

1738.

MARQUIS OF
LOTHIAN AND
OTHERS
v.
HASWELL
AND OTHERS.

MARQUIS OF LOTHIAN, *et alii*, *Appellants*;
HASWELL, *et alii*, *Respondents*.

14th April, 1738.

BURGH ROYAL.—The meeting for election of magistrates of a burgh being held previous to the usual day, and without due notice, the election was reduced.

ACT 7, GEO. II. c. —Circumstances under which an election of magistrates was reduced as irregular and void.*

[*Elchies voce* Burgh Royal, No. 9.]

THE ordinary Town Council of Jedburgh consists No. 42. of twenty-five members, viz. the provost, four bailies, a dean of guild, a treasurer, fourteen merchant councillors, and four deacons. The first step in the annual election of magistracy, is the nomination of eleven merchant councillors and of four deacons, and the whole number form what is called the extraordinary council.

On the morning of 15th of September, 1737, the Marquis of Lothian, the appellant, (then provost) gave directions for summoning the council to meet at three o'clock that afternoon. A meeting accordingly took place, at which nineteen members were present; three were absent from the town, and the other three declined attending.

At this meeting the appellant proposed choosing the council for the ensuing year, and offered two

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lists of the eleven new councillors. Eleven members of the council present were for proceeding, and did accordingly elect the ordinary number of new councillors; but the other eight opposed the motion, and separated from the rest.

On the 17th and 19th the eleven of the old council, with the new merchant councillors chosen at the last election, proceeded to the election of the four deacons.

On the 22d September a meeting of the whole members of the extraordinary council, including the new merchant councillors and the four deacons, took place. The provost then proposed that they should proceed to the election of the new magistracy, and that the votes of the new councillors and deacons should be received.

This was opposed, and a motion made to adjourn, which was agreed to by fourteen of the old councillors, viz. the eight who had dissented at the first meeting, and the six who had been absent. The eleven old councillors however, with the new councillors and the deacons, then proceeded to choose the magistrates and council for the ensuing year, and elected the Marquis of Lothian their provost. Mutual protests were taken—the fourteen of the old council protested against the whole proceeding, and the other party against the separation of the former, as contrary to the act of the 7th of Geo. II.

On the 23d, 24th, and 26th, the fourteen had meetings, and proceeded to elect the respondent, Haswell, as provost, and the other constitutional members of the new magistracy and council.

Mutual actions of reduction and declarator were

brought by the different parties before the Court of Session.

Against the election of the appellant it was objected, 1. That the time for calling a council for an election must be after the 20th of September.

2. That notice of the election was only given on the morning of the 15th, whereas, by immemorial custom, and by an act of the Town Council of the 28th September, 1733, two days' notice previous to any meeting for extraordinary matters was necessary, and one day for ordinary meetings.

3. That the appellant was aware that some of the members of the council were absent from town when the meeting was summoned.

It was answered, 1. That there was no such rule, there being upon record an election of an earlier date than the present, viz. on 12th September, 1662.

2. That in the sixty-two previous elections only twenty-three appeared from the Council books to have been made by previous appointment. Had such previous notice been considered essential, it must also have been held necessary to have entered it in the books.

3. That the appellant, the Marquis of Lothian, having judicially declared, upon being interrogated by the respondents, that he was not aware of the absence of the three members, this evidence was to be held as conclusive.

The court (January 19th, 1738,) after a hearing in presence, "found the reasons of reduction relevant and proven, and reduced accordingly."

Against the election of the respondents it was objected, 1. That it was contrary to the act of the 7th of Geo. II. which enacts, "that at the annual

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‘ election of magistrates and councillors for burghs,
 ‘ no magistrate or councillor, or any number of
 ‘ magistrates or councillors, shall for the future,
 ‘ upon any pretence whatever, take upon him or
 ‘ them to separate from the majority of the magis-
 ‘ trates or councillors, but shall submit to the elec-
 ‘ tion made by the majority of the Town Council
 ‘ assembled; and it is provided that, if the minor-
 ‘ ity shall proceed to a separate election, their act
 ‘ and election shall be *ipso facto* void.’ As the
 eleven members formed a majority of the meeting
 of the 15th of September, the proceedings of the
 other party fell under the above nullity.

Answered :—1. This act does not affect the pre-
 sent case. The meeting on the 15th was not the legal
 meeting for the election; it having been held se-
 veral days before the usual day, and without due
 notice. The act could only have reference to a
 separation from a majority at a legally constituted
 meeting. Moreover, the pretended election was
 not made by the majority of the magistrates and
 counsellors of the preceding year; whereas the
 election of the respondents was upon the usual
 day, and by a majority.

2. That the two days previous notice, the ne-
 cessity of which was insisted in by the respond-
 ents, had not been given to the appellants, only
 one day’s intimation having been made.

3. That by the constitution of the burgh, trades-
 men were disqualified from being elected mer-
 chant counsellors, whereas six of the fourteen who
 separated from the appellants were tradesmen, and
 consequently unqualified; so that the remaining
 eight could not form a quorum. It was also ob-
 jected that two of the new-elected merchant coun-

sellors were tradesmen, and therefore also disqualified.

4. That a certain number of deacons formed a constituent and necessary part of the extraordinary meeting for the election of the new magistracy, whereas at the meetings of the respondents for this purpose no deacons were present.*

The Court ‘repelled the objection founded on ‘the act of parliament, in respect this case does ‘not come within the same.’

With regard to the other objections, the Court (8th and 16th February) repelled them, except with regard to the two new merchant counsellors, and assoilzied the respondents. The objection to the six old merchant counsellors, viz. that they were tradesmen, was repelled, ‘in respect they ‘were not chosen counsellors at the election quar- ‘relled, but at Michaelmas 1736, or preceding ‘election, for reduction whereof no action was ‘brought within the time limited by law;’ but the objection to the two new merchant counsel- lers was sustained, ‘in respect, it was admitted ‘that they were members of the incorporated ‘trades, who are not capable of being elected in- ‘to the magistracy or council,’ and the objection as to them was brought forward in due time.

The appeal was brought from the interlocutors of the 19th January, and of the 1st, 8th and 16th February 1738.

Pleaded for the Appellants :—1. The meeting and election of the 15th September took place at a time justified by precedents, and was conform- able to the constitution of the burgh.

* Some other objections were pleaded, but it appears unnecessary to detail them.

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2. The objection to the election of the respondents, founded upon the act of the 17th Geo. II. ought not to have been repelled, because they separated from a majority of the town council assembled, and proceeded to a second election, although the majority was greater than was requisite to make up a quorum of council. It is absurd to maintain that the separation must be from such a number as must make up a majority of the whole constituent members. Such a construction would render the statute useless, because the minority, which should separate from such a majority, could never amount to a quorum qualified to act; and the double election, in the present case, is productive of every mischief which was intended to be remedied by the statute.

3. As the objection of being incorporated tradesmen has been found good against two of the new merchant counsellors, it ought also to have been sustained against the six members of the old council, as it was in virtue of the election in 1737 that these persons pretended to a place in council at the election in question, and not by virtue of the election in 1736.

Pleaded for the Respondents:—The meeting for the election of new counsellors has always been held on the 21st day of September, or between that day and the 28th, and not sooner; and the only case referred to by the appellants where an earlier meeting took place, was owing to very peculiar circumstances; so that the object of the meeting on the 15th, to elect magistrates contrary to the opinion of the real majority of the old council, was very obvious.

From the records of the council, and the exa-

mination of witnesses, it appears that the meeting for choosing new counsellors has generally been fixed by the appointment of a previous council, and this ought more particularly to have been done in the present case, when the meeting was so much earlier than common, and where there was an act of council of 1733, requiring previous notice.

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2. As to the election of the respondents, it appears,

First, That if the proceedings of the appellants on the 15th and subsequent days were irregular, as the Court of Session have found, the respondents were regularly elected, for they were chosen by a majority of the electors, viz. fourteen members, agreeably to the constitution of the borough, and the practice in similar cases.

Second, That after the protest taken by the fourteen members on the 21st of September against the irregular proceedings of the appellants, the latter had no right to proceed to the election; and if any of the parties had acted contrary to the provisions of the 7th of Geo. II. it was the appellants, who, notwithstanding the meeting was adjourned by the majority, had continued to act, and to proceed to an election.

Third, Although there may have been valid objections against some of the persons elected by the respondents, that will not affect the validity of the general election, which must stand good if it has been regularly carried on.

After hearing counsel, 'it is ordered and ad- Judgment,
 'judged, &c. that the interlocutors of the Lords of April 14, 1738.
 'Session of the 19th January last, whereby the
 'election of the appellants was reduced at the

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‘ suit of the respondents, be affirmed ; and it is
 ‘ declared that the election of the counsellors and
 ‘ magistrates for the borough of Jedburgh, insist-
 ‘ ed on by respondents, were irregular and void ;
 ‘ and it is therefore further ordered and adjudged,
 ‘ that the same be reduced, and that so much of
 ‘ the other interlocutors complained of whereby
 ‘ the Court of Session decerned in the declarator
 ‘ at the instance of the respondents, and assoilzied
 ‘ from the reduction at the instance of the ap-
 ‘ pellants, with regard to all the elections there-
 ‘ by quarrelled, (excepting those of Robert Win-
 ‘ terup and George Scougald, the two tradesmen,)
 ‘ be reversed.’

For Appellants, *Ch. Areskine, W. Murray.*

For Respondents, *W. Hamilton, J. Browning.*

It does not appear upon what precise ground the House of Lords reduced the election of Haswell. If it be held that the interlocutor of the 1st February was reversed to the effect of finding that the act of 7th Geo. II. applied, then the inference from the decision would be, that, where a minority of a town council separated from the majority at a meeting for the election of magistrates, their proceedings fell under the act, although it had been found that the original meeting was not legally constituted, and the election by the majority had in consequence been set aside. But other objections were pleaded, any one of which may have been the ground of the judgment.

JEAN BURDEN, Widow of JAMES	} <i>Appellant ;</i>
Kinross, - - - - -	
DAVID SMITH, - - - - -	<i>Respondent.</i>

27th April, 1738.

MUTUAL CONTRACT.—SUCCESSION.—A provision in a marriage contract of certain sums in favour of the wife, failing children, or in the event of their deaths in minority and unmarried,—