

1780. *January 13.*

JAMES HILL *against* THOMAS HOPKIRK and JOHN MACALL.

By the set of the city of Glasgow, as recorded in the books of the Convention of the royal burghs in 1711, the town council was composed of the provost, three bailies, and 25 common counsellors, who were chosen annually. In this number were included the dean of guild, deacon-convener, treasurer, and master of the works, who were *ex officio* constituent members of the council.

By regulations enacted in 1748 by the town council, and likewise recorded in the books of the Convention, only four counsellors are to be changed every year, according to their seniority; but the dean of guild and deacon-convener must continue for one year after the expiry of their respective offices, and are afterwards to be removed in rotation with the other members of council.

By these regulations it was further provided, That every person elected or continued a counsellor should be obliged to accept or continue under a penalty of L. 20, to be paid to the collector for the poor of the Merchant's House. After this, he could not be again required to undertake that office. In the same manner, every person elected dean of guild was obliged to accept, under a penalty of L. 40.

Soon after these regulations were made, Mr Hopkirk and Mr Macall had been elected counsellors, and paid their fines for non-acceptance. In 1778, they were one after another elected deans of guild, and refusing to accept, were fined each in L. 40.

Of these fines they complained by bill of suspension, their contradictor being Mr Hill, the collector for the Merchant's House. The question chiefly agitated, was the legality of the regulations 1748; which introduced a considerable change into the set, and imposed fines on persons declining offices in the burgh.

Pleaded for the suspenders: It is not in the power of the town council, though supported by the Convention, to new-model the constitution of the burgh; August 7. 1778, John Dalrymple and others, against James Stodart and others, No 14. p. 1861. ; much less by fines and penalties to enforce a deviation from the constitution. This last, which presupposes some crime, attended with a forfeiture of the delinquent's effects, is the prerogative of Parliament. In any other hands, it would be productive of dispute and arbitrary measures. In those of the rulers of burghs, directed by motives of party and spleen, it would be peculiarly hurtful. It is quite distinct from the right which every corporation has to make by-laws in the matters intrusted to them. Nor can any reason be adduced in support of it from the practice observed in some of the cities in England, unless it could be shown, that the government of burghs in England stands precisely on the same footing as in Scotland.

Answered: That the original sets of burghs, which in general have no other foundation than the consent, either expressed or implied, of the community,

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The Magistrates of a royal burgh have power to inflict discretionary fines on burghesses refusing to accept of offices within the burgh.

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may be altered by immemorial usage, or by regulations of the town council, approved and adopted by the burgesses, is evinced by precedents in almost every burgh in Scotland. The recording in the books of Convention of the regulations now in dispute, which have been acquiesced in by all the other burgesses, as well as the suspenders themselves, was nowise requisite to their validity, but merely for certifying their authenticity at a future period.

The question now at issue is not concerning an alteration in the set, but whether the town council may, by an adequate fine, compel the performance of offices in the burgh. This seems not to admit of dispute. The power inherent in every corporation to make by-laws for the support of their own body, for regulating police, and the management of their own affairs, must be quite nugatory and unavailing, if this sanction were wanting to insure obedience from its members.

As the office of magistrate is essential to the existence of a royal burgh, persons refusing to submit in their turn to this burden, ought regularly to be deprived of their citizenship altogether. Consequently it is by a mild commutation of punishment, that a small fine is substituted in its place. Hence, in the city of London, the practice of fining those who refuse the office of mayor, sheriff, or alderman, is in daily observance. And the same rule is followed in Scotland, in every incorporated society, where the offices are not attended with power or profit sufficient to excite a competition.

It was separately *contended* for the suspenders, That having been already fined for refusing the office of counsellor, they could not, consistently with the regulations themselves, be again fined for declining an office necessarily including that of counsellor.

THE COURT seemed to be of opinion, That there existed in every society a power, by discretionary fines to compel performance of the public offices; but that in this case the town council were barred, by their own regulations, from exacting the fines in question.

THE LORDS found, ' In respect of the special circumstances of this case, particularly that the suspenders formerly fined off when elected into the office of counsellors, and paid that fine of L. 20 Sterling each, that they could not be of new fined for refusing thereafter to accept of or act in the office of Dean of Guild, who, *ex officio*, must act likewise as a member of the town council; and therefore dismissed the letters *simpliciter*.'

Lord Ordinary, *Gardenston*. Act. *Lay Campbell*. Alt. *Morthland*. Clerk, *Campbell*.
Fol. Dic. v. 3. p. 102. Fac. Col. No 97. p. 187.