

time but a burgh of regality, and whatsoever the Marquis, who was Lord of Erection, and came in place of the abbot, might have done in the election of a burgh holden off himself, yet now the burgh being erected into a burgh royal, holding the privilege of a burgh immediately off the King, with express power to elect their magistrates, they had thereby good right to a free election. The defender *replied*, That he having an established right before their erection, no subsequent erection could evacuate the same, which is granted *periculo petentis et salvo jure tertii*.

THE LORDS found the Earl of Panmuir's right, by infeftment and erection, relevant, and assoilzied from the declarator.

Stair, v. 2. p. 448.

1747. July 29.

MASON, DOUGLAS, and Others, Counsellors of St. Andrews *against* The MAGISTRATES.

BY the set of the burgh of St. Andrews, the council, by order of one of the magistrates, ought to convene on the Wednesday next to the 24th of September, and fill up the vacancies occasioned by death in the council, which consists of twenty-nine persons; and then chuse three new counsellors for the next year; and this is the first step and foundation of the election.

At the time of the election 1745, ten of the counsellors met, without a magistrate, and filled up the vacancies of the council, chose the three new counsellors, and, upon the subsequent usual days, the compound body, so made up, completed an election without the concurrence of any magistrate.

A complaint was given in against this election by some of the counsellors not present, as being carried on by a minority of the council, without any of the magistrates, who had declined acting at that time, as the rebels were in possession of the country, and threatening to come to the town; so that they were apprehensive of being disturbed, neither could the election be free.

Answered, That any defect in the proceeding was owing to the fraud of the complainers, there being more than a quorum of the council in town; but that faction finding they could not carry the election, had resolved not to make any; and the Bailie, who was in the concert, had refused to call a council when required; upon which the ten counsellors met, and proceeded; as they did on the subsequent meetings, which the magistrate always refused to call, as was his duty, and to which the other counsellors on the place were warned; that in law, when any matter was to be performed on a precise day, and there was no quorum, yet the persons present might proceed; much more when the want of a quorum was occasioned by the fraud of a party, wilfully absenting themselves; for this election was completed without disturbance from the rebels, who came not into the place till it was over, and all the other burghs in Fife made their election that year.

No 19.

clude the right of the Lord of Erection, who previously, by his infeftment, had power, when it was a burgh of regality, to elect one of the bailies.

No 20.

An election made on the ordinary day by the minority of a town council, without any of the magistrates, who were alleged to have absented themselves from fear of the rebels, was reduced for want of a quorum, although the absence was said to have been fraudulently concerted.

No 20.

THE LORDS, 15th January 1747, ' Found the reasons of reduction relevant and proven ; and therefore found the election void and null, and reduced it.'

They found, 4th June, ' the election made by the ten counsellors complained upon valid, the same having been made on the ordinary day for election of magistrates and counsellors for the burgh of St Andrews, and the absent members of council having been in town, and having declined to attend, though required so to do.'

They, 2d July, ' adhered to the interlocutor of the 15th January last, finding the reasons of reduction relevant and proven, because there was not a quorum or majority of the council present at the election ;' and, on bill and answers, adhered.

Act. *Ferguson & Scrymgeour.* Alt. *W. Grant, Lackhart, & Erskine.* Clerk, *Kirkpatrick.*
D. Falconer, v. I. No 205. p. 282.

* * * Kilkerran reports the same case :

IN the summary complaint brought for reducing the election of the magistrates and council of the burgh of St Andrews, made at Michaelmas 1745, a variety of points were determined ; some of a general nature, that concerned the constitution of the burgh at all times, and others upon the import of the several late statutes made for regulating the elections in burghs ; of the first sort were the two following.

By the set of the burgh of St Andrews, the town-council consists of 29 persons ; and, upon the Wednesday preceding the 24th of September, the council convenes by order of a magistrate, and fills up the places of such counsellors as have, since last election, become vacant by death or otherways, and chuse three other new counsellors. Upon the 24th September 1745, ten of the council and no more met without a magistrate, and filled up the vacancies in the council ; chose the three new counsellors ; and upon the subsequent usual days completed the election of magistrates and council for the ensuing year.

In July 1746, a summary complaint was brought of this election (the time for giving in such complaint being still current, in consequence of the late statute in that behalf) at the instance of Andrew Mason, Robert Douglas, and others, to the number of 12 of the former year's council, on this ground, That the ten counsellors were not a *quorum* of the council, which consists of 29, and therefore had no power to meet for any purpose whatsoever.

The defenders *objected, imo,* To the competency of the complaint, as at the instance of the complainers, in respect, that though a greater number were upon the spot than with the ten who convened, would have made a quorum, yet they, though required under the form of instrument to attend, wilfully absented themselves, as did a magistrate, who was in concert with them, refuse

to call a council though required ; all on an affected pretence of fear of disturbance from the rebels, but really with a view to disappoint the election, in which they saw their friends could not prevail. They admitted, that if any of the council had, by fatality, been detained from the meeting, or had been absent upon a lawful occasion, it might be competent for such person to complain of the election, as made when there was not a quorum assembled ; but as it is the duty of every member to attend the election, whoever, contrary to his duty, absents himself, is *personali exceptione* barred from objecting the nullity of the election for the want of a quorum.

2do, To the relevancy, For that as by the constitution of the burgh, as of all the other burghs in Scotland, the annual election is tied down to a precise day, on which, if the election be not made, the government of the burgh is dissolved, until the authority of the Crown be obtained for a new meeting for election ; it is the duty, as it is the right, of every elector to attend upon that day, and lawful for those who do attend, though not the majority of the council, to proceed to perform this necessary act at the stated time : That so the case would stand, suppose the absence of the majority were not wilful, but much more in the present case, where as many were upon the spot as would have made a majority, and who, though required, wilfully absented : That the law has no where said, that there shall be no election, unless a majority of the council assemble ; nor would it be reasonable, in the nature of the thing, as thereby great inconveniencies would follow ; as it would be in the power of a few, or even of one designing person, by absenting himself, to dissolve the government of the burgh.

Upon the *first*, The competency of the complaint at the instance of persons wilfully absenting, the Court was inclined to have listened to the objection, notwithstanding the answer made, that even supposing a wilful absence of the complainers, however that might subject them to censure, those who did convene, could not thence acquire a power to act, which in law they had not ; but gave no judgment on it other than what may be thought implied, in that to be just mentioned.

For the defenders having affirmed, that all and each of the pursuers had wilfully absented, and the complainers on the other hand having rested in general on the apprehension from the rebels as a just cause of absence, and alleged other lawful excuses for the absence of some that were not at St Andrews at the time of the election : THE LORDS had no regard to the general excuse, but ‘ appointed the complainers to give in a special condescendence of the names of such of them as were not at St Andrews during the election, and of the reasons of their absence ;’ and after hearing parties on the condescendence and answers, on the 15th January 1747, Found, ‘ that Andrew Mason, Robert Douglas, and other two, were not barred *personali exceptione* from complaining of the election ; and repelled the objection to the competency.’

No 20.

With respect to the relevancy, it was *answered* for the complainers, that where any power is given to a body, no act can be done but by the whole, unless either by law or custom a quorum be settled: That by the statute of James III. *anno* 1469, the power of electing the council, which before that time was by poll of the whole burgesses, is vested in the magistrates and council, who ought all to convene or their act be void, were it not that custom had settled the majority to be a quorum, but that without such quorum no step whatever can be taken even in the most trifling affairs of the burgh: That though this may be attended with some inconveniencies, these can only be remedied by lawful means, and not by a court's receding from established forms: That the wilful absence of as many as might have made a quorum could not affect those against whom it is found no personal exception lay, having been at the time at a great distance upon their lawful occasions.

Upon this point the Court was much divided, and gave contrary judgments. But, at last, by their final judgment, on the 29th of July 1747, ' Found the reasons of reduction relevant and proved, that there was not a quorum of the council present at the election.'

N. B. One thing was plain, That if the election by ten, of a council consisting of 20, was to be sustained, there was no stopping: Why not, for the same reason in the like circumstances, sustain an election made by three or fewer?

During the dependence of this question, occasion was also given to determine upon the construction of the particular statutes made for regulating elections in burghs.

Particularly, Whereas by the act 7^{mo} Geo. II. ' It is declared lawful for any magistrate or counsellor of a burgh, who apprehends any wrong done at any annual election, to bring his action for rectifying such abuse within the space of eight weeks after such election,' which afterwards, by act of the 16th of Geo. II. is allowed to be by summary complaint brought in the same space; it was for the defenders *objected*, That the complainers had now no interest to quarrel the election 1745; in respect the election at Michaelmas 1746 had since ensued, against which no challenge had been made, and now could not be made as more than eight weeks had elapsed since the election.

But this was repelled 19th February 1747.

THE LORDS considered both statutes to respect only the case of wrongs done at the election complained of; and therefore, though the election 1746 could not now be quarrelled for any wrong done thereat, yet should the election 1745 be reduced, it was still competent to quarrel the election 1746 at common law for want of power in the electors.

And whereas, by the act of the 16th of the King, the summary complaint was only given to the constituent members at the election, it was *objected*, that though an ordinary action might lie in this case to the complainers, yet a summary complaint did not lie, as none of them were constituent members at the

election quarrelled: THE LORDS found, 2d and 29th July, That by constituent members was understood any person who was entitled to have been a member, though not present at the election; and repelled also that objection. See SUMMARY APPLICATION.

No 20.

Kilkerran, (BURGH ROYAL) No 7. p. 107.

1754. February 28.

ANDREW GLASS, and Others, *against* The MAGISTRATES of ST ANDREWS.

The annual election of the magistrates and council of the burgh of St Andrews, was begun upon the 26th September, and ended on the 8th October 1753. Three of the counsellors chosen declining to accept, a council was called upon the 19th of the same October, when three other persons were elected in their places.

Upon the 18th December following, a petition and complaint was exhibited by Andrew Glass, one of the bailies, and others, on 16th Geo. II. cap. 11. for annulling the election of these three new counsellors, and for costs.

Objected to the competency of this complaint: *1mo*, That the act of Parliament doth not authorise application to the Court of Session by summary complaint, except against the proceedings at the annual election, or previous thereto; and that the proceedings of the magistrates at an ordinary meeting, such as this was, can be reversed by way of reduction only. *2do*, That supposing the election complained of to be within the act, yet the summary complaint ought, in terms of the act, to have been exhibited *within two kalendar months after the annual elections of the magistrates and counsellors*. Now this complaint, though within two months of the election complained of, was more than two months after the annual elections.

The Court was of opinion, that the annual elections only could be summarily complained of upon the statute.

'THE LORDS found the complaint not competent, and therefore dismissed the same.' See SUMMARY APPLICATION.

Act. *Ja. Ferguson.*

Alt. *Ro. Craigie.*

Clerk, *Pringle.*

Fac. Col. No 102. p. 152.

1755. February 18.

HENRY GILLIES, Merchant in Linlithgow, and Others, *against* ALLAN WAUGH, Merchant in Linlithgow, and Others.

AT the annual election of magistrates and counsellors for the burgh of Linlithgow made at Michaelmas 1754, there was a controverted election, and a double set of magistrates and counsellors chosen; and each party brought a pro-

No 21.

Elections for filling up vacant places in town councils in burghs, made by ordinary meetings of council, cannot be tried by summary complaint upon 16th Geo. II. c. 11. which relates only to annual elections.

No 22.

In a process for reducing an election of one set of magistrates and counsel-