

No. 38. HUGH ARBUCKLE, Appellant.—*Adam—Keay.*

CAMPBELL INNES, Respondent.—*Spankie.*

Mandate.—Burgh Royal.—A constituent member of a Town-Council, present at an election of Magistrates, having gone abroad; and a petition and complaint having thereafter within the statutory period been presented in his name; and it being alleged that he had granted no mandate authorizing this to be done, and no mandate having been produced, Held (affirming the judgment of the Court of Session,) that the complaint at his instance was incompetent.

Feb. 22, 1827. ON the 26th of November 1825, Hugh Arbuckle, one of the
 1ST DIVISION. constituent members of the meeting for the annual election of
 Lord Medwyn. Magistrates and Councillors of the burgh of Queensferry, held on 29th September 1825, presented to the Court of Session a petition and complaint, complaining of certain wrongs and abuses committed in the course of the election, and praying that the election should be found illegal. M'Bain, a deacon of tailors of the same burgh, was also a complainer, but the question which arose had no relation to him.

Innes, and the other constituent members of the meeting of election, objected, that as Arbuckle had left Scotland a day or two after the Michaelmas election, on a foreign voyage, was furth of the kingdom at the time the complaint was presented, and had left no written mandate for presenting the complaint, it could not competently be insisted in at his instance, and in his name; and as the statutory period within which a complaint could be presented was expired, the election could not be questioned by him.

On the other hand it was stated, that Arbuckle was a native Scotsman,—had been long domiciled as a resident burghess at Queensferry,—was the master of a trading vessel, in consequence of which he was occasionally absent,—that the vessel was his own property, and he also was owner of heritage in the burgh,—that soon after Michaelmas 1825, he sailed with his vessel to a port in the continent, not *animo remanendi*, but intending to navigate his ship home, when the object of the voyage was accomplished,—that, before his departure, he had given verbal instructions to present the complaint; and that accordingly, on the 7th of November, he wrote from Dieppe to his professional agent,—‘ I have been detained here with contrary winds this
 ‘ fortnight. I expected, when I saw you, to have been on my
 ‘ passage home from Rotterdam before this time. I have to go

‘ there for a cargo, and I hope not to be long detained. Prefixed Feb. 22, 1827.
 ‘ I send you a memorandum about our Michaelmas election. I
 ‘ expect that you have got the minute of election. Should you
 ‘ want any farther information on the subject, write me to the
 ‘ care of D. B. and Son, of Rotterdam, and I will attend to it
 ‘ immediately; and should it be necessary for you, I will ra-
 ‘ ther come home from Rotterdam by the way of London as
 ‘ you should be disappointed. I have no doubt that Deacon
 ‘ M‘Bain will allow you to use his name in the petition and
 ‘ complaint. Mr M. could speak to him, or I could send word
 ‘ over from Rotterdam to my mother, for him to go into Edin-
 ‘ burgh to speak to Mr M. Perhaps in the petition and com-
 ‘ plaint it might be as well to conclude for the penalties of
 ‘ L.100 for each person voting who may be found disqualified.’
 The case having been remitted to the Lord Ordinary for pre-
 paration, his Lordship, after doing so, made avizandum to the
 Inner-House on the question of title; and the Court, on the
 11th March 1826, dismissed ‘ the petition and complaint, in so
 ‘ far as it is made by Hugh Arbuckle, and decern; and find him
 ‘ liable in one half of the expenses incurred in process, in terms
 ‘ of the statute.’*

Arbuckle appealed.

Appellant.—As a constituent member of the Michaelmas meeting 1825, for electing Councillors and Magistrates of the burgh of Queensferry, the appellant had a good title to complain of any wrong committed by the majority of the meeting. The appellant was obliged, soon after that meeting, to proceed to sea; but, before he sailed, he gave verbal instructions for presenting the petition and complaint in question at his instance, and repeated these by a letter from Dieppe, referring to these instructions. The temporary absence of the appellant did not create any necessity for a mandate. The appearance of his counsel presumed the existence of a mandate. This is a very different case from that of a foreigner, or of a Scotsman domiciled abroad, instituting a suit in a Scotch court. There a mandatory (although even that, in some cases, may be otherwise supplied) is requisite. But the present is the case of a Scotchman domiciled in Scotland, being absent for a short and temporary purpose, and with the view of speedily returning. The presumption that he has given authority to his professional agent to act in his name, cannot be challenged. The utmost

* See 5 Shaw and Dunlop, No. 253.

Feb. 22, 1827. the respondent could require would be, that on his return he should acknowledge the proceeding. The action, therefore, having been raised within the statutory period, the appellant has an indisputable title to pursue ; and to be allowed to enter into the merits.

Respondent.—The election of the magistrates could only be competently challenged by a summary complaint within two calendar months. The petition and complaint, although presented in time, in name of the appellant, was not at his instance. He had already left Scotland, and had given no authority or mandate for any such proceedings. Even if he had left general instructions of this nature, they would not have been sufficient. There must have been a written mandate for this particular purpose, the holder of which should have appeared and sisted himself as mandatory. The appellant did not offer to prove his alleged parole instructions ; and the letter from Dieppe did not amount to a mandate in favour of the party written to, or of any other person. Had the Court been aware of these circumstances when the complaint was moved, the petition, instead of being ordered to be served, would have been dismissed. Being therefore originally null, and incompetent, as in the name of the appellant, but not at his instance, and the two calendar months having expired, the most express sanction now given by the appellant to all that was done in his absence cannot be of any avail.

The House of Lords ordered and adjudged ‘ that the said ‘ petition and appeal be, and is hereby dismissed this House ; ‘ and that the said interlocutor, so far as therein complained of, ‘ be, and the same is hereby affirmed : And it is further ordered ‘ that the cause be remitted back to the Court of Session in ‘ Scotland, to proceed therein, with respect to the complaint ‘ made by James M‘Bain, as shall be just.’

LORD CHANCELLOR.—My Lords, in the cause in which Hugh Arbuckle was appellant, and Campbell Innes and several other persons were the respondents, the question was, whether Mr Arbuckle, who was absent at the time, had given authority for the institution of certain proceedings upon the election of which he complained ; and the case having been heard before the First Division of the Court of Session, the Court expressed their opinion in the following interlocutor—(his Lordship then read it.) The judgment expressed in this interlocutor proceeds upon the opinion of the Court of Session, that it was necessary that Mr Arbuckle should prove that he had given a mandate to institute the suit.

My Lords, this case, in my judgment, affords a question of very great importance in every way of considering it; but, in a case of this nature, in which it appears to me that the Court of Session, in all human probability, must understand a matter of practice of this sort better than we can understand it; and there being great inconvenience, either in holding that they are right, or that they are wrong, it does not appear to me that it is possible for me to represent to your Lordships that I can form so clear an opinion that they are wrong as to take upon myself to advise your Lordships to reverse the judgment. I should, therefore, propose to your Lordships, that the judgment should be affirmed, and that the cause should be sent back to the Court of Session, to proceed as to the matter of James M'Bain, the other party, according to the reservation in the interlocutor, as they should be advised. Having stated this as my judgment upon this extremely difficult question, and as there are great difficulties, in the one or the other view of the case, it does not appear to me that this is a case in which your Lordships ought to give costs.

Appellant's Authorities.—Stair's Inst. 1. 12. 12.—Ersk. 3. 3. 33.—O'Haggen, July 31, 1761. (4644.)—Hope, June 10, 1797. (4646.)—Ivory's Forms, Vol. 1. p. 162.—Scott, Jan. 29, 1823.—(2 Shaw and Dunlop, No. 152.)—Ewing, Nov. 28, 1823.—(2 Shaw and Dunlop, No. 521.)

Respondents' Authorities.—7. Geo. II. cap. 16. § 7.—16 Geo. II. 2. § 24.—14 Geo. III. c. 81.—Bell's Election Law, p. 493.—Campbell, June 24, 1814. (Fac. Col.)—Bank. Inst. 4. 3. 26. &c.—Stewart, Feb. 3, 1681. (353.)—Butler, July 31, 1708. (356.)—Dundas, July 20, 1780. (8837.)—Davidson, July 6, 1802. (8842.)—M'Innes, June 3, 1813. (Fac. Col.)—Cameron, Feb. 28, 1818. (Fac. Col.)—M'Coll, Jan. 17, 1822. (1 Shaw and Dunlop, No. 284.)—Taaffe, Feb. 22, 1822. (1 Shaw and Dunlop, No. 387.)—Hamilton, May 18, 1822. (1 Shaw and Dunlop, No. 477.)—Gibson, Dec. 17, 1822. (1 Shaw and Dunlop, No. 90.)—Scott, Jan. 29, 1823.—(2 Shaw and Dunlop, No. 152.)—Grant, Nov. 30, 1825. (2 Shaw and Dunlop, No. 190.)—Paxton, 1749. (16121.)—Gray, Feb. 24, 1804. (App. No. 15. Burgh Royal.)—Speirs, March 3, 1826. (4 Shaw and Dunlop, No. 341.)

JAMES CAMPBELL—RICHARDSON and CONNELL, Solicitors.

JAMES GARDNER and Others, Appellants.

No. 39.

JAMES REEKIE and Others, Respondents.

Burgh Royal.—Set.—Usage.—The Court of Session having found that there was not sufficient usage established to modify the written set of a Royal Burgh, the House of Lords remitted to make further inquiries.

By the set of the burgh of Kilrenny, dated 5th September 1710, the election of Bailies and Treasurer is declared to proceed in this manner:—

‘ Three days before the third Thursday of September, which is the day fixed for the said election, the bailies cause their

March 23, 1827.
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