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SIR HECTOR MUNRO, Provost, and other Members of the Town Council of Nairn, FORBES and Others, Burgesses of Nairn,	}	<i>Appellants;</i> <i>Respondents.</i>	<hr style="width: 50px; margin: 0 auto;"/> MUNRO, &c. v. FORBES, &c.
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House of Lords, 3d May 1785.

BURGH—ELECTION OF MAGISTRATES.—Held, that in the election of the Magistrates of a burgh, the Provost and other Councillors need not be resident burgesses, or inhabitants of the burgh, but that the bailies and office bearers, in the burgh of Nairn, must be chosen from amongst the burgesses resident. Also held, that the town clerk of the burgh is incapable of holding said office, and at same time of holding the office of one of the magistrates of the said burgh.

This question arose as to the right of non-residents to be elected to the magistracy of the burgh of Nairn.

The ancient charter of the burgh was lost: but the number of councillors, as far back as the records went, varied from 13 to 19.

The respondents, the burgesses, having objected to the introduction of country gentlemen, and others not residing in the burgh, into the magistracy and council, brought the present action of declarator, to have it found that the provost, magistrates, and whole councillors ought to be elected from among the burgesses, inhabitants of the burgh, and that the town clerk was not entitled to hold that office, and also the office of bailie.

After proof of the usage, the Court of Session “found, (21st July 1784), That by the constitution of the burgh of
 “ Nairn the council thereof must consist of a provost, three
 “ bailies, dean of guild, a treasurer, and nine councillors:
 “ Find and declare, that it is not necessary that the provost
 “ be a resident burghess; but find and declare, that the three
 “ bailies, the dean of guild, and the treasurer, must all be re-
 “ siding burgesses; and of the nine councillors, at least six
 “ must always be residing burgesses: And find and declare,
 “ that the town clerk, or any person officiating as his depute,
 “ must be a notary public, and that he shall be incapable of
 “ being elected a member of the council of the said burgh in
 “ any capacity during his continuance in the office of town
 “ clerk or deputy: Find, that the expense of the defence laid
 “ out by the defenders in the cause, must be paid by the de-

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“ fenders themselves, and cannot be laid on the funds of the
 “ said burgh : Find the defenders conjunctly and severally lia-
 “ ble to the pursuers in the expense of extract ; find no
 “ other expense due, and decern.”

Against this judgment the present appeal was brought.

Pleaded for the Appellants.—1. That the Court of Ses-
 sion has no jurisdiction or power to make or model the set
 of a burgh, as in the present case. 2. That the Court had
 gone out of the action, in ascertaining the number of the
 council, as there was no such conclusion in the libel. 3.
 That there was no law requiring the councillors of a burgh
 to be resident, and the current of decisions was the other
 way ; and 4. That the judgment, in so far as it declared that
 of the nine councillors, there must be six resident within the
 burgh, had no foundation in law or usage, or in any thing but
 expediency, which it does not belong to a court of justice to
 proceed upon. 5. That *that* part of the judgment which
 finds that the expense must be paid by the defenders them-
 selves, and not out of the funds of the burgh, is quite irregu-
 lar, and foreign to the present action, which had no such con-
 clusion ; and it is contended that none of the appellants ought
 to be subjected to pay either the costs of the burgh, or that
 part of the costs which the decree awards, because, as guar-
 dians of the rights of the burgh, they were bound to defend the
 action, which they had not done improperly or groundlessly.

Pleaded for the Respondents.—The essence of the consti-
 tution of a royal burgh is, that it should be governed by its
 own members, residing within the burgh, as appears by the
 common law, and various acts of Parliament. The *Leges*
Burgorum, § 77, require that the bailies should be chosen of
 “ the faithful men, and of gude fame, be the common con-
 “ sent of the honest men of the burgh.”—The act 1487 re-
 quires “ That the election of officers in burghs shall be of
 “ the best and worthiest *indwellers of the town*,” and the act
 1535 is to the same effect. The appellants say that these
 acts are in disuse, and, 2dly, that they only applied to office-
 bearers such as bailies, &c. and not to the remaining coun-
 cillors ; but these acts were never repealed, and have not
 become obsolete. Although the ancient charter of the burgh
 be lost, yet it is clearly established by usage, that the prac-
 tice for the last century has been, to elect the provost, bai-
 lies, dean of guild, and treasurer, from among the resident
 burgesses. The propriety of this itself is so obvious, as to be
 admitted by the appellants. They did not object to this as to

the bailies, the dean of guild, and treasurer, nor to the part of the interlocutor as to the clerk, and yet they have appealed generally.

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After hearing counsel,

LORD CHANCELLOR THURLOW said:—

“ MY LORDS,

“ The first thing which struck me was, the amazing difference between the conclusions of the libel and the judgment. I had directed the counsel to speak to the power of the Court thus to wander; and from the admission of both sides, assumed it as a clear proposition, that in all actions, the Court is confined to the matter submitted by the libel.” (He then entered into an examination of the evidence of the usage in the burgh, and said,) “ If it had been proved that it had been the custom to elect councillors from amongst the residing burgesses only, he would have proceeded on this as the law of the burgh; and if there had been very few exceptions, he might have considered that as an abuse; but the instances are numerous and constant of electing non-residents. The question then comes to be, What is the general law? I see no evidence that, from the nature of the office, residence is essential. There is no statute. The train of the decisions establishes, that residence is not a necessary qualification as a councillor. It is said that a provost need not reside, and it would seem to follow, that much less need the councillors. The Court of Session, in this case, have found it impossible to lay it down generally, that councillors must reside; but, without any rule, except ideas of expediency, they have declared, that a certain number of the councillors in this burgh, short of the total number, ought to be residents. If the Court had a *discretionary* power, bordering on a legislative one, to regulate the set of burghs, even then, I would have varied the judgment, for that discretion should have led them to require the *whole* councillors to be resident; but I cannot find that the law had clothed the Court of Session with any such power. Lord Kilkerran, one of their number, in reporting the case of Wick, complains bitterly of their assuming it. In that case, the Court went far indeed; they laid down a new qualification, viz. having property in the burgh, without law, and without evidence of the custom.

“ I therefore move to amend the decree, by leaving out all that related to the numbers of the different members, as not put in issue by the summons; and by inserting, that the Court finds that the bailies, dean of guild, and treasurer, must be chosen from amongst the burgesses resident.”

It was therefore ordered and adjudged, that the interlocutors of 10th July 1784 be affirmed, with the following variations, leave out after the words (they find that), all

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the words of the interlocutor, to the words (and find and declare), and instead thereof insert (that the bailies and office-bearers of the said burgh of Nairn, in all time coming, ought to be elected and chosen from among the real and resident burgesses thereof; but they do not find, that such residence is a necessary qualification of the persons to be elected provost or other councillors of the said burgh, except the magistrates aforesaid); leave out the words (town clerk), and instead thereof, insert (common clerk of the said burgh); leave out after the words (incapable of) the words (being elected a member of the council of the said burgh, in any capacity during his continuance in the office of town clerk or deputy), and instead thereof, insert (holding the said office of common clerk, and, at the sametime, of holding the office of one of the magistrates of the said burgh.

For the Appellants, *Ilay Campbell, J. Anstruther.*

For the Respondents, *T. Erskine, Alex. Wight.*

MRS. HELEN DOUGLAS, Spouse of JAMES BAILLIE of Olivebank, and Him for his in- terest, - - - - -	} <i>Appellants ;</i>
MRS. ELIZABETH CHALMERS, Widow of the deceased ARCHIBALD SCOTT, Surgeon in Musselburgh, - - - - -	

House of Lords, 6th May 1785.

VERITAS CONVICTI—RELEVANCY OF DO.—DEFAMATION.—In an action of damages brought for defamation of character, where the *veritas convicti* was pleaded in defence, but chiefly founded on rumours and reports of *mala fama*. Held, that this was irrevelant to go to proof, and a special condescendence ordered of the particular acts. A condescendence having been given in, it was objected to it, that it was too general, vague, and indefinite in its terms,—that it did not set forth any specific act of adultery, which was the crime with which the pursuer had been defamed. The objection was sustained to the effect of ordering the defenders to give in a more articulate condescendence of the several facts they offered to prove, as well as the time and place, and a list of witnesses by whom they meant to