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<hr/> STIRLING, &C. v. CAMPBELL, &C.	CHARLES STIRLING, Esq. of Kenmure, and Others, JAMES CAMPBELL, Esq. of Bedlay, and Others,	<i>Appellants ;</i> <i>Respondents.</i>
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House of Lords, 1st July 1816.

ELECTION OF MINISTER TO A PARISH—CASTING VOTE—PROOF—MINUTES OF MEETING AS EVIDENCE—MANDATORY—CURATOR—MINOR.—The election of a minister as assistant and successor, came to be exercised in the parish of Cadder. The appointment was vested in the whole heritors and elders of the parish. On the day of election thirty-two voted for Mr Grahame, and thirty-two for Mr Lockerby, and the preses gave his casting vote for Mr Grahame. The election having been objected to; Held, (1) That the vote given for Ann Reid, a minor, then seventeen years of age, per mandate of her curator alone, without her signature or consent, was inept. (2) That the objection to the vote of James Provan was bad. (3) That the preses had no right to a second or casting vote; and (4) That the minutes of the meeting could not be looked to as unexceptionable evidence of what took place, from the alterations made on them by the clerk, after the meeting was over; and (5) That the majority of votes was given for Mr Lockerby. In the House of Lords, the interlocutors were affirmed, except as to the second and fifth points, as to which the cause was remitted.

The election of a minister to the parish of Cadder was vested in the heritors and elders of the said parish, they having purchased the right of presentation thereto.

In 1811 the Rev. Mr Provan, the then incumbent, from age had become unable to discharge the ministerial duties of the parish, and he declared his wish, by letter, to resign a part of his emoluments, in order that an assistant and successor might be duly appointed.

A meeting of the heritors and elders was held, and agreeably to the request, they appointed the 5th September 1811 for the election of his assistant and successor.

On the 5th day of September the meeting was held according to appointment. Mr Stirling, one of the appellants, was called to the chair, and acted as preses of the meeting, and Mr Carrick was chosen clerk.

Three candidates appeared for nomination. Three of the electors voted for Mr Cumming, thirty-two for Mr Lockerby, and thirty-two for Mr Grahame. There being an equality

of votes for the two latter, Mr Stirling, the preses, gave his casting vote for Mr Grahame, and he was accordingly, by the meeting, declared duly elected.

Some of the heritors shortly thereafter, taking a different view of the election, among whom were the respondents, they protested against the election; and followed up their protest by two bills of suspension, which were respectively refused by Lords Justice-Clerk Boyle and Robertson. They then made application to the presbytery, to induce them to stop proceedings as to the call of Mr Grahame. But both the presbytery and synod repelled the objections stated, and ordered the call to be made.

They then brought the present action of declarator, in which they concluded, 1st, That James Purden Gray, who was entitled to vote at said meeting, and whose name was inserted in the original minutes as voting for Mr Lockerby, but whose name was illegally omitted in the extended minutes, ought to be restored in the minutes by the clerk of the meeting. 2d, That Ann Reid having been present at said meeting, a mandate, signed by persons alleging themselves her curators, addressed to Robert Stevenson, was irregularly entered in the said minutes of sederunt, and in the list of votes given in favour of Mathew Grahame; because a deed signed by the curators only, without the minor is null. That it should be found that the respondents being the legal and actual majority of the said meeting, and having declared their choice of Mr Lockerby, that he, Mr Lockerby, should be declared duly elected as assistant and successor to Mr Provan, in the parish church of Cadder; and that Mr Grahame was not duly elected. 4th, That supposing there had been an equality of votes, yet it ought to be declared that the election was still void, in respect Mr Charles Stirling, the preses of the meeting, had no right to a double vote, and that it was illegal in him to assume the right of giving such double or casting vote on that occasion.

The appellants stated the following defences, 1st, That matters had been conducted properly and regularly on their part; that the whole heritors at the conclusion of the election had formally given their votes in favour of the candidate whom they had previously supported, and solemnly agreed to join in a call, and to subscribe a presentation in favour of Mr Grahame. 2d, That the vote of Mr Purden Gray, whether his right to tender it was good or bad, had not, in point of fact, been tendered at all, and therefore could not be com-

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petently counted. 3d, That no objection had been made to the vote given in name of Ann Reid at the meeting, and that they were still ready to prove that she approved and concurred in what had been done in her name. 4th, That the casting vote given by the preses was authorized by an express and unanimous agreement of the heritors; and that at any rate, even if there had been no such agreement, the preses of such a meeting was entitled, both by law and custom, to give a casting vote. 5th, That one of the respondents, James Provan, was not duly qualified to vote, in so far as he had been divested of the property, in right of which his vote had been given, a considerable time before the election.

Feb. 9, 1813.

A condescence of the facts having been given in, and a proof allowed and reported, the Lord Ordinary reported the cause with the proof to the Second Division of the Court; and the Court pronounced this interlocutor, "Having heard
" counsel in their own presence, and having resumed con-
" sideration of a petition for the defenders, to open the sealed
" deposition of Ann Reid and Agnes Hamilton, refuse the
" desire of the said petition; and on the merits of the cause
" repel the objection proponed by the defenders to the vote
" of James Provan: Find no evidence that a legal vote was
" given or tendered for or on behalf of Ann Reid: Find also,
" that Charles Stirling, Esq., had no right *qua preses* to a
" second or casting vote; and that the minutes of proceed-
" ings are not entitled, in the way they were completed, to be
" considered as unexceptionable *prima facie* evidence of the
" proceedings, and, therefore, without deciding on any other of
" the points brought under discussion: Find, that the legal
" majority of the votes was given in favour of Mr Thomas
" Lockerby, and that the said Thomas Lockerby was duly
" elected, and ought to be admitted and inducted assistant
" and successor to Mr Archibald Provan as libelled; and
" decern." On reclaiming petition, the Court adhered.

March 4, 1813.

Against these interlocutors the present appeal was brought to the House of Lords, by those who had voted for Mr Grahame.

Pleaded for the Appellants.—1st, That the minutes of meeting of the heritors of the parish of Cadder, being the formal certificate or record of the proceedings of that meeting prepared by their own clerk, are authentic legal evidence of the *res gestæ* of the meeting, and incapable of being impeached by parole testimony. 2d, If it were otherwise, it is in evidence that Mr Purdon Gray alleged to have voted, or to have

offered to vote for Mr Lockerby, voluntarily declined voting; and, at any rate, being a minor, Mr Gray could not have voted without the consent of his curator, who refused to concur with him. 3d, There is evidence that a vote was given for Ann Reid of Cleddans, by mandate of her curators. There is also evidence that she concurred in the appointment of the proxy, and approved of the vote given by him, and that vote being unobjected to at the time, and being expressive of the intention of every individual who had any interest in the property in right of which it was given, is a good vote. 4th, By the agreement of the meeting, the right of a casting vote in addition to his original vote was conferred on Mr Stirling, the preses; and even if such agreement had not been entered into, the preses would, by the common law of Scotland, have been entitled to a double vote. 5th, The vote of James Provan given for Mr Lockerby, must be set aside, inasmuch as James Provan was, previous to the election, formally divested of the property, in right of which the vote was given, by a regular delivered deed in favour of his brother, John Provan. 6th, From the circumstances stated, there was a decided majority of votes in favour of Mr Grahame.

Pleaded for the Respondents.—The paper bearing to be the minutes of the meeting of the heritors and elders of the parish of Cadder, on the 5th September 1811, is not entitled to bear faith in judgment. Because, after the meeting had been dissolved, the under clerk at the meeting had taken the minutes away, and altered various passages of the minutes, and he had, besides, made marginal additions thereto; and this, he admitted on oath, had been done by him. It was improper and incompetent for him to do so, even to correct a blunder, far less to alter the sense. Among these alterations was the passage which conferred on Mr Stirling the right to exercise a casting vote in the case of equality, and which, therefore, was interpolated and inserted after the meeting was over, and “from the deponent’s (clerk’s) own conception of what “Mr Stirling had said at the meeting.” 2d, The vote given per mandate, of the curators for Miss Ann Reid, was null and void, and ought not to be counted. In the first place, because Ann Reid being then seventeen years of age, with curators, she was the party to act, and not her curators by themselves. She ought to have signed the mandate, and the mandate ought to have been her mandate, and not the mandate of her curators alone. The want of her signature to that mandate rendered it null and void, because, after

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twelve years of age, every act of the curators must have the consent of the minor, just as every act of a minor having curators, must, in order to render it valid, have the concurrence of the curator. 3d, In regard to the vote of James Provan, which was given for Mr Lockerby, this was a perfectly good vote. He had not then, in point of fact, divested himself of his property in favour of his brother. The conveyance to that brother was merely collusive, and devised to serve a purpose, and to screen his property from his creditors. At the moment of the election, the feudal investiture was in his person, and nothing had been done to take it out of it, and, therefore, he was publicly seized and infeft as proprietor. 4th, In regard to the casting vote exercised by Mr Stirling, two questions arise, 1. Whether, in point of law, he was entitled to give a double vote; and 2. Whether, in point of fact, he was authorized by the meeting to exercise such a vote. 1. There is no rule in the law of Scotland which vests the chairman or preses of such a meeting with any such privilege, as that of giving a double vote. It was a meeting of private individuals met to exercise a common right, in which each of them had an equal interest; and no proof has been offered, that in such a situation, the person placed in the chair, is entitled, by virtue of that office, to a double vote; nor, indeed, is there an instance in any court or assembly of men whatsoever, where such a right is vested in the chairman, except in consequence of express statute, or of long and inveterate custom. In the meetings of creditors, the preses has not two votes. In the law courts of the country no such thing is known; and, till the late judicature acts, the President of the Court of Session had not even an original vote, but merely a casting vote, when there happened to be an equality without him. In the House of Commons the Speaker has no original vote; nor the Lord Chancellor in the House of Lords. And in the Church Courts, the Moderator has no original vote. But, secondly, It is said that the meeting agreed to confer expressly on Mr Stirling, the preses, a double vote; this is totally unfounded. The meeting never agreed to any such thing, and it has been proved by the evidence of the clerk, who inserted this clause in the minutes, that this was done after the meeting was over, and from his own conception of what Mr Stirling had said, when he assumed the chair.

After hearing counsel,

It was ordered and adjudged, that the interlocutors com-

plained of, so far as they refuse the desire of the petition to open the sealed deposition of Ann Reid and Agnes Hamilton, and so far as they find no evidence, that a legal vote was given, or tendered, for, or on behalf of Ann Reid, and so far as they find that Charles Stirling, Esq., had no right *qua preses* to a second and casting vote; and so far as they find that the minutes of the proceedings are not entitled, in the way they were completed, to be considered as unexceptionable *prima facie* evidence, be, and the same are hereby affirmed: And it is further ordered, that the cause be remitted back to the Court of Session to review so much of the interlocutors complained of, as repels the objection proposed to the vote of John (James?) Provan, and in case the Court, upon such review, shall sustain that objection, the Court do review so much of the interlocutors as finds that, without deciding on any other of the points brought under discussion, the legal majority of the votes was given in favour of Mr Thomas Lockerby, and that he was duly elected, and ought to be admitted and inducted assistant and successor to Mr Archibald Provan, as libelled, and decerns, and before answer as to expenses, appoints the account to be given in: And it is further ordered, that after such review, the said Court of Session do order and direct as is just in all respects.

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For the appellants, *Sir Saml. Romilly, Fra. Horner.*

For the Respondents, *John Clerk, James Moncreiff.*

NOTE.—Unreported in the Court of Session. Under this remit the Court repelled the objection stated to the vote of James Provan, and held the legal number of votes to be in favour of Mr Lockerby, and that he was duly elected.

JOHN ALEXANDER HIGGINS, W.S., and
Others,

Appellants;

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JOHN HAMILTON COLT, Esq.; WM. HAMILTON of Westport, Esq.; SIR THOMAS LIVINGSTONE, Bart.; ARCHD. FERRIER, Esq.; Honourable WM. BAILLIE; SIR WM. AUGUSTUS CUNYNGHAME, Bart.; ANDREW BUCHANAN, and GEORGE MORE NISBET, Esqs.,

Respondents.