

burgh jurisdictions. No appeal lay to Parliament from their judgment; M. T. C. B. c. 17. There is no certain evidence where the sets of the burghs originated. In none of the ancient charters of these burghs, extant, are there any traces of a set. It is highly probable, however, that they proceeded from the chamberlain-court; though instances cannot be given, as the records of the court are lost.

No 14.

The Convention came in place of the chamberlain, as to the superintendence of the burghs.—By the act 1487, the Convention is ordained to meet, ‘with full commission to commune and treat upon the welfare of merchandize, the gude rule and statutes for the common profite of burghs.’ These words are sufficient to imply a power of giving new sets to burghs, and altering old sets; and are explained to have had that meaning by usage. The Convention, ever since, have exercised these powers, as appears from the records; particularly in the cases of Dumfermline, in 1618; Elgin, 1705; Inverness, 1676; Wick, 1708; Inverkeithing, 1741; Glasgow, 1748; Kinghorn, 1769. The powers of the Convention to alter sets were expressly recognised by the Court of Session in the case of Inverness, 11th February 1724, Edgar, No. 4. p. 1839.

Replied for the suspenders: In the instances adduced, where the Convention altered the set, there was either a submission by all parties concerned, or a general consent. The judgment of the Court, in the case of Inverness, does not apply. All that the Court found was, that the Convention could make alterations in a set formerly given by the Convention itself, which was the case of the set of Inverness.

The COURT were of opinion, That the convention had no powers to alter the set of the burgh; and that this was a competent ground of suspension.

‘The COURT sustained the reasons of suspension;’ and adhered, on advising a reclaiming petition and answers.

Act. *Crosbie, Rae.*Alt. *Advocate, Ilay Campbell, M^r Laurin.**Fol. Dic. v. 3. p. 100. Fac. Col. No 43. p. 75.*

1782. July 24.

WILLIAM CHALMER of Easter Dalry, Deacon of the Incorporation of Surgeons, against The LORD PROVOST, MAGISTRATES, and TOWN-COUNCIL, of the City of Edinburgh.

UPON 15th September 1781, Mr Chalmer was unanimously elected deacon of the surgeons, had the oath *de fidei* administered to him, and entered into possession of the office. Upon the following Wednesday, being 19th September, the deacons of the different incorporations were, agreeable to the set and usage of the burgh, presented to the town-council; and such of them as were present, had the oaths of counsellors, and the oaths to government, administered to

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The presenting and receiving of deacons in council, was found not requisite, by the set of the burgh of Edinburgh.

No 15.
in order to
entitle dea-
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convenery.

them. Mr Chalmer being indisposed, was unable personally to attend ; but an extract of his act of election was produced, and no objection made to it.

Upon Thursday, 20th September, there came on in the convenery the election of a deacon-convener ; and at this meeting there were present the *fourteen* deacons of crafts, the *two* trades-counsellors, and together with these, the deacon-convener of the preceding year, who, as such, had undoubted right to a casting voice in the event of an equality of votes.

The candidates for the office upon this occasion were, William Fraser, deacon of the hammermen, and the said Mr Chalmer, who, in order to shew his right to be held a member of the convenery, produced the extract of his act of election as deacon of the surgeons, and a certificate of his having since that time taken the oaths to government before one of his Majesty's justices of the peace for the county of Edinburgh.

On the part of Mr Fraser it was *objected*, That as Mr Chalmer had not been presented to, and received by the town-council, as deacon, so he had no legal right to be held a member of the convenery, and could not be upon the leet for the office of convener. Mr Chalmer, however, proceeded to act and vote ; and, by including his own, the number of votes in his favour being equal to the votes for Mr Fraser, the matter came to be determined by the casting voice of the former deacon-convener, who gave it for Mr Chalmer.

Afterwards Mr Chalmer, upon appearing before the town-council, was received as deacon, and took the oaths in the usual manner, under protest, however, that his doing so was not necessary in order to give him right to be a member of the convenery ; and both he and Mr Fraser having severally claimed to be received and qualified by the council, as deacon-convener, each alleging that he had been elected by a legal majority of the convenery, the council gave their determination in favour of Mr Fraser, who was accordingly received, and had the oaths administered to him in common form.

Mr Chalmer brought this determination under review, by bill of suspension, which having been passed, the Lord Ordinary took the cause to report ; and it was argued at great length in informations.

Upon the part of Mr Fraser, it was *contended*, That the deacons form a part of the town-council, and are subject to its authority ; that the council give out a short leet of three, out of which the deacon of each incorporation is chosen ; that the deacon, when elected, must be presented to the council, and by them be authorised in his office ; that by the set of the burgh, given by the decret-arbitral of King James VI. in 1583, it is specially provided, that ' upon the next counsel day after the election of deakens, the auld deakens, with some of the maisters of their crafts, sall present the new deakens to the counsel, quha sall authorise them in their offices ;' that agreeable to this, a deacon, till so authorised, is not entitled to act as such, or to sit and vote in the convenery ; and that as in this case, Mr Chalmer was absent when he should have been pre-

sent to the council, and authorised in his office, so in that situation he was not entitled to vote in the conveyery, or to stand candidate for the office of convener.

To these arguments it was *answered*, on the part of Mr Chalmer, That the office of deacon was originally altogether unconnected with the town-council; that although deacons came afterwards to form a part of the town-council, yet this did not vary their original and separate capacity as heads of their several crafts; and that although it be requisite to present the deacons in council, in order to their taking the oaths as *counsellors*, and to their being received and authorised in *that character*, yet no such form was ever supposed necessary to entitle them to act as heads of their several crafts, and as members of the conveyery. To make out this, a long historical deduction was given, which in substance was as follows.

The original institution of deacons was merely for the purpose of regulating craftsmen in the exercise of their trade, and checking any abuses they might commit to the prejudice of the public. For a very long time, the deacons of crafts formed no part of the town-council of burghs; the election of the magistrates and council, till the year 1469, being annually by a poll of the whole free burgesses, as may be seen from the *Leges Burgorum, c. 77.* and the *Statuta Gildæ, c. 33. 34.* and the deacons of crafts being entitled to nothing more than their privilege, like every other burgher, of electing or of being elected into the office of magistrate or counsellor. The connection between *deacons* and the *town council* of burghs took its rise from the remarkable change introduced by the act 1469, *c. 29.* which made the form of election aristocratical, in place of democratical, and appointed that the old council should chuse the new council; and that the old and new council, together with the *deacons of crafts*, should chuse the magistrates. In this manner deacons came to have, *ex officio*, a share in the government of the burgh; and besides being the head of his incorporation, entitled to preside in their meetings, and to exercise his authority over the members of his craft, a deacon had now conferred upon him the new and additional character of being a *constituent member* of the *town-council*.

From all this it was *contended*, That the office of a deacon, as chief officer of his incorporation, was quite distinct and separate from his character as a member of the town-council; and that the additional capacity of *counsellor* made no variation upon the rights and privileges of the more ancient and separate office of *deacon*. With regard to the set 1583, about *presenting* and *authorising* deacons in council, it was observed, that it entirely related to the capacity of the deacon as *counsellor*. As he was to be a *counsellor* as well as *deacon*, it was proper his election should be certified to the council, and that he should be presented, in order to his being received at the council-board; and by *authorising him in his office*, nothing more was meant, than the admitting and administering the oaths to him as counsellor. Before being presented, he was already elected deacon, and the council had not any right to reject him, or to put a

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negative upon the choice made ; all that they had to do being nothing farther than the mere ministerial power of admitting him as counsellor, and administering to him the oaths taken by counsellors. With respect again to the convenery, it was shown to be a meeting composed of the deacons themselves, not in their character as *counsellors*, but in their distinct original capacity, *as heads of their several crafts* ; and therefore the being presented and received in council was not requisite, in order to entitle a deacon to be a member of the convenery.

THE COURT had no difficulty in finding the determination of the magistrates and town-council erroneous : They therefore ‘ suspended the letters *simpliciter*, and found expences due.’

Reporter, *Lord Kennet.* For Mr Chalmer, *Cullen, Cha. Hay.*
For the Magistrates, *Buchan-Hepburn, Blair.* Clerk, *Colquhoun.*

Fol. Dic. v. 3. p. 99. Fac. Col. No 58. p. 92.

S E C T. II.

Government of the Burgh.

1678. *January 11.* THE TOWN of ABERDEEN *against LESK and Others.*

No 16.

Magistrates may impose a stent for the utility of the burgh ; but not otherwise than by calling the whole incorporation, and proceeding with the consent of the major part of those who shall happen to convene.

THE Magistrates and Town Council of Aberdeen having ordered a stent of 16,000 pounds, upon many several considerations contained in the act ; Lesk and several other inhabitants gave in bills of suspension, and upon the chargers desire, the LORDS ordained the cause to be discussed upon the bill, as if the suspensions were past : Whereupon the suspenders *insist* on these reasons, *1mo*, That the magistrates and councils of burghs-royal have only the power of jurisdiction and government, and thereby may stent the inhabitants for public impositions, by King and Parliament, which burden the whole incorporation, and is only to be proportioned by the Magistrates ; but can impose no other burden or stent upon the incorporation ; or otherwise property cannot be preserved against arbitrary power, and the Magistrates would exercise greater power than the King doth exercise ; and, therefore, *1mo*, This act should be suspended so far as concerns inhabitants which are not of the incorporation, but live there for their own inconveniency ; which, if sustained, would scare all persons to live in towns, to the common detriment of burghs-royal. *2do*, It is clear by the act, that the most part of the grounds thereof are the town's debts, which cannot burden the incorporation, but only the common good of the town, whereunto the Magistrates have the power of administration for common utility, to raise money upon the common good of the town, but cannot for their debt, or any voluntary cause, stent the whole incorporation ; but, in such cases, the necessity, or utility of the in-