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the lands with his concurrence. This is the last transaction in which the father is stated to have borne a part; so that it is probable his death happened soon after, which would be above forty years prior to the date of the appeal paper. In 1691, his son John is found transacting for the first time *alone* with Robert, who was then in possession of the lands of Burgh, settled on him by his father.

It is also founded upon in the argument, that Robert had died without serving heir to his father, which statement almost necessarily implies the fact that the son had survived.

This presumption is further supported by the probable age of the father, the marriage having taken place in January 1638, while the son lived, at least until 1700. There is some uncertainty as to the precise period of his death. In the appellant's case, it is said, that "Robert the son died in 1700;" whereas, in the respondent's case, he is said to have "received annually for *thirteen* years his annuity," which had been settled on him in 1691, according to which statement, he must have survived till 1704.

GEORGE SMOLLETT, Provost, *et alii*, Magistrates of Dumbarton, - } *Appellants;*

WILLIAM BUNTEIN, *et alii*, Burgesses of Dumbarton, - - - } *Respondents.*

19*th February*, 1730.

BURGH ROYAL.—DESUETUDE.—ELECTION.—The acts 1503, c. 80, 1535, c. 26, and 1609, c. 8, which disable persons not being actual traders and residenters within the burgh from being elected Magistrates, found to be in desuetude.

A councillor having been imprisoned on the eve of the election in virtue of a warrant obtained upon information of the adverse party—found not sufficient to avoid the election, there being such a number in favour of it as would have formed a majority notwithstanding he had been present.

No. 7. ON the eve of the election of the Magistrates for the burgh of Dumbarton, one of the councillors, named Porterfield, being forcibly carried off, and

other acts of violence committed by the adverse party, David Colquhoun, who was one of the electors, was, in virtue of a justiciary warrant, committed to the Castle of Dumbarton, as having been principally concerned in these outrages. On the day of election the council separated; eight of their number (being a quorum) made choice of the appellants, while the remaining six elected the respondents.

The respondents brought an action of reduction and declarator for setting aside the election of the appellants, and declaring themselves duly elected.

They insisted that the appellant, George Smollett, was no trafficking merchant, nor residenter in the town of Dumbarton, and therefore could not, because of the acts 1503, c. 80, 1535, c. 26, and 1609, c. 8, be elected provost. To which it was answered, that although by the sett of the town, the burgh is said to be made up of merchants and tradesmen; yet according to the constant practice, any person, although not of any of the trades or companies of mechanics, was capable of being elected a magistrate; —that although Smollett did not trade, yet he was a considerable proprietor in the town, and resided there for some time every year; and moreover that the statutes founded on were in desuetude.

The Lords found "the reason of reduction, viz. "that George Smollett was not a merchant resid- "ing in the town of Dumbarton, relevant and "proved; and therefore reduced his election as "provost." February 6, 1729.

It was next pleaded that the election ought to be reduced *in toto*, because it was carried on

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without a quorum, and the want of the quorum was occasioned by the imprisonment of Colquhoun in consequence of the devices of the appellants. It was answered that the imprisonment was legal; but if it had been otherwise, the appellants were not accessary to it; and even if he had been at liberty, and had voted against them, still they would have had a decided majority.

February 8. The Lords found, "that the execution of the "warrant against David Colquhoun, upon an in- "formation exhibited against him of an atrocious "crime, by incarcerating him in the Castle of Dum- "barton, was a contrivance of design, to disable "him from being present at the ensuing election; "and they found it proved, that Provost George "Smollett, and those adhering to him, were acces- "sary to the said contrivance and execution, which "they found relevant to annul the election of the "said Provost George Smollett, and the other ap- "pellants, the magistrates and council joining with "him;" and they likewise found it proved, "that "Archibald Porterfield was violently seized and "carried away to an island of Lochlomond, which "they found was done by a contrivance designed "to disable him to attend at the said election; and "that William Buntein, and the other magistrates "joining with him, were accessary to that contri- "vance, which they found relevant to annul the "election of the said William Buntein, and the "other magistrates joining with him; and there- "fore reduced both elections *in toto*."

A petition against that part of the judgment which annulled the election of the appellants was refused.

The appeal was brought from the interlocutor of the 6th February, 1729, part of the interlocutor of the 8th February, and the interlocutor of the 27th February, in the same year.

Pleaded for the Appellants.—1. Although the laws of James the V. and VI. direct that no person be chosen provost of a burgh, but merchants and actual traffickers within such burgh, yet these statutes are fallen into desuetude, and a contrary custom has prevailed in this town and other burghs in Scotland. That acts of Parliament, by the construction of the laws of Scotland may, by falling into disuse, lose their force, is certain; and, upon this principle, many other statutory regulations touching the government of royal burghs, are abrogated by custom without any formal repeal.

2. The imprisonment of Colquhoun can afford no foundation for setting aside the election of the appellant, as it cannot be supposed to have been done with a view to disable him from voting; for it is certain that the appellant had a decided majority, having nine to seven, (including Colquhoun's vote,) and although the respondents had carried off Porterfield, as the Judges have found, yet even then the appellants would have had a majority of eight to seven, so that they were under no necessity of preventing Colquhoun from voting.

3. Supposing the imprisonment of Colquhoun to have been unjust, yet as none of the appellants (the provost excepted) had any share in it, it cannot annul the election of the other appellants, otherwise it would be in the power of any faction in a

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town, when they cannot themselves succeed; at least to avoid the election of their opponents.

Pleaded for the Respondents:—1. Such acts concerning public polity, as these now founded on, cannot fall into desuetude, as has been always adjudged by the Court of Session.

The acts in question are not gone into disuse, but are in strict observance in all the considerable burghs in Scotland, though encroachments upon the laws have been made in some small burghs, by the too great power and influence of neighbouring proprietors. Nor can the error or abuse committed in a few particular towns abrogate the general law of the nation, while no such practice is universal, but the statutes are observed in most of the burghs, and when the judges have decreed conform to the laws in every case where judgment has been pronounced on the point.

2. The using of violence and carrying off any one councillor is sufficient to void the whole election; and the judges have justly so decreed in every case. It cannot be known how the votes would have gone, had Colquhoun been present. His reasoning and influence might have persuaded others to support him in obedience to so express laws; persons undetermined might have followed the majority, nor can it be known how many were intimidated by his imprisonment, which, it appears from the whole circumstances, could be for no other reason but to disable him from voting.

3. The provost and other appellants were all one party, acting upon the same interest towards the same end, and the objection of violence being

not a personal objection only, but a real objection against the whole proceeding, must void the election, since if the violence had not been done, it cannot possibly appear how the election would have gone.

At all events, the two individuals upon whose false information the warrant of commitment was obtained, were directly guilty, and if they, with the provost, are set aside, the majority is in favour of the respondents.

Judgment Feb. 19, 1730.

After hearing counsel, "it is ordered and adjudged, &c. that the said several interlocutors "complained of be and are hereby reversed; and "it is hereby further adjudged and declared, that "the election of the said provost George Smollett, and the other appellants be, and the same is "hereby confirmed and established."

For Appellants, *Dun. Forbes*, *C. Talbot*, and *Will. Hamilton*.

For Respondents, *P. Yorke*, and *Ro. Dundas*.