

1681. *January 27.*JACK *against* The TOWN of STIRLING.

## No 3.

The old council, yearly, at Michaelmas, must chuse a new council; but the major part only need be changed. These two councils, with the deacons of the trades, elect the Provost and Bailies, dean of guild, treasurer, and all officers within burgh. No person can continue to hold any of these offices, except that of counsellor, for more than two years.

BAILIE JACK, and other Bailies and burgesses of Stirling, pursue a declarator against Robert Russell, present Provost, and other Magistrates of the town, that they had done wrong in perpetuating themselves in the magistracy, and have not observed the order of election prescribed by act of Parliament 1469, cap. 29. and Parliament 1487, cap. 108. and Parliament 1503, cap. 80., nor yet the custom of the burgh, whereby *the guildry did yearly offer seven persons to be of the new Council*; which the Council was accustomed to accept; but of late they picked out only one or two, by which this provost has been eight years continued; and the whole Council is made up of his near relations, whereby the common interest of the burgh is mismanaged, and their common good set in tack, or collection, without roup, to the Provost's son, who is also made overseer of the hospital, having a considerable rent of 8000 merks yearly; whereas by act of Parliament 1593, *the common goods of burghs are only ordained to be set yearly by roup*.—The defenders *alleged*, 1<sup>mo</sup>, That the statutes founded upon were in desuetude, and that the several burghs in the kingdom had, by prescription, their different customs settled, that neither justice nor policy would allow to be altered. 2<sup>do</sup>, These acts, though in vigour, do not import that no person can be continued, by the new election, in the Magistracy or Council, but only that one election should not be for more years, but a free election should be every year. 3<sup>tio</sup>, This town hath a special set produced, bearing, *the Council to consist of fourteen merchants and seven tradesmen*. 4<sup>to</sup>, There is produced an act of the Council of Stirling, *That Magistrates shall continue to be elected for no more than two years together; and that all counsellors, at their election, swear never to alter the same*; which excludes the clamour of perpetuating the same persons in office.—The pursuers *answered*, That desuetude, or prescription, cannot operate against the laws established for the common good of the kingdom, but only against the rights of private persons; and, therefore, these laws are so oft renewed by several kings, for the common good of all the burghs, and whole kingdom, founded upon the nature of the incorporation of burghs, being a society of merchants and tradesmen; and having a common good, and government of the society, it is inconsistent therewith, that a few persons should enhance the whole power, and perpetuate themselves; but that they ought to be changed, that they may be made countable to their successors in the office. And, as to the set of this town, by the Convention of Burghs, of fourteen merchants and seven tradesmen, that only determines the proportion of merchants and trades, but says nothing as to the manner of the election of the Council or Magistrates. And, as to the biennial act, it was only done *pendente processu*, and will not exclude the perpetuating of the same faction, unless the order be observed, prescribed by the acts of Parliament, *That the old Council should choose the new, and that both these, and the deacons of crafts, or one out of each craft,*

*should name the Magistrates yearly*: Which necessarily imports, that the whole Magistrates and whole Council must be changed yearly, otherwise the old Council may elect themselves to be the new, or alter only a member or two; but the act bears, *That the Council and whole officers shall be changed yearly.*

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THE LORDS repelled the defence of desuetude and prescription, and found the statutes founded on, not concerning private right, but the public good of the kingdom, to stand in vigour; and, therefore, ordained the old Council, yearly, at Michaelmas, to choose a new Council; but found, that it did not import that every person in the Council should be changed, but that the major part, at least, should be changed, viz. *seven merchants and four tradesmen*; and that these two Councils, with the deacons of the trades that were already constitute in deaconries, should elect the Provost and Bailies, Dean of Guild, Treasurer, and all officers within burgh, comprehending the overseers and masters of the hospital; but that no person should continue to be Provost, Bailie, Treasurer, Dean of Guild, or other officers within burgh, except counsellors, more than two years; and that all the common good of the town and hospital should be set yearly by roup. See COMMUNITY.

*Fol. Dic. v. 1. p. 117. Stair, v. 2. p. 844.*

1724. February .

The TRADES and MAGISTRATES of Inverness, *against* DUFF of Drummuir and Others, Members of the Guildry.

A COMMITTEE of the royal burghs, by appointment of the convention *anno* 1676, confirmed a set and constitution of the burgh of Inverness, or made a new one, by which the trades were totally excluded from being members of the town council, and in consequence from any share of the management of the burgh.

The trades continued in this state till betwixt the year 1689 and the year 1701, during which interval the magistrates began, *via facti*, to bring some tradesmen into the council; but this having been discontinued from the last-mentioned period, the trades, in the month of June 1722, made application to the magistrates and council for redress of this grievance, and obtained an act of council giving them a certain share of the administration, provisionally always, That what the magistrates and council had done should be authorised and approved of by the convention at their next meeting.

The act of council was accordingly laid before the royal burghs in the month of July thereafter, and received their approbation.

The guildry of the town being dissatisfied with this procedure, suspended both acts; and, amongst other reasons, *insisted* upon this, That the convention had no power by law to alter the constitution of any burgh; that when the royal grant erecting a burgh did not appear, in such a case the forms which had

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The Convention of Royal Burghs was found entitled to make an alteration in the set of a burgh. See No 6. p. 1840.

The contrary was found in a subsequent case, *infra*.