

1735.

HERIOT
v.
RAY.

GEORGE HERIOT, *et alii*, styling themselves Magistrates and Members of the Town Council of Haddington, } *Appellants* ;
WILLIAM RAY, *et alii*, likewise styling themselves Magistrates and Members of the Town Council of Haddington, } *Respondents*.

30th April, 1735.

BURGH ROYAL.—PRESCRIPTION.—Act 7. Geo. II. c. 16.—An action being brought for setting aside the election of Magistrates on the ground of irregularities in the previous election of deacons of trades,—it was found that the limitation of eight weeks imposed by the statute, was to be reckoned from the date of the election of Magistrates, and not from that of the deacons.

It was found that, in the event of an equality at the election of a deacon of the trade, the old deacon had a casting vote.

It being argued that a person was disqualified for voting at the election of a deacon, because he was bellman of the borough—the objection was repelled.*

At the election of magistrates for the borough of Haddington, a dispute having arisen between two parties, each of whom pretended that they were duly elected, mutual actions of reduction and declarator were raised for setting aside their opponents, and declaring their own right.

No. 35.

* The import of the judgment upon the last point is uncertain, it being stated by the respondents that, in point of fact, the voter had resigned his office before he tendered his vote.

1735.

 HERIOT
 v.
 RAY.

It appears that at the previous meeting of the incorporation of hammermen for the election of their deacon, Robert Sawers and John Hay had offered themselves as candidates. The votes, being eight in number, were equally divided; whereupon the former deacon, who presided on the occasion, gave his casting vote for Sawers.

It was objected on the part of the appellants, that, even in the case of there being an equality, the old deacon had no privilege of a casting vote; but it was further objected, that John Young, one of the voters, was, by the rules of the borough, disqualified as a public servant, being bellman of the town. It was likewise stated, that Robert Sawers had not paid up his quarterly accounts to the incorporation, and was, on that account, incapable, in terms of an act of council, of electing or being elected.

At the election of the deacon of the weavers, the corporation separated. One party chose Charles Lawrie, in the interest of the respondents; while the adherents of the appellants held a separate meeting, and elected Andrew Smith.

Under these circumstances, these several individuals assumed to themselves the *status* of deacons, and voted at the subsequent election of magistrates. John Hay and Henry Smith supported the appellants; Robert Sawers and Charles Lawrie supported the respondents; and the question between the parties turned upon the merits of the previous elections of deacons.

The appellants, who had got possession, objected to the competency of the respondents' action, on

the ground that it had not been raised within eight weeks from the date of the election, which was alleged to have been irregular; that being the time limited by the act (7 Geo. II. c. 16. § 7.) for bringing such actions.

1735.

 HERIOT
 v.
 RAY.

The respondents answered, that the prescription in the act founded on relates only to the general annual election of magistrates and councillors, and not to the election of deacons; and, at any rate, that they (the respondents) having continued in the peaceable possession of their office until the occasion of the general election, when the appellants declared their election void; the wrong of which they complain was only done then, and, consequently, the prescription against their right of complaining can only run from that time.

They further answered, that the bellman did not receive any wages from the town, and that, although a public servant, he was not thereby disqualified, either by the rules or the practice of the burgh.

In reply to this, the appellants adduced an act of the council, made in February 1734, by which they discharged any of the town servants to vote at subsequent elections.

To this it was answered, that the council had no power to make such a by-law, and that the same had been unanimously rejected by the incorporation. It was further stated that, in point of fact, Young had resigned his office, and another person had been elected bellman in his stead, before he gave his vote; so that the objections, even if they were sound, would not apply to him.

As to the objection made to the casting vote,

1735.

 HERIOT
 v.
 RAY.

the respondents answered, that, by the custom of Haddington, as well as of almost all the boroughs in Scotland, deacons have two votes,—one in course with the other members of the trade, and the other as a casting-vote, in the event of there being an equality; in the same manner as it was found, in a late case, that the provost of this borough had; and as it has been found, in the cases of the hammermen of Perth, and the goldsmiths of Edinburgh, that deacons had.*

The Court (26th February 1735) “repelled the
 “objection, that it was more than eight weeks af-
 “ter the election of the deacons, before the raising
 “the said William Ray’s process; and sustained
 “the said John Young’s vote, notwithstanding the
 “objection; and found that the deacon of a trade
 “has a title to the first vote, and also to the cast-
 “ing vote, in case of an equality; and repelled
 “the objection, that Robert Sawers was under an
 “incapacity, because of his deficiency in his quar-
 “terly payments, of being elected a deacon, and
 “found him duly elected; and before answer, al-
 “lowed either party a conjunct proof, as to the
 “points not above determined; and ordained either
 “party to give in a condescendence of the facts
 “they want to prove.”

A petition was presented by the appellants, in which they stated, that the summons with which they had been served was blank, and pleaded, 1st, that the prescription must apply, because execut-

* None of the decisions here referred to have been found in the reports.

ing such a summons was not raising an action in terms of the statute; and, 2d, That Robert Sawers was not duly qualified to be elected, in regard he did not pay scot and lot, and because of the other objections already stated against him.

The Court (28th February 1735) “refused the said petition as to the prescription, in regard no blank summons can now be executed; but ordained the other points of the said petition to be seen and answered against the 1st of June, without prejudice to the act already pronounced to go out,” &c.

The appeal was brought from these two interlocutors of the 26th and 28th February 1735.

After hearing counsel, “it is ordered and adjudged, &c. that the appeal be dismissed, and the interlocutory sentences therein complained of be affirmed.”

For Appellants, *Ja. Erskine* and *Will. Hamilton*.

For Respondents, *Ch. Arskine* and *W. Murray*.

It does not appear that the question regarding Sawers' incapacity, (upon which point the reclaiming petition had been appointed to be answered,) was made the subject of the appeal. In the respondents' paper it is expressly assumed that it was not, and, accordingly, no argument is there given upon the subject.

1735.

HERIOT
v.
RAY.

Entered
Mar. 11, 1735.

Judgment
April 30, 1735.