

1759. August 9.

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

IN a complaint, M'Kenzie of Brae, and others, against Colonel John Scot, and others, concluding, that the Michaelmas election 1758, of the magistrates and town-council of the burgh of Dingwall should be voided, upon the head of bribery and corruption, the following point occurred. By the set of the burgh of Dingwall, it is directed, ' That there shall be two at least of the council ' changed every year.' The fact was, that four of the old council were thrown out, and four new counsellors brought in by Colonel Scot and his adherents; and that the opposite party, being four in number, satisfied themselves with protesting against this measure, without choosing any new counsellors on their part. Of the seven who were for the new counsellors, Colonel Scot was disqualified by being a briber, and three others for being bribed; by which means they were reduced to be the minority. The election, therefore, of the four new counsellors was declared void; and the question occurred, What must be the consequence; and, in particular, whether the election must be voided altogether? in which case the corporation was dissolved, as being without a magistracy, unless the King were pleased to renew the incorporation. The argument for total dissolution, was founded on the before-mentioned clause in the set, requiring a change of at least two counsellors every year; and consequently, that there could be no council unless this was done.

But, in *answer*, it occurred, *first*, That it is not the intention of the set to require this change absolutely in all events. For, what if two counsellors cannot be found to accept the office? Must the corporation dissolve in that case? By no means. The sound sense of the set is only that where there are candidates, two of the counsellors must be changed. And all that is intended by the set, is to furnish an objection against the election, if a change be not made in that case.

In the *next* place, the present case is a *casus incogitatus* about which there is nothing provided in the set. For here a compliance with the set was intended, and four new counsellors chosen in place of four that were to be dismissed. But it happens that the four new counsellors are illegally chosen, by which their election is voided. The set directs nothing with respect to a case of this nature. It is left to be supplied by a court of equity. And the only question is, In what manner this defect is to be supplied, whether by directing the imperfect council that now subsists, to proceed immediately to fill up the vacancies, or to delay till the next Michaelmas election? The set, it is true, talks of no election except at Michaelmas. But then the set is contrived for elections in their common course, and not for an extraordinary event like the present. Therefore, the term of Michaelmas specified in the set, ought to have no influence in the present question. And as expediency requires, that the town-council be com-

No 24.
An imperfect and incomplete Michaelmas election of the magistrates of a burgh, cannot be completed by order or interference of the Court of Session. It is null, and there is room for a poll-election.

No 24.

pleted as soon as possible, there can be no good-reason for a delay, seeing there is no legal obstruction against proceeding forthwith to complete the election. What if a man be brought into a town-council who is afterward found incapable; a papist for example? Such mistake will not void the election. The Court of Session, as a court of equity, will interpose its *nobile officium* and appoint a day for completing the election.

The Court, notwithstanding, declared the election totally void, and refused to sustain the imperfect election made by the plaintiffs.

It was generally agreed, that an imperfect election is not void; but that if by any chance the election become imperfect, it may be supplied, as in the example above given, where a papist happens by mistake to be chosen a magistrate or counsellor. But the Court thought it was assuming too much power to name a day for completing an election, which was begun indeed on the regular day, but not finished or completed. And here the plaintiffs, instead of proceeding to name new counsellors on their part, stopped short, and satisfied themselves with protesting against the election of the counsellors named by their antagonists. *2dly*, They were guilty of a still greater blunder, which was to chuse for a Bailie, Colin M'Kenzie, not a member of the council, but only one of the four brought in by Colonel Scot, who were all set aside as unduly elected. And consequently, the nomination of him as bailie, must also be set aside, since he was not a member of the town-council. So here the election made by the plaintiffs was imperfect even as to the magistrates, who are necessary for the ordinary government of the town, and therefore indispensable. It was concluded that an election so imperfect must be void, so as to make room for a poll-election.

Sel. Dec. No 156. p. 216.

1761. *March 12.*

CAPTAIN HALDANE, &c. *against* ADMIRAL HOLBURN, &c.

No 25.
Bribery in a Michaelmas election of a burgh, can only disqualify the bribers and the bribed. But an election carried by force, is *funditus* reducible.

THERE being a competition betwixt Captain Haldane and Admiral Holburn about the town of Inverkeithing, with a view to the approaching Parliament, the Admiral and his party having the greater number of votes got possession of the magistracy; which occasioned a complaint to the Court of Session by the Captain and his party, insisting that the election of their competitors was brought about by force, and also by bribery and corruption; and concluding, that the election of the defenders should be reduced, and that the election of the plaintiffs should be sustained, as having the majority of legal votes.

A proof being admitted to both parties, it was clearly proved against Admiral Holburn, that he had overawed the election by bringing into the town several press gangs, which he employed to keep under confinement some of the electors, and to terrify others; and also, that he had been guilty of gross bribery. But