1789. *July* 29.

JAMES DONALDSON, and Others, *against* The MAGISTRATES of KINGHORN.

No 32.
Where no deacon has been elected at the usual time, the next election must be authorised by the magistrates.

THE corporation of bakers in the town of Kinghorn had not elected a deacon for eight years preceding September 1788. At this time James Donaldson was chosen into the office; but on his appearing to take his seat in the Council, it was *objected*, That his election having proceeded without any previous authority from the magistrates, was unwarranted and void.

The magistrates having sustained this objection, James Donaldson and his adherents complained to the Court of Session, in terms of the statutes 16 Geo. II. and 14 Geo. III.; and

Pleaded: Where no magistrates have been chosen on the day fixed for that purpose, it is understood that an application must be made to the King for authorising a poll-election; and hence it may be thought, that where a corporation has omitted to chuse a deacon, a similar application ought to be made to the magistrates, from whom the different corporations have received their privileges. But the distinction between the two cases is sufficiently obvious. The authority of the magistrates, who in general have a power of chusing their successors, is only for a year, and after the elapsing of that period, without a new nomination, there is no one who can proceed to an election. But in the case of the subordinate communities within burgh, where the right of election is in the members of the corporation, as this must subsist as long as there is a member capable of enjoying the privileges belonging to it, so where, for one year, no deacon has been chosen, there is nothing to hinder the members of the corporation, after due premonition, to meet and chuse their office-bearers, in the same way as where a deacon regularly chosen happens to die during his office. In such a case, it is usual for the members of the corporation, without any warrant from the magistrates, to meet for the purpose of chusing his successor; l. 7. § *ult.* D. *Quod cujuscunque universitatis nomine;* Bankt. lib. 1. tit. 2. § 27.

Answered: The only difference in this matter between the election of magistrates and that of a deacon, is, that the magistrates deriving their authority from the Crown, it is necessary, where no election has been made on the day fixed by the charter of the burgh, to apply to the Sovereign for a warrant to proceed to a new election; whereas the lesser communities within the burgh having been originally created by the magistrates, it is to them that an application is to be made, when, in consequence of a failure to elect at the time appointed for that purpose, the corporation is without its ordinary representative and manager. In both cases, where the regulations laid down in the original formation of the society, as to chusing the office-bearers in it, have not been observed, it is indispensably necessary to obtain a special warrant for that purpose; because, it is in virtue of those regulations alone, that any one member of the community can pretend to any pre-eminence over his fellow-citizens.

No 32.

To admit a contrary practice would occasion much inconvenience and disorder.

Reference was also made by the respondents to a decision of the Court in 1770 or 1771 (not collected), where the question appeared to have been determined agreeably to the argument maintained by them.

'THE LORDS dismissed the complaint, and found expences due.'

Act. *Wight*, *Hay*, et alii. Alt. *Tait*, et alii.

Craigie. *Fac. Col. No.* 83. *p.* 150.

1789. *August* 6. THOMAS HIGH *against* ROBERT MAIN.

No 33.
It is a disqualification from voting, that the party holds an office within the burgh at the will of the Magistrates.

WILLIAM CHAPMAN had been appointed town's officer and trade's officer, and John Chapman jailor, in the town of Kinghorn, all of these offices being revocable at the pleasure of the magistrates.

In a complaint, therefore, in terms of the statutes 16th Geo. II. and 14th Geo. III. preferred by Thomas High, it was *contended*, That the votes given by these men, in electing Robert Main into the office of deacon of the weavers in that town, in exclusion of the complainer, should not be reckoned. The complainer

Pleaded: It is necessary for preserving the independence, as well as the purity of elections, that those persons whose livelihood depends on the will and pleasure of others, should not be admitted to vote. This was provided by the act of the Convention of Estates in 1689, c. 22. which must be considered as declaratory of the common law. It is also ordered, in every warrant that has been issued for a poll election. And although sometimes, in practice, this rule does not seem to have been sufficiently attended to, yet in the later decisions a due regard has been paid to it; 1775, Andrew Paul *contra* Alexander Fraser.

Answered: It would be carrying the system of political freedom, and the purity of elections, to a great length indeed, if the circumstance of a burgess having an office dependent on the magistrates, were to incapacitate him. No such regulation, however, exists. The directions prescribed in the act of Convention, as well as the warrants for poll elections, which are merely temporary in their nature, suppose the general law to be different; and though the decisions on this point are far from being uniform, those examples in which the objection was over-ruled, as being more agreeable to justice, ought now to be followed.

Some of the Judges being unwilling to deprive any man of his right of voting without a positive regulation or immemorial usage, were inclined to repel the objection; but the majority, moved by the late decisions, being of a different opinion,

'THE LORDS sustained the objection to the votes of John Chapman as jailor, and of William Chapman as town-officer and trades-officer; and found, that