the magistrates, merchant-counsellors, and deacons of crafts, consists of twenty-seven persons, viz. The provost, four bailies, the dean-of-guild, treasurer, twelve merchant-counsellors, and eight deacons, viz. of the smiths, taylor, baxters, cordiners, weavers, wrights, coopers, and fleshers: The provost, bailies, dean-of-guild, treasurer, and twelve counsellors, are to be of the estate and calling of merchants, or of such other burgesses as are not incorporated with the trades.'

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

At the annual election of the council of this burgh, which happened 24th September 1774, among the twelve persons chosen merchant-counsellors for the ensuing year, were Thomas Dundas, John Cocks, and Thomas Cornwall. In November thereafter, James Andrew, &c. presented a petition and complaint to this Court, founded upon the statute, the 16th of the late King, for redress of an alleged wrong committed in the election of magistrates and counsellors of

No 26. the burgh of Linlithgow, at Michaelmas last, by Thomas Cornwall, Thomas Dundas, and John Cocks, being chosen merchant-counsellors of said burgh, although incapable of being elected, in so far as, though formerly residenters in the town of Linlithgow, and, in respect thereof, they had been elected into the council, they had entirely abandoned that burgh some years ago, and had gone to reside elsewhere: Cornwall had been established as a salt officer at Grange-pans, or at Borrowstounness; and has no property at Linlithgow, or elsewhere, that the complainers know of, excepting an old barn and tail-rig said to belong to him, though no evidence of the fact has been produced: Dundas has been settled as a land-surveyor at Borrowstounness, and never had any property in the burgh; or what small subjects once belonged to him were some time ago judicially sold in this Court, and the proceeds not near sufficient to pay his debts: And Cocks, a skinner by profession, had taken up his residence at Bell's-mills, in the neighbourhood of Edinburgh, where he has since carried on his business. But as, supposing these three to be disqualified by reason of their non-residence, and total desertion of the burgh, there still remained a sufficient number of persons duly qualified to constitute a council, the complaint went no farther than to conclude, that it should be found and declared, ' That the said ' Thomas Cornwall, Thomas Dundas, and John Cocks, were incapable of being ' elected merchant-counsellors of the burgh of Linlithgow at Michaelmas last; ' and to decern and declare their election, as counsellors, to be null and void,' &c.

Henry Gillies provost, with ten other members of the council, and the three counsellors whose elections were challenged, put in answers to this complaint, wherein they stated, That this election proceeded with the most perfect harmony and unanimity, the whole members of council concurring in it, without any opposition or objection whatever: That, very soon after this, however, the late Parliament was unexpectedly dissolved, and there immediately ensued a contest for the representation of that district of burghs in which Linlithgow is classed, and of which it was, upon this occasion, the returning burgh: That, in the choice of a delegate to represent the burgh at the election of a member of Parliament, a competition arose betwixt James Andrew and another gentleman, in which the latter prevailed, (fourteen of the council, including the three persons now complained on, having voted for him, while only thirteen gave their voices for the former), and soon after was elected member for this district of burghs; and it became next the business of Mr Andrew and his friends to contrive some pretext, by means of which they might endeavour to dispute this last mentioned election; with which view the present petition and complaint was exhibited. To which, on the merits, it was

Answered, 1mo, That, by law, it was not necessary for counsellors to be residing burgesses; *2do*, That neither the constitution nor usage of this burgh made residence in the counsellors necessary; *3tio*, That, as the three persons com-

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,

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A craftsman, though not resident within the burgh,