must be carried into execution; and yet if a process be necessary, it would be the judgment of this Court which would be carried into execution, not the judgment of the House of Lords *3tio*, With regard to the precedents of this Court, there is not a single instance where a new process was found necessary: The form has always been, that if a depending process was removed to the House of Lords by appeal, the parties, after discussing the appeal, took up the process where it left off, and proceeded to obtain a final determination; and that a summary application was always admitted, where a cause finished in this Court was carried to the House of Lords. *4to*, No defence can arise to John Sinclair; but that of payment, which he has access to propone in a suspension; but the possibility of such a defence ought no more to be a bar to a charge of horning in the present case, than it is in ordinary cases.

No. 9.

"The Lords pronounced a decree; and avoided granting letters of horning, for no better reason than that a decree was only demanded in the first petition."

Rem. Dec. v. 2. No. 44. p. 72.

1747. *February* 17.

JAMES COUTS and Others, claiming to be Magistrates and Councillors of Montrose, *against* DAVID DOIG and Others, claiming to be Magistrates and Councillors of Montrose.

No. 10.

An election of Magistrates being made, on a warrant from the King in Council, upon a failure of Magistracy in a burgh, it is competent to try the validity thereof by a summary complaint before the Court of Session.

There having been no election of Magistrates and Councillors of the burgh of Montrose at Michaelmas, 1745, a warrant was granted by his Majesty in Council, 16th June, 1746, authorising the Magistrates and Councillors of the former year to proceed, on the 10th of July, to the election of others, in the same manner as they ought to have done if they had not been prevented by the Rebellion, and appointing the persons so elected to serve till the time of the ordinary change of Magistrates in 1746.

Before the diet of election, three of the Council had been apprehended, on suspicion of treasonable practices, and committed to the tolbooth of Perth, upon a warrant issued by his Royal Highness the Duke of Cumberland, by means of whose absence the election was carried for Mr. Doig and his friends, as was evident by the declarations of these three, produced at the election, containing their votes, which, joined with the votes of others there present, made a majority, and would have carried the election another way.

A complaint was given in to the Lords of Session by James Couts and others, setting forth, That this warrant had been impetrated upon a false information, fraudfully exhibited to his Highness by the respondents, that these three Councillors might thereupon be detained from the election; and therefore, that not only the election made ought to be reduced, but the votes of the absentees, as contained in their declarations, be sustained, and the election made by that party in the Council affirmed. On the other hand, it was pleaded, That these three being absent, not detained by

No. 10. any illegal force, but legally committed to prison, no regard ought to be had to their declarations; and besides, in fact, upon its being refused in Council, to have any regard to them, in the election of Councillors, their party had not given any votes for the office-bearers; so that there was none whose election could be sustained.

As the decision now to be marked concerned alone an objection to the jurisdiction of the Court, and the competency of the form of process, it is needless at present to insert more fully the allegations of the parties, and their arguments on the relevancy thereof, the Lords having granted an act, before answer, for proof.

Objected, That this election having been made in virtue of a warrant issued by the King in Council, the validity thereof was not cognizable by the Courts of law.

The ordinary elections of Magistrates in burghs are a right competent to them by law; and therefore any questions concerning them is to be determined by the Courts of law. But when, by a fatality, a burgh is reduced to the want of a Magistracy, the defect can no way be supplied but by an act of the Prerogative; and it is optional to the King in what manner he will supply that defect; and instances have been of his doing it by granting to the burgesses a poll election; in other cases, he has appointed the Magistrates and Council for the former year; and, in some, as in that of Perth, *anno* 1716, the former Magistrates alone to make the election: But, in all these several cases, the electors act as commissioners by the King for that purpose, and their proceeding cannot be brought in question in any Court of law, as no person could claim any right antecedent to the warrant, which is allenarly their rule of proceeding; and so was found in the case of the burgh of Dysart, (see APPENDIX), where the Magistracy was restored by a poll election; so also has been found in like cases, where special powers have been committed, as that the actings of the commissioners for putting in execution the late act for the impressing of soldiers could not be brought under review, nor of Magistrates in settling a price upon bread within their burgh, as in the case of Glasgow, (see APPENDIX.)

Answered, That, by our law, a corporation is not dissolved by falling into anarchy, but has a right to have a Magistracy restored; in doing whereof, the King may make use of any of the methods that have been practised for that purpose; but when he takes a poll election, he names commissioners to take the poll, who are to report it to him; which is the reason that Courts of law cannot judge, as was found in the case of Dysart, the approbation of the election being reserved to the King, without which it is ineffectual. But in the present case, what his Majesty did, was to appoint the former Council to choose, as they might have done, if not prevented: This was only a prorogation of the diet of election; and it was plainly in the character of Councillors that they were to elect; so that their procedure fell to be regulated by the same rules, and must be subject to the same examination, as it would have been if it had been made at the proper time. The diet

of election is fixed by no law; and greater alterations than this have been made by the burghs themselves, at least with consent of the Convention of Royal Burghs. No. 10.

Replied, That though the commission was given to the former Council, they could only be considered as any other persons that were commissioned would be, as they were *functi officio;* and the decision in the case of a poll election applied with greater force to this; for if no complaint could be offered, although the election was yet imperfect, till it were reported to the Privy Council, which was no court of law, and could not determine in any point of right, neither could any be competent against an election, which had taken effect by complete execution of the commission, as in this case.

Observed on the Bench, That when a warrant was granted, a right arose thereon to the persons named, and to the burgesses, to have the election made according to the rules thereby laid down; and this right was subject to the cognition of the Court; that here the old Council were not made judges, but electors, which distinguished the case from a poll election, although the approbation or disapprobation should not be reserved; for the commissioners were judges.

Objected, This question is not competent to be tried upon a summary complaint; for the act of the 16th of the King relates alone to annual elections, as is clear not only from the words thereof, but from this, that there is a prescription of two months for bringing a complaint; whereas such an election as this might happen at more than two months from the sitting of the Session.

Answered, The meaning of the term, annual elections, is the election made for such a year, though made not at the ordinary time; and this is the election concluding at Martinmas, 1746.

Suppose an election to have been made at such a time as a summary complaint could not have been presented within the time, though from this *causus improvisus*, the party lesed should be cut out from this method of a summary complaint, it does not follow that it is not competent to those who have it in their power to bring it within the time limited by the act.

The Lords, 17th January, found the complaint competent, and therefore sustained process at the complainer's instance; and, on bill and answers, adhered.

Act. *Lockhart et J. Graham.* Alt. *R. Craigie et Maitland.* Clerk, *Gibson.*

Fol. Dic. v. 4. *p.* 309. *D. Falconer, v.* 1. *No.* 166. *p.* 218.

*** Kilkerran reports this case:

The magistrates and town-council of Montrose having made no election at Michælmas 1745, on application to his Majesty for restoring a magistracy to the burgh, it was, on the 6th June, 1746, ordered in council, "That for restoring the peace and government of the burgh, the magistrates and council who served for the year last past, should be, and thereby were authorized and required, on the 10th of July then next, to proceed to the election of magistrates and council-

No. 10. lors to serve in the said burgh, from the said 10th of July until the Michaelmas following, in such manner as they ought to have done, if they had not been disturbed by the Rebellion, and that thence-forward the procedure of the election of magistrates and councillors should continue according to the constitution, set, and custom of the burgh."

Upon the 10th of July, an election being made, David Doig was elected provost, and others of his party were chosen into the magistracy and council. Against which election James Coutts senior, and others, brought a summary complaint upon the act of the 16th of the King, setting forth, That the said James Coutts senior, and two others, councillors of the burgh, had been deprived of their right of voting, by a commitment for high-treason, on a warrant from the Duke of Cumberland, procured by a false information exibited to his Royal Highness against them, by combination of the said David Doig and others, his associates, on purpose to withdraw the said councillors from voting at the election; and therefore concluding for annulling the election of the said David Doig, &c.

The defences were, 1*mo*, A total objection to the jurisdiction of the Court, on this ground, That the right of election had in this case been lost, and was only renewed by an act of the Crown's prerogative; and the consequence thereof was said to be, That the proceedings at the election could only be judged of by the Crown: And the case of Dysart was referred to, wherein it was said, that the Lords had found they had no jurisdiction to review the proceedings of the commissioners appointed by the Crown to take the votes in a poll-election. 2*do*, Supposing a jurisdiction in the Court, the remedy could only lie by ordinary action, and not by summary complaint upon the act of the 16th of the King, which only repects the usual annual elections. 3*tio*, That the matter sought to be proved in this case, namely, That the commitment was of the defender's procurement, was a matter incapable of proof, as his Royal Highness could not be called upon to discover the grounds, upon which he as General *tempore belli* granted the warrant; and, for the same reason, neither can the defenders have access to disprove it, and of consequence the election could not be challenged on any ground depending on such commitment.

Answered for the pursuers, to the first, That the right of election was not lost, and only renewed by act of the Crown's prerogative; for though, where the stated time for election passes, there can be no meeting for election without authority from the Crown, because there is no magistrate to call such meeting, yet the burgh has a right to demand such interposition; and therefore, as an election in consequence of the Crown's warrant, to elect in the same manner as they ought to have done, had they not been disturbed by the Rebellion, is an election made in the right of the burgh, the Lords are competent judges of any wrong done at such election, as they are judges in all civil rights. And as to the case of Dysart it was said not to apply to the present case, as it was a poll-election, not to take effect till it should be approved of by the King, after report made to his Majesty, by the commissioners appointed for taking the poll, in which case the Lords may have thought it improper for them to interpose; whereas here no commissioners

No. 10.

are named, no report to be made, and all that is done is to restore the community against the lapse of the anniversary day, and to allow them to proceed as they might have done on the stated day.

To the *second*, That the act of the 16th of the King extends to this kind of election as much as to any other, as it is an annual election, that is, an election for the year, although not made upon the anniversary day.

To the *third*, That they offered to prove an express concert, that such information should be exhibited to his Royal Highness for the declared end and purpose, that by the commitment expected to follow thereon, the complainers might be with-held from the election.

The Lords " repelled the objection to the jurisdiction of the Court, found the summary complaint competent; and, before answer, allowed either party to prove the several facts and circumstances by them set forth," &c.

On advising bill and answers, something new was thrown out upon the Bench. It was said by one of the Lords, who, while at the bar, had been in the service of the Crown, That the warrant from the Crown had been ill advised in this case, for that it was not in the power of the Crown to grant a warrant to the Magistrates and Council of the former year to elect: That in England, till of late, the corporation was extinguished where the election was not made on the stated day, and it was in the power of the Crown to restore it or not, or to restore it in what form it should be thought fit;—whereas in Scotland, the corporation, it is true, is not extinguished; it only cannot meet for election. It is also true, that the corporation has a right to require from the Crown a warrant for their meeting, which therefore the Crown cannot refuse; but then neither can the Crown grant such warrant otherwise, than in order to their meeting for election, according to the rights of the corporation, that is, by a poll-election; as by the lapse of the day for the council's meeting, the only right was in the burgesses. He concluded, that as in this case the warrant from the Crown was irregular, it was an act of the prerogative, and therefore the execution of it was not subject to the jurisdiction of the Court, even by an ordinary action: That had it been a poll-election, there would have lain a jurisdiction in the Court, as it would then have been an election to which the burgh was entitled in point of right; and that the report to be made to the Crown concerns only the regular execution of the order, but by no means other matters that might happen to be irregularly done in that election. But as the election was here in consequence of an act of the prerogative, no review of it could lie.

To which it was by others answered, That though there are some instances of warrants granted, which were thought irregular, as that to the town of Perth after the rebellion in 1715, whereby the magistrates of the former year were authorised to elect the magistrates and council; yet, in this case, it was regular to give warrant to the magistrates and council of the former year to elect their successors: For that, though originally the method of election was by poll, yet, that being found inconvenient, was by statute in 1469 altered, and the right of election

No. 10. lodged in the council; and therefore, when the Crown conferred that power on the Council in this case, it was not an act of the prerogative, but of justice in restoring the burgh to its right. For it was too thin a distinction, that the Crown could not restore the council, but only the town to a poll-election; as now for two centuries, since the days of James III. the town's right of election had lain in the council. The restoring the council was, in other words, restoring the burgh against their omission; and as the Court has an inherent jurisdiction in all questions touching the legality of elections, there was no reason for depriving them of it in this case.

Accordingly the Lords "repelled the objection to the jurisdiction of the Court, and adhered to their former interlocutor as to that point." They adhered also as to the competency of the summary complaint, though by a narrow plurality, several of the Lords being of opinion that this case was *casus improvisus et omissus.*

The Lords also adhered on the *third* point, allowing the proof before answer. For although some were of opinion, that there could be no relevancy without alleging that the commitment was unlawful, and that its illegality could not be proved without a discovery from the Duke of the cause of the commitment, which could not be obtained; yet the contrary opinion prevailed, that as a commitment might be lawful, although the warrant for it had been illegally obtained, so the concert and combination as qualified was relevant.

Kilkerran, (BURGH ROYAL) *No.* 6. *p.* 104.

1747. *December.* 23.

No. 11. Whether a summary application be competent in the case of fraudulent bankruptcy?

MACKENZIE, WILSON, and Others, Creditors of FORRESTER, Complainers.

Robert Forrester, having for some years carried on a small trade in the pedlar way, between Glasgow and England, introduced by degrees a younger brother George, who found means to purchase, upon credit, large parcels from several different merchants, who knew not what trust others had given; and having gone to England, he broke with the full hand.

The two brothers having thereafter returned to Glasgow, George proposed a composition at 7*s.* or 8*s.* *per* pound, for which Robert, the eldest brother, was willing to become bound. But by this time, the merchants having ground to suspect, that Robert had been in the concert with George to cheat them, set forth the circumstances of their suspicion to certain Justices of the Peace, and obtained their warrant to apprehend both George and Robert; and the Justices, after examining them, committed both to prison.

Of this procedure of the Justices, Robert complained by a bill of suspension and liberation.

It appeared to be the opinion of the Court, that it was a matter not within the province of the Justices of the Peace. And it is uncertain what judgment the Lords would have given, had not the complainer's procurator come to the bar,