

SUPPLEMENT

TO

CASES ON APPEAL FROM SCOTLAND.

[THE Compiler, on going over the omitted cases, doubted whether those now given as a Supplement might not be deemed of sufficient importance. Distrusting his own judgment in the matter, he has thought it best to make the selection now given, leaving it to the profession to consider whether he has done right or not. He has, also, recovered the Lord Chancellor's speeches in a few cases, already reported by him, which are given at the end.]

DAVID BROWN, Moderator of the Synod of
Aberdeen, and Others, *Appellants*;

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Mr GEORGE CHALMERS, Principal of the Old
College of Old Aberdeen, and Others, . . . *Respondents*.

BROWN, &C.
v.
CHALMERS, &C.

House of Lords, 14th March 1734.

CHARTER—FOUNDATION—TRUST USES—ELECTION OF PROFESSOR.—Held, that the appellants having deviated from the directions contained in the Charter of Foundation, as to the election of a Professor of Divinity in King's College, Aberdeen, the election was void and null.

In the year 1641, the Provincial Synod of Aberdeen, by a voluntary contribution, raised the sum of 10,000 pounds Scots, and laid the same out in the purchase of lands from Forbes of Craigivar, the rents and profits whereof were destined for the support of a Professor of Divinity in the College of Old Aberdeen.

By this settlement (which was completed by charter and sasine), the lands purchased were granted to John Forbes, then Professor, and his successors in office; and rules were

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given for electing the Professor of Divinity upon vacancies of any kind, and for disposing of the rents and profits during such vacancy. In this grant, and in this charter from the Crown, that followed thereon, anno 1642, the rules of election were contained, namely, "That the Professor is to be elected of the most qualified, without respect to birth, place of residence, or place education,—that the holding that office is to be inconsistent with the holding of any other office in the church or kingdom,—that, therefore, upon the Professor's obtaining any other benefice, or office, the professorship is to become vacant. That the triers, electors, and admitters (examinatores, electores, et admissores), of the said Professor, in all time coming, shall be the Moderator of the Synod of Aberdeen: Two commissioners, delegated from every presbytery in that Synod, to be chosen by the several presbyteries for that end; the Principal of the College, with another delegate from the College, and the Dean of Faculty of Theology, or some other person of that faculty, to be chosen by election, making in all twenty persons. *That immediately after any vacancy the Moderator of the Synod shall convocate and meet with the other electors within twenty days after such vacancy happens, within the College Church of Old Aberdeen, in order to issue proper intimations for the election. That upon the Moderator of the Synod's failing to convocate and assemble as aforesaid, the Moderator of the Presbytery of Aberdeen, and upon his failure, the Dean of Faculty shall, within other twenty days, convocate and meet with the other electors, and shall issue programmes of advertisements, to be published in the places in Scotland most famed for literature, to the end proper persons may have notice, and may offer themselves to a trial (on certain heads expressed in the charter). That the office shall be conferred upon the person who, on trial, shall be found to be the worthiest and best deserving. The place of election to be in the College Church of Old Aberdeen. And the profits during any vacancy are to be uplifted by the Minister of Old Aberdeen, and the Moderator of the Presbytery, to be accounted for by them to the Provincial Synod; to be applied by the approbation of said Synod for some pious use; and the deeds and evidents are ordained to remain in the charter chest of the University of Aberdeen."*

Mr David Anderson, the last Professor of Divinity, having misapplied some money appropriated to the support of this

professorship, the Synod of Aberdeen, pursuant to certain powers reserved to them in the original settlement, in October 1726, made the following act and resolution, viz., “ That upon the next vacancy, the stock should be replaced out of the vacant rents, which, by the charter, are provided to be at the disposal of the Synod,” and, therefore, they resolved to suspend the supplying a vacancy until the sum was made up.

On the 13th February 1732, the Chair of Divinity became vacant, by the death of Mr David Anderson.

The first meeting of the electors ought, according to the charter, to have been, on or before, the 5th of March following; but the Moderator of the Synod omitted to bring the electors together against that day, so that the right of convocation devolved on the *Moderator of the Presbytery*.

Nevertheless, the appellant, Mr Brown, Moderator of the Synod, with nine others of the twenty electors, thought fit to meet at Aberdeen (not in the College Church, the place of election), on the 21st of March, long after the period fixed for that meeting was over, and then, in place of issuing the proper intimations for inviting candidates, as the charter directs, they adjourned their meeting for election, first, to the 2d, and then to the 26th of April, when, having fixed on the other appellant, Mr Gordon, a member of their own Synod, as a fit man to fill the Professor's chair, they, without the concurrence of the other electors, who declined to give countenance to so unwarrantable proceedings, without issuing any programme to invite candidates, and without any trial or examination, thought fit to elect Mr Gordon Professor of Divinity, in King's College, Aberdeen.

The respondents thereupon brought a suspension and interdict (injunction). They also brought a reduction of the election; and the two actions having been conjoined, the Lord Ordinary reported the case to the whole Lords, and the Lords pronounced this interlocutor: “ Finds, that the clause in Craigivar's disposition, enabling the Synod to make additions to the rules of the mortification, is to have its effect, though not particularly mentioned in the charter; but finds, that the Synod's act in the year 1726, suspending the supplying the vacancy until a sum was made up, was beyond their power. And find, that the diet, appointed by the moderator of the Synod, for convening the electors being beyond the twenty days, was not agreeable to the charter; albeit the advertisements were within the twenty days. Find this relevant to annul the election;”

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1734. . “ and also *separatim*, find that the election being made with-
 BROWN, &C. “ out issuing a programme, and a comparative trial is re-
 v. “ levant to reduce the same.” On reclaiming petition the
 CHALMERS, &C. Court adhered.

Against those interlocutors the present appeal was brought.

Pleaded for the Appellants.—That the omission to assemble within twenty days was inconsiderable. It was occasioned by the moderator of the Synod, not knowing the precise tenor of the charter, which was in the respondent, Mr Chalmers’ hands. Though the delegates from the several Presbyteries did not meet till after the lapse of twenty days, yet the moderator sent his summons to acquaint them of the day of meeting before the expiration of that period; and, therefore, since he did what he could to assemble the electors in due time, their act ought to be sustained. 2d, Though the charter seems to require a notification by programme, to all learned men, and an invitation to stand candidates at a public trial, where the most deserving, upon examination, is to be preferred, yet *de praxi* this method has been disused for many years, as having been found unprofitable, because men of worth and character would not willingly submit themselves to comparative trial and to public disputation, which is the reason why the act of the commission for visitation of colleges and schools aforesaid, anno 1690, did not extend the directions therein given to Professors of Divinity. This Act, which the Court held not to affect the question, declares that Professors of Divinity are not to undergo any comparative trial at the admission, and therefore their omitting to comply with the rule established by the charter, was justified.

Pleaded for the Respondents.—1st, The moderator of the Synod either did or ought to have known the precise directions of the charter, a copy whereof is constantly kept with the Synod’s books, for his guidance. The respondent, Mr Chalmers, had the original charter, only as he was Principal of the College where it was deposited, and to this the moderator might have had access. Whatever might be said as to the validity of the appellants’ act, after the lapse of the first twenty days, without meeting, if the charter had made no subsidiary provision, yet as *de facto*, the charter provides that upon failure of the first meeting to be called by the moderator of the Synod, the moderator of the presbytery shall act; and, upon his failure, the Dean of Faculty shall proceed within the space of twenty days more, there is a clear determination of the moderator of the Synod’s right to assemble

the electors after a neglect of twenty days; and that devolves upon other persons who must execute it.

2d. Neglect to comply with the directions of the foundation charter, in instances where such omission is not objected to, cannot invalidate these directions, but the electors, whose power flows from that charter, must be ever bound by the conditions thereof.

It is not by the charter necessary, that there should be any public disputation or comparative trial, such, as by the act of the commissioners of visitation, *anno* 1690, seems to be required in the case of *masters and regents*; but, it is required that programmes be published, and that notice be given in all the places of Scotland most famed for literature, to the end that proper persons may offer themselves as candidates, and that *trial* be taken of their *qualifications*. Now, as trial may be taken without public disputation, and, as upon notice given, men of worth and learning might be found willing to offer themselves as candidates for a divinity chair, though the appellants had had power, as they had done, to supersede the directions of the foundation charter; it would have been a very improper exercise of that power, to stifle the notice intended by the charter to be given to all learned men, to foreclose themselves thereby from all comparison upon trial, and to fix, without any invitation of learned men to be candidates, or any examination, upon the minister of a country parish, to fill a Professor of Divinity's Chair in a public University.

After hearing counsel,

It was ordered and adjudged, that the interlocutors complained of, be, and the same are hereby affirmed, with £50 costs.

For the Appellants, *A. Hume Campbell, R. Dundas.*

For the Respondents, *Dun. Forbes, Wm. Hamilton.*

Mr ARCHIBALD MURRAY, *et al.*, Trustees }
 for the Creditors of JOHN LOWIS of } *Appellants*;
 Merchistoun, }

The Honourable FRANCIS CHARTERIS and
 his Guardians, } *Respondents.*

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