

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-

No 22.
 lers, and for
 declaring the
 election of
 another, all
 persons who
 are, or pre-
 tend to be,
 members of
 council, must
 be made par-
 ties, either as
 pursuers or
 defenders, in
 the principal
 summons.
 It is not suf-
 ficient to call
 them by an
 incident dili-
 gence.

cess before the Court of Session, for declaring their own election, and reducing the election made by the opposite party.

It was *objected* by Allan Waugh and his party, against the action brought by Henry Gillies and his party, That there was no process, all persons having interest not being made parties to the suit; for John Buckney, who had been provost of the burgh for the year preceding, and behoved, by the set of the burgh, to continue a counsellor for the current year, and Andrew Buckney, who was a counsellor for the preceding year, and had by the pursuers been re-elected a counsellor at Michaelmas last, were neither pursuers nor called as defenders.

Answered for the pursuers, That it was not necessary to make John and Andrew Buckney parties to the action, because they had not as yet accepted of the office of counsellors. And although it be customary in all burghs, that the persons who have borne offices in the magistracy for the preceeding year should remain in the council for the succeeding one, yet the office-bearers are not bound to continue in council if they choose to be free of the burden; and, as an evidence of this, they, as well as the other counsellors, after the election, declare their acceptance, and take the oaths to the Government. And since it was optional to John and Andrew Buckneys to accept or refuse the office, they could not be considered as possessed of it until they declared their acceptance.

2dly, The pursuers *contended*, That John and Andrew Buckneys were now barred from accepting of the office by the act 6^{to} Annæ, cap. 14, which enacts, That every person admitted into a civil office, shall, within three months after his admission, take the oaths to the Government, and, in case of neglect, he is declared incapable to enjoy the office.

3dly, That supposing they were to be considered as counsellors, yet there was no occasion for calling them as defenders, because the summons contained no conclusion against them.

4thly, That if it were necessary to make them parties to the process, they might yet be made parties to it by being called as defenders by an incident diligence.

Replied for the defenders: That this action must be cast, as John and Andrew Buckneys were not made parties to it, even although they had not been members of the council for the current year; because they were members of the last year's council, and therefore behoved to be parties in any process for declaring or reducing an election made by that council.

2dly, That John or Andrew Buckneys were not at liberty to accept or refuse to be counsellors; for that all burgesses are bound to accept of the offices into which they are elected by the town council, if the council insist upon their accepting of them. But whatever be in this, it was certain John Buckney ought to be considered as a counsellor; for he was not elected into that office at Michaelmas last, but continued in it by virtue of his having been provost for the year preceeding; by accepting of which office he subjected himself to all the burdens consequent thereupon. And even supposing that an acceptance had been

necessary in order to vest him in that office, yet, as he had it in his power to accept when the summons was executed, he ought to have been made a party to the process; in the same way as a creditor of a defunct in a process against heirs portioners must call all of them, though some of them have not acknowledged the succession at the time the summons is raised.

To the *second* answer *replied*: That persons are by the act 6, *Annæ* only obliged to qualify within three months after they begin to act in consequence of the office; and that at any rate, John and Andrew Buckneys had not forfeited the offices in November, when the summons was raised.

To the *third* answer *replied*: *1mo*, That the summons contains a conclusion that John and Andrew Buckneys ought to be found and declared members of the Council: *2do*, That although it had contained no conclusion with respect to them, yet they behoved to be called, because otherwise the representation of the burgh was not full; and for this reason, when a process is only for reducing or declaring the election of a single counsellor, the whole members of the council must be made parties, either as pursuers or defenders, as the Lords found, 28th January 1741, George Heriot and others against Charles Cockburn, provost, and others, counsellors of the burgh of Haddington, where the Lords sustained the objection of no process, because one of the council-deacons was not called, though it was pleaded, that he needed not be made a party, because the pursuers were not disputing his right to sit in council. See PROCESS.

To the *fourth* answer *replied*: That a principal party cannot be brought into process by an incident diligence, but must be called by a principal summons, and have the ordinary *induciæ* given him; as has been often decided, particularly 18th February 1747, Lord Forbes against the Earl of Kintore and others, observed by D. Falconer, v. 1. p. 222. *voce* PROCESS; and lately, in the case of a sale pursued by Dalgleish against Hamilton, where the Lords found, that Hamilton's curators could not be called by an incident diligence.

'THE LORDS sustained the objection, and found no process.' See PROCESS.

Act. *And. Pringle, Miller, & Johnston.* Alt. *Fergusson, Brown, & Bruce.* Clerk, *Home.*
Bruce. *Fac. Col. No 140, p. 210.*

1759. August 7.

M'KENZIE of Brae, M'KENZIE of Fairburn, &c. against Colonel JOHN SCOT.

M'KENZIE of Brae, &c. brought a complaint before the Court of Session against Colonel Scot and others, for giving or receiving bribes in the Michaelmas election 1758, of magistrates and counsellors for the burgh of Dingwall. They set forth, That Colonel Scot, with a view to a new Parliament, offering himself a candidate for the district of burghs, whereof Dingwall is one, began his operations with a present to the town of Dingwall of L. 100 Sterling for

No 23.

In a complaint for bribery and corruption at the election of a burgh, the following points were