1747. *February* 28. ANDERSON *against* SINCLAIR of Ulbster.

No 296.
An election of magistrates of a burgh being challenged, and the matter not determined within the year, may be proceeded in, notwithstanding the succeeding election founded on it has not been challenged.

JOHN ANDERSON, burgess of Wick, with other burgesses, all of whom, by the constitution of that burgh, have right to vote in the election of magistrates and councillors, presented in due time a complaint against the election of Sinclair of Ulbster as provost, and the other magistrates, made at Michaelmas 1745; and during the dependence of this process, a new election being made 1746, they raised a reduction thereof, as proceeding upon leets given out by the former magistrates, who not being lawful, and their title under question, they could not execute this act, which was necessary in the election of a succeeding magistracy.

THE LORDS, 11th February, having found no process, and assoilzied from the reduction of the election 1746, they therefore "found no necessity for determining in the complaint against the election 1745 any further."

The meaning of this interlocutor was, that the pursuers were excluded by lapse of time from bringing any challenge of the election 1746, and the challenging that made at 1745 was only in order to annul the other, which not being competent, it could serve no purpose to proceed therein.

Pleaded in a reclaiming bill; That the pursuers were not barred from bringing a reduction of the election 1746, the statute 16th Geo. II. which limits summary complaints to two kalendar months, not speaking of reductions, or if it also regarded that more formal method, it could only be interpreted of a reduction brought in the case, and by the person to whom a summary complaint would have been competent, to wit, a constituent member of a meeting for election, at which wrong had been done by the majority, in order to have that rectified; but the giving this summary remedy certainly did not exclude others having interest from insisting at common law upon other nullities in the election, and particularly on this, which was the present case, that it was made by persons who all of them had no right.

As little were they barred by the act 7mo Geo. II. which allowed any magistrate or councillor apprehending wrong to be done by the majority at an election to bring an action within eight weeks; for the principal end of that statute was to prevent separations, by allowing the minority this other remedy, which if they did not take within the time, they were held to have submitted to the election; but this could not hinder a complaint at the instance of another, who alleged that the whole electors, though ever so unanimous, were entirely void of authority; for if the law regarded that case, it would follow, that when a set of pretended magistrates had the good fortune to conclude their year before the trial of their election could be completed, they might chuse successors whom they pleased, and continue their faction in power, the action by this statute being only given to magistrates and councillors, to wit, those who were such at making the election.

Answered; That the petitioners were too hasty in urging for a determination, whether a reduction were yet competent to them, which would be soon enough,

No 296. when they had raised and were insisting in one; and in the mean time, the interlocutor ought to stand, that there was no necessity for determining in the complaint.

No reduction was now competent, but barred by both these acts; by the 16th Geo. II. the limitation introduced by which would be of no effect if confined to summary complaints, while the same cause could be brought in by summons. An election made by those who had no power, was certainly a wrong done at an election, though, if the electors were unanimous, as it could only be complained of by some other burgess, it behoved to be by ordinary action, yet still subject to the prescription of time; but more expressly was a reduction barred by the act 7mo Geo. II. limiting ordinary actions within eight weeks.

THE LORDS found, that they might proceed to determine the election made in the year 1745, notwithstanding there was no reduction subsisting of the election made in the 1746.

Act. *H. Home.* Alt. *W. Grant.* Clerk, *Gibson.*

Fol. Dic. v. 4. *p.* 150. *D. Falconer, v.* 1. *No* 175. *p.* 234.

*** See No 8. p. 1842, *voce* BURGH ROYAL.

No 297.

1747. *February* 28. MASON *against* The MAGISTRATES of ST ANDREWS.

THE like determination to that in the preceding case was given on a complaint against the election for St Andrews made at Michaelmas 1745, though there was no complaint or reduction yet raised against that made 1746.

Act. *Ferguson.* Alt. *W. Grant.* Clerk, *Kirkpatrick.*

Fol. Dic. v. 4. *p.* 150. *D. Falconer, v.* 1. *No* 176. *p.* 235.

*** See No 20. p. 1871, *voce* BURGH ROYAL.

No 298.
Whether after witnesses have deponed, the pursuer may recur to the defender's oath?

1747. *June* 24. LAW *against* LUNDIN and LUMSDEN.

JEAN LAW, as executrix-dative of David Bayers her husband, brought an action against Lundin of Lundin and Lumsden of Innergelly, for payment of two different accounts, as due to her deceased husband, consisting of dales, timber, iron, &c. furnished; in which there was an act pronounced, finding the libel and accounts therein referred to relevant to be proved *prout de jure*, and granting diligence.

In consequence of this, the pursuer adduced two witnesses, one on Lundin's account, who knew nothing of the matter, another on Innergelly's, who proved the account, so far as the testimony of one witness could go. And when the act came to be called, in order to a second diligence, the pursuer passed from