[Fac. Coll. Vol. xiii. p. 292.]

JOHN MARTIN and Others, of the Borough of Queensferry, . . } *Appellants;*

ALEX. MACNABB and Others, of the said Borough, . . . } *Respondents.*

House of Lords, 1st July 1806.

ELECTION OF FREEMEN OR BURGESSES.—Circumstances in which it was held that such election must take place at a meeting of the council legally called, and held for that purpose.

In the burgh of Queensferry there were three bailies, each of whom, according to the custom of the burgh, at one time, had the power to give the freedom of the burgh to any person he thought proper. But, by act of council in 1802, the town council thought it proper to restrain the magistrates in this power so exercised, and passed an act of council in these words:—"The council resolve and enact, "that in future no person shall be admitted to the freedom "of this burgh, without the consent of a majority of the "town council first had and obtained thereto."

From a difference in opinion as to the interpretation of this act, a practice grew up of granting the freedom of the burgh to any person, without any meeting of the council being called for that purpose, upon obtaining the consent of a majority of the town council, until the election of the appellants as magistrates and town council took place, in September, whereupon the respondents brought a petition and complaint to the Court, complaining that the appellants were unduly elected. That by virtue of the above act of council, no person could obtain the freedom of the burgh but by a public act of the town council, regularly assembled in its corporate capacity; and the appellants not having been elected burgesses in this manner, were ineligible to be elected magistrates and town council.

The Court of Session pronounced a special and articulate interlocutor; and the part of it which raises the present question is in these words; 3tio, "Find that burgesses "are only admissible by a majority of the council present "at a legal meeting." On two reclaiming petitions the Court adhered.

Feb. 2, 1803.

Feb. 22, ——

June 24, ——

1806.

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Against these interlocutors the present appeal was brought.

Pleaded for the Appellants.—Before the bye-law or act of council in 1802, it is not disputed that the immemorial custom and usage of the burgh was to give each of the bailies a power of conferring the freedom of the burgh without consulting any one, or the consent of the council regularly convened at a meeting. Therefore, if the present objection had been made before the passing of the act of council in 1802, it could not for a moment have been listened to, because a legal practice of so appointing had been in this, as in many other burghs, thoroughly established. The question then comes to be, Does this act of council make it imperative for all who are admitted to the freedom of the burgh, to be elected thereto by a majority of the council at a meeting regularly convened in a corporate capacity? It was maintained, upon the construction of the bye-law or act of 1802, that the old practice or custom of the burgh was unchanged; and all that it provided or required was, that the burgess be admitted with the consent of the majority of the town council, however obtained. That this was the meaning of the act, in the understanding of all who passed it, is proved, by their adopting a practice conformable thereto. The majority of the council consenting, was the leading feature and chief object wished to be attained by the bye-law; and, therefore, to hold that a regular meeting of the town council was also necessary for that purpose, is to depart altogether both from the spirit and express meaning of the bye-law itself.

Pleaded for the Respondents.—There is no evidence to show that the five pretended councillors were ever admitted to the freedom of the burgh, as burgesses, in a regular manner. And where, as in this case, the act of council makes it necessary that such burgesses be admitted by a majority of the town council, this implies that the power lies with them as a corporation, and that the exercise of a corporate act cannot be legally performed except at a meeting of the town council regularly convened for that purpose. A meeting of the town council, regularly assembled and constituted, was necessary, in order legally to admit the appellants as burgesses; and this not having been attended to, they are not eligible to be appointed members of the town council.

After hearing counsel, it was

Ordered and adjudged that the interlocutors be, and the same are hereby affirmed. 1806.

RAES v. NEWAL.

For Appellants, *Henry Erskine, John Clerk, Wm. Adam.*
For Respondents, *Wm. Alexander, David Boyle.*

JAMES RAE, Merchant in Dumfries, WILLIAM RAE, Merchant in Kingston, Jamaica, and JOHN RAE, Farmer at Torrorie, - } *Appellants;*

MARGARET NEWAL, formerly RAE, Wife of David Newal, Writer in Dumfries, and the said David Newal for his interest, - } *Respondents.*

House of Lords, 2d July 1806.

EXECUTRY—RETENTION—DEBT—DISCHARGE.—A daughter raised an action against her brother intromitting with her deceased father's personal estate, for her third share of the executry due her as at his death. The brother refused payment, and claimed to retain her share, for large advances and other sums made to her husband during the father's life. Circumstances in which it was held, that her deceased father having entered into a transaction and agreement, by which he had discharged all these claims for advances, she was entitled to her third share of the executry.

Fergus Rae, whose estate is now in dispute, died intestate in September 1797, leaving issue the appellants, his three sons, and a daughter, the respondent, Mrs. Newal. Their father left heritable property to the amount of £3000 or £4000, and personal estate worth £4693. 11s. 4d. 1797.

James, the eldest son, succeeded to the heritable estate, and, by the law of Scotland, the personal estate behoved to be divided equally among William, John, and the respondent Margaret Raes.

Although James Rae had no interest in the personal estate, yet he improperly possessed himself of that estate, and took upon himself the administration of it for the benefit of his two brothers, they residing at a distance, and conceiving, besides, the idea that the respondent had no right to any part of it.

In these circumstances, the present action was raised by the respondents, setting forth "That as no settlement had "been executed by the said Fergus Rae, the said James