No. 13. MAGISTRATES of DUNDEE, Appellants. — *Lushington — Rutherfurd.*

JOHN MACKENZIE LINDSAY, Respondent.—*Spankie—Robertson.*

Burgh Royal—Process—Appeal.—1. The town council of a royal burgh being empowered by the set, in the event of the person elected Dean of Guild by the guildry not producing evidence of his qualification to hold the office, to elect a Dean of Guild themselves; but having, in respect the party elected by a majority of the guildry was disqualified, found that another candidate supported by an apparent minority was duly elected, and that the votes for the other candidate, to whom no objection was stated at the meeting of guildry, were thrown away — Held (affirming the judgment of the Court of Session) that the Town Council had not exercised their powers under the set, and that the whole election was illegal, null and void.

2. After an appeal had been entered against a judgment reducing an election of Magistrates, and the parties (as was alleged) came to an understanding, for political reasons, to allow it to be heard *ex parte*, found competent for a burgess, although not a member of Council, to be sisted and heard as respondent, but that a candidate as Member of Parliament was not so entitled.

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2D DIVISION.
Ld. Moncreiff.

BY the set of the royal burgh of Dundee, the election of the Dean of Guild and Councillor to the Guild, who are constituent members of the Town Council, is regulated as follows:—" On " the Wednesday immediately after the election of the provost " and other office-bearers, the Guildry Incorporation shall meet " at eleven o'clock in the forenoon, in the Guildhall, or such " other place in Dundee as a general meeting of the guildry " shall at any time fix, and, by the voice of a majority of the " members present, elect a guild-brother, being a burgess, " to be Dean of Guild for the year ensuing; and another guild-" brother, being also a burgess, to be Councillor to the Guild " also for the year ensuing. The Dean of Guild, and Councillor " to the Guild, shall attend the first stated meeting of council " after their election; and, before taking their seats in council, " shall produce their several burgess and guildry tickets, as " evidence of their being burgesses and guild-brothers, with an " extract of the minute of their election, certified by the clerk of " the guildry." A similar course of proceeding is prescribed for the convener and deacon of trades; and, with reference to this matter, the set declares, that " in case the Dean of Guild and " Councillor to the Guild, and convener, or any of them, shall " fail to appear in council on the day appointed for their taking " their seats—or appearing, fail to produce the requisite evi-

"dence of their several elections and qualifications,—or if it "shall appear, from the evidence produced, that the guildry "and trades, or either of these bodies, have made a double "election, then and in any of these cases the right of sup-"plying the deficiency which shall have thus arisen in the "Council shall, for that year, devolve on the Magistrates and "Council, who shall immediately elect a Dean of Guild and "Councillor to the Guild, or either of them, in place of the "Dean of Guild and Councillor to the Guild who have so "failed to take their seats as elected by the guildry, and a "Trades Councillor in place of the Convener who has so failed "to take his seat as elected by the trades; without prejudice, "however, to the guildry and nine incorporated trades exer-"cising their respective rights to elect those members of "Council in future years."

Alexander Kay and William Lindsay, were put in nomination for the office of Dean of Guild at the meeting of guildry held on the 3d of October 1827 for the purpose of election. No objection was stated to Kay, as not being duly qualified to be elected; and on the roll being called there appeared for him 141 votes, and for Lindsay 128. A scrutiny of the votes was commenced, but abandoned; Kay was thereupon declared by the presiding Dean to be duly elected—was called in—took the chair—and presided at the election of the Guild Councillor; but a protest was taken for Lindsay, that he was the duly elected Dean. On the 8th October, at the first meeting of Council held thereafter, Kay appeared, presented an extract of the minutes of election, and claimed to be received as Dean of Guild for the ensuing year. To this it was objected, *inter alia*, that he was not qualified, as being a burgess only for his lifetime, and not for his heirs and successors,—which last description of burgess-ship was said to be necessary to qualify a party for office; and the Provost moved, "That the Council do find "and declare that the said Alexander Kay has not produced "the requisite evidence of his qualification for the office in "terms of the sett of the burgh, and therefore cannot be "received by the Council as Dean of Guild;" and this motion was seconded by Mr. Anderson.

Calman, Old Bailie and Councillor, moved, as an amendment "That the Council do find and declare that the said Alexander "Kay has produced the requisite evidence of his qualification

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The question having been put, and the vote called, all the members present voted against the amendment, and in support of the Provost's motion, except Calman and Gardener, who voted in support of the amendment, and against the Provost's motion; but two Merchant Councillors had left the meeting before the roll was called; and accordingly the Council, Calman and Gardener dissentient, found and declared in terms of the Provost's motion.

Thereafter the Council, by a majority, found and declared, "That, in respect the Council have determined, and hereby "determine and declare, that the said Alexander Kay is not "legally qualified to hold the office of Dean of Guild, it is un-"necessary to enter on any inquiry of the other objections."

After the Council had thus rejected Kay, Lindsay appeared, and, producing the minutes of the guildry meeting, claimed a seat in Council as Dean of Guild duly elected, as set forth in the said minute.

Against Lindsay's claim two objections were made: "1. That "he had not been elected to the office of Dean of Guild by the "guildry. 2. That, on the contrary, he had a minority of votes; "but, independently of this, many of his voters were disqua-"lified because they were members of one or more of the nine "incorporated trades of Dundee, and did not produce evidence "that they had renounced their political privileges as such."

Thereon the Provost moved, "That the Council, having con-"sidered the claim of the said William Lindsay, the said extract-"minutes of the meeting of the guildry, and the evidence pro-"duced by the said William Lindsay of his being a burgess and "guild-brother, and the whole proceedings above recorded, and "also specially the objections stated by the said Alexander Kay "above mentioned,—find, that the said William Lindsay has "produced sufficient evidence of his being a burgess and guild-"brother: find, that it appears from the said extract-minutes of "the meeting of the guildry that the said William Lindsay "and the said Alexander Kay were the only persons put in "nomination for the office of Dean of Guild, and that there "were votes which have not been objected to for each of them: "find also, that the Council have already determined that the said "Alexander Kay is not legally qualified to hold the office of

" Dean of Guild : find therefore, that the votes given for the said " Alexander Kay are not to be regarded : find likewise, that " as there were unchallenged votes in favour of the said " William Lindsay, and no other person in nomination legally " qualified to hold the office, it is not necessary to inquire " whether the particular votes mentioned in the objections were " legal votes or not; and therefore that the said William Lindsay, " the only qualified candidate, has been legally elected by the " guildry to be Dean of Guild for the ensuing year." Calman moved, as an amendment, " That the said William Lindsay " was not legally elected to be Dean of Guild, in respect it " appears from the extract-minutes produced that it was not " Mr. Lindsay, but Mr. Kay, who had the majority of votes at " the said meeting, and that therefore the Council cannot receive " Mr. Lindsay as a member of Council ;" and the vote having been called, all the members present voted against the amendment, and in support of the Provost's motion, except Calman and Gardener, who voted for the amendment, and accordingly the Council found in terms of the Provost's motion.

Thereafter Lindsay was admitted and received by the Council as Dean of Guild for the ensuing year, and he accepted of his office, promised to be faithful, and took his seat in Council.

At the same time John Morton (whose burgess ticket was alleged to be precisely similar to that of Kay) was admitted as Guild Councillor.

Kay and Morton then presented a petition and complaint, the fee-fund dues of which were paid on the 7th December, and it was marked as boxed and lodged on the 8th. They prayed the Court to find that " the whole of the said annual election or pre-" tended election is illegal, contrary to the sett, laws, and con-" stitution of the said burgh, and the laws of the land, and ab-" solutely null and void, and to reduce and set aside the same " accordingly ; or at least to find that the said pretended election " of the said William Lindsay as Dean of Guild is illegal, contrary " to the sett, laws, and constitution of the burgh, and the laws " of the land, and absolutely null and void, and to reduce and set " aside the same accordingly ; and to find and declare that the " complainer, Alexander Kay, was legally elected to the said " office, and has the only legal and undoubted right and title to " the same, and ought to have been received and admitted by " the Town Council into their body as Dean of Guild accord-" ingly ; and to ordain the persons complained upon still to

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This they maintained on these grounds:—"1, The complainer, "Alexander Kay, was duly elected Dean of Guild by the "guildry, and is now the only legal Dean, and as such ought "to have been received by the Magistrates and Town Council, "the objection taken against his qualification, that he was not a "burgess, being groundless and totally unsupported by the sett, "and contrary to the usage of the burgh.

"2. Supposing the complainer not to have been duly elected "by the guildry, or to have forfeited the office conferred upon "him by that election, in consequence of the disqualification "alleged against him, there was no legal election of Dean of "Guild at all; for no notice having been given to the electors at "the meeting for election, of the said pretended disqualification "as existing against the complainer, there was no legal ground "for holding the votes of the majority of the meeting as thrown "away; and there being a majority of votes against Mr. William "Lindsay, that gentleman was of course not elected Dean of "Guild by the guildry; therefore the decision of the Council "that he was so elected, with their consequent admission of him "as a member of Council, was contrary both to fact and law.

"3. If the complainer, who was the only person elected Dean "of Guild by the guildry, did not produce to the Council sufficient evidence of his qualifications to hold that office, or "otherwise forfeited his right to be received by the Council, "then, Mr. Lindsay not having been elected by the guildry, "the only course allowed by the sett for filling up the office was, "that the Council should themselves, *jure devoluto*, have elected "a Dean of Guild by an independent act of election of their "own; and this not having been done, the necessary consequence would be, that no Dean of Guild has been legally "elected at all.

"4. Supposing the objection taken against the qualification "of the complainer, Mr. Kay, to be well founded, the complainer, "Mr Morton, whose qualification is liable to similar objection, "has not been legally elected Councillor to the Guild, and the "full and necessary number of the Council has not been filled up.

"5. If the election, either of the Dean of Guild or Councillor to the Guild, was contrary to law, the consequence "must be, that the whole election of Magistrates and Councillors becomes null and falls to the ground."

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Against the competency of this petition it was objected, that as the election of the Dean took place on the 3d October, and the petition had not been lodged till the 8th December, the statutory period of two months had elapsed; but the Court (31st May 1828), holding the admission of the Dean on the 8th October to be the last step of the election, found the complaint competent.*

While this discussion was going on, the Council, at the election of 1828, cited Kay to attend and act as Dean of Guild; and on his failure they elected to the office, as in virtue of their jus devolutum, Jobson, who acted as Dean in the several parts of the election. In the meantime, the cause having been remitted to the Lord Ordinary for preparation, condescendences and answers were given in and revised. The parties differed widely on the facts necessary to determine the objections to the qualifications of the two candidates and the validity of the votes at the guildry meeting; but, at the request of the parties, the Lord Ordinary reported the cause, without however closing the record, lest it might be necessary to remit to the Jury Court. His Lordship added the subjoined note.†

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* 6 Shaw and Dunlop, No. 322.

† The Lord Ordinary reports this case at the desire of both the parties. The complaint contains alternative conclusions; either, 1. To have it found that the whole election of the Magistrates and Council at Michaelmas 1827 was null and void, in respect that there was no legal election of the Dean of Guild completed in terms of the set; or, 2. To have it found that William Lindsay, the person received by the Council as Dean of Guild, was not duly elected; and that the complainer, Alexander Kay, was duly elected, and ought to have been admitted by the Council. The merits of the case depend partly on matters of fact, in which the averments of the parties are opposite, and partly on questions of law; and in some points the law and the fact are very much mixed together. 1. The first plea in law for the complainer, and the first part of the first counter plea for the respondents, depend on the facts regarding Mr. Kay's situation as a burgess and as a guild-brother, on the construction of the set, on the usage of the burgh in regard to the admission of burgesses and guild-brethren, and on the validity of the votes given at the election meeting. Though there may be a good deal of law involved in this part of the case, it would probably appear to be fit for trial in the Jury Court if not superseded by other points. 2. The second plea in law for the complainer is, that, supposing him not to have been qualified to be elected, it was incompetent for the Council to declare his competitor duly elected, in respect that no notice of the objection to his qualification was given at the election meeting, whereby the votes given for him were not thrown away; and the third plea on the same supposition is, that the Council could only make an independent election of a qualified person by their own powers, jure devoluto, and that by the course which they have followed no Dean was elected. These pleas seem to depend on questions of pure law, assuming the facts as against the complainer; and they are met by the second part of the respondent's first plea. 3. The last or fifth

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After a hearing in presence, the Court, on the 9th March 1830, pronounced this interlocutor:—" In respect that the election of Alexander Kay as Dean of Guild of the burgh of " Dundee, for the year ending the 8th of October 1827, was " not duly completed and declared by the Council in terms of " the set of the burgh, and that William Lindsay was not duly " elected Dean of Guild in terms of the set, and that the number of the council, at the close of the annual election complained of was thereby incomplete, therefore find the whole " election of Magistrates and Council of the burgh of Dundee " for the said year illegal, null, and void; and decern and declare " accordingly."*

On the 11th, the Court appointed interim Managers†; and against these judgments the Magistrates, on the 23d, entered an Appeal, but they allowed it to fall by not lodging their case in due time. They then, on the 24th of June, presented a petition to the King in Council, setting forth that the burgh had been disfranchised, and praying for a royal warrant containing a new set of political constitution for the burgh. A dissolution of Parliament being expected, two candidates announced themselves, the Hon. Donald Ogilvie and the Hon. J. S. Wortley, for the representation of the district of Burghs of which Dundee formed a part, and in consequence a

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plea in law for the complainer, that if no Dean of Guild was lawfully chosen there was no legal election, would, if his second and third pleas were also sustained, support the first conclusion of the complaint. 4. The fourth plea in law for the complainer relates to the alleged disqualification of Mr. Lindsay, the person declared to be duly elected; and this involves a case of fact, construction, and usage which would probably require trial; but, 5. The respondents, in a third branch of their first plea in law, maintain, that even though they erred in judgment the proceeding was judicial, and, though subject to review, would not infer a nullity in the whole election. This is a point of law which, if sustained, would, on the supposition made, introduce the second alternative conclusion of the complaint; but it probably would not be decided unless the facts were either admitted or ascertained by trial. 6. But the respondents, in their second plea in law, further maintain, that, supposing neither Mr Kay nor Mr. Lindsay to have been legally elected in 1827, a Dean of Guild was lawfully elected by the Council, in virtue of their own powers, in 1828. This involves a question of law as to the effect of the proceeding referred to, to prevent the consequences of any error in the election of 1827. In this state of the case it has been thought proper to report the cause, rather than at once to send it to the Jury Court; and as it has been found inconvenient in other cases to have a shut record where a remit to Jury trial may take place, the record, though fully made up and revised, has not been closed.

* 8 Shaw and Dunlop, No. 338. † Ibid. No. 348.

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meeting of the managers was held on the 13th of July, when, after expressing their regret that the burgh had from disfranchisement no vote, they recommended the other burghs to support Mr. Wortley. A general election having taken place, and the contest between these two gentlemen being equal, a delegate was appointed for Dundee, and in consequence Mr. Wortley was returned. Against this Mr. Ogilvie petitioned; and a Committee of the House of Commons being appointed, the Magistrates, on the 10th of November, presented a new petition of appeal, and on the 7th of December the committee resolved that the election was void. A new writ was in consequence issued, when a contest took place between the Hon. William Ogilvie and the Right Hon. Francis Jeffrey, who had just been appointed His Majesty's Advocate for Scotland. A delegate was again sent by Dundee, and the Lord Advocate having thereby a majority obtained the return. Against this Mr. Ogilvie presented a petition to the House of Commons; and the Magistrates, having (as was alleged) come to an understanding with Kay and Morton, the original respondents, applied to the House of Lords to have the cause heard on an early day, and ex parte, in respect that Kay and Morton had lodged no case. Mr. Ogilvie and John Mackenzie Lindsay, a burgess and guild brother, but not a member of council, thereupon presented petitions to the House of Lords, the former stating the position in which he stood as a candidate for the representation of the burghs, but not alleging that he was a burgess of Dundee, while the latter stated that he was a burgess and guild brother, and praying that they should be permitted to appear as respondents, and be heard against the appeal. The Committee on Appeals reported, that "they were of opinion, under the circumstances of the case, that "the said petitioner, John Mackenzie Lindsay, might be allowed "to appear as a party respondent to the said appeal, and be heard "by his counsel against the same, but with a saving of all objections* which may be made on the hearing of the appeal to "the competency of his being so let in as a respondent," and that they were "of opinion that the prayer of the petition of the "said William Ogilvie ought not to be complied with."

* On opening the case, the appellants waived all objections to John M. Lindsay being let in as a respondent.

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Appellants.—1. By the statute 7 Geo. II. c. 16. § 7. it is enacted, that it shall be competent to complain of any wrong "done at any annual election" "only within the space of eight "weeks after such election is over;" and by the 16 Geo. II. c. 11. § 24. the period is declared to be "two calendar months "after the annual election of the Magistrates and Councillors." In Dundee the election commenced on the 2d of October 1827, by choosing nineteen members of the Town Council, and on the 3d it was concluded by the Dean of Guild and a Councillor being on that day elected so as to make up the complete number of the Town Council; the election therefore terminated on that day; and although it is true that a subsequent meeting was held on the 8th to receive the Dean of Guild and Councillor, yet this was not an act of election, but a judicial proceeding; but as the petition and complaint were not lodged till the 8th of December, and the statutory period had expired on the 3d, it was incompetent, and consequently the judgments complained of unwarranted.

2. The original complainer, Kay, was not qualified to hold the office of Dean of Guild, and those who voted for him threw away their votes. It was not necessary to state any objection to his qualification; the electors were bound to know whether he was qualified or not before giving their votes. Although this matter goes to the foundation of the case, and the appellants offered proof that Kay was not qualified, the Court below did not allow such evidence to be taken.

Independent of this, his competitor Lindsay had the majority of legal votes. On this point also the appellants were always ready to join issue; and as the leaning of the court ought to be against disfranchisement, they ought to have been permitted to have had this matter investigated.

At all events, as both Kay and Lindsay were cited to appear at the election of 1828, and they failed to attend, the appellants were entitled, in virtue of their jus devolutum, to make choice of a Dean of Guild; and as that election was not complained of, and was regular, the burgh ought not to have been disfranchised.

Respondent (Lindsay).—1. The proceedings on the 2d and 3d of October were merely preliminary or initiatory steps towards the election of the Magistrates and Council, and that election was not complete till the 8th of October. The evil complained

of is the act which was done on that occasion, and consequently there were no grounds of complaint till it occurred. Besides being the last of a continuous act of election, the statutory period must be counted from that date, and not from any of the intermediate ones.

2. No objection was stated to Kay as a qualified person at the time of the election; and it is not denied that he was, at least to certain effects, a burgess and member of the guild. By allowing him to be put in nomination without objection one of two consequences follow, either that all objection was waived, or that no valid election has taken place. In either case the complaint is well founded. Although a scrutiny was competent on the occasion of the election by the guild, yet so soon as the election was over it was incompetent, and cannot now be entered upon. Besides, a scrutiny was begun, but abandoned, and Kay regularly installed into his office.

If the election of 1827 was illegal, then no subsequent election could, without the intervention of a royal warrant, be valid; and, besides, the general rule of law is, pendente lite nihil innovandum est.

Lord Chancellor.—My Lords, when this case was opening, I entertained, for a considerable time, some doubt upon one point, as my noble and learned friend did on another. I have since, and I believe my noble and learned friend concurs in that opinion, satisfied myself that those doubts, grounded on the words of the act of parliament, and the terms of the 6th article of the sett, with the proceedings thereupon, were not well founded, and that the Court below has come to a right decision on that point as well as on the other. Two questions are brought into discussion by this appeal. One is the question of limitation. Whether or not the statutory period of two months had elapsed before the petition and complaint (which summary mode of proceeding gave rise to the present appeal) was presented? The other, whether or not, admitting the petition and complaint to have been duly prosecuted, and within the statutory time, the Court came to a sound conclusion on the merits of the case? The first of these questions, if decided in favour of this appeal, would render the other wholly immaterial. The second question only becomes material in the event of the first being given against the appellants.

According to the view I take of this case, the second question becomes material, and is raised before your Lordships. The first question depends on another, namely, what shall be taken to be the

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the sixth article plainly requiring him to take his seat on doing more than being elected—on doing more than even producing an extract of the minute of his election—on producing his qualification—his burgess and guildry ticket? If all that was wanted was his being elected, the producing an extract of the minute of his election would be enough, because he was elected, and his election was not disputed; but it requires him to go further, and to produce the evidence of being a burgess and guild-brother, by producing the burgess and guildry ticket, which production is never once hinted at in section fourth of the sett, the one that regulates the mode of proceeding at the guildry for the election. Now, this goes far to throw light on what constitutes the complete election, and to get rid of what at first had struck me, namely, the difference between the election and taking seat; because the expressions are, "the first meeting after the election," which should seem to imply the election was over at that time; "and before taking their seats," not before being elected councillors, "shall produce a minutë of their election," intimating the election was over, "certified by the clerk;" and the sett further says, if any persons shall fail to appear, or, appearing, fail to produce the requisite evidence of their several elections and qualifications, or "there shall have been made" (in the past tense) "a double election," thus indicating that the election was one stage, as it at first appeared, and the taking the seat another thing, done subsequent to and independent of the election, and not constituting any part of the election; but when you take into consideration the matters which I have just now referred to in respect of the induction, as it were, of the councillors, the difficulty which arose on what I have last referred to appears to be got rid of. Now come we to the act itself. The first act is less material, both because in point of time antecedent to the other, and because the other is more explanatory and more precise. It says, that "whoever apprehends wrong done at any annual election is to bring his action before the Court;" that is, his action, and not his summary petition, for making void; "they are to hear it summarily; but it is an action for making void the whole election (if illegal) only within the space of eight weeks after such election is over." From this it might be contended, that you are to run the date eight weeks from the period of election of which you complain; but the 18th of Geo. II. cap. 11. sec. 24. appears to me to leave really no doubt on the soundness of the construction; for that says, "to apply to the said Court of Session by a summary proceeding (which this proceeding is) to rectify such abuse, or for making void the whole election made by the majority, or for declaring and ascertaining the election made by the majority, so as such complaint be presented to the said Court of Session within two calendar months after the annual election of the

March 17, 1831. magistrates and councillors." It seems to me to make the whole proceeding one election from the beginning to the end, (all the steps taken together,) and to make the two months run from the determination of those steps, from the last of the steps which completes that called in this part not "election," or "such election," or "election complained of," but "the annual election," as a thing known in the law,—"the annual election of the magistrates and town councillors." I am therefore of opinion with the Court below, that, in this case, that must be taken as the period from which the two months are to run; and then, my Lords, how greatly is that construction aided by the consideration, that if you do not give it this meaning, you really do no common fairness towards the act of parliament. You are always to lean towards that construction which makes an instrument consistent with itself or its principle; and in this case the construction contended for on the appellants' part gives rise to one of the greatest absurdities we can well imagine. This is a summary complaint and summary remedy,—it is festinum remedium; and it is to receive, being beneficial, a large and liberal interpretation. You will exclude the benefit of that summary remedy altogether, as to every act or wrong meant to be complained of, if the party does not apply within two months from a time when, for aught that appears, he had no ground of complaint whatever. The two months, within which his application for the remedy is to be confined, would run from one period,—not the period of the wrong complained of, for which the redress is meant to be given, but from another period when, perhaps, he had no complaint to make,—as, for example, in this very case of Mr. Kay (for it illustrates the argument very remarkably), he had no complaint on the 3d of October; he was then elected by a majority of thirteen; his complaint first began on the 8th of October, not at the time of his being elected, which he had no objection to, but at the time of the council refusing the vote of the guildry, and saying, "Although you have a majority of thirteen, yet you are not elected, because you are not a burgess, a guild-brother; but Mr. Lindsay, who had the minority of thirteen, ought to have been elected; and we elect him, although no notice was given of the flaw in your title." If this did take place within a week, no doubt that left Kay time to apply; but the next meeting of the council might have been three months afterwards, and then is he to be told, Because you did not apply when you had nothing to complain of, therefore you are too late? I think, my Lords, it would be an absurd and a monstrous conclusion to suppose the legislature meant to exclude a very possible case, namely, that of the time having elapsed within which the complaint must be taken advantage of, before any one thing occurred of which the party could have a right to complain. Upon this ground I think

the Court has well decided; and therefore the question of the merits is raised before your Lordships. March 17, 1831.

I am also of opinion that the Court below was right on this question. The thing complained of,—brought before the Court of Session,—decided on by the Court,—and brought before us by appeal, —is the thing which formed the subject of the petition and complaint; consequently, what is before us to decide on appeal is and can be none other than that which took place on the 8th of October, —the decision of council setting aside Kay's election, which I do not complain of, and putting Lindsay in his place, which I do complain of. Now, what was the Court of Session to do with this point? Were they to maintain,—" True it is, Lindsay, having the minority, " beat Kay, who had the majority; because Lindsay had a qualifi- " cation which was never brought in question, and Kay had no " qualification—which objection was not taken at the time;—but " then, if you had done something else, and had chosen either to " scrutinize the majority of Kay,—in which case you might have " found Lindsay had the majority,—or had taken advantage of your " jus devolutum, and elected him yourselves, he would have been " duly elected, and therefore, quacunque via data, Lindsay is to be " sustained as duly elected; and although you, the council, came " to that conclusion in a wrong and absurd and inconsistent manner, " yet as you have come, on the whole, to a right conclusion, we will " not listen to this petition and complaint." That is the argument; but it is wrong, fundamentally wrong, because the question was, whether or not the council had done right in rejecting Kay, who had the majority of thirteen; and not only rejecting him for want of qualification, but putting Lindsay in his place, who had the minority,—there having been no notice given at the election to make the votes thrown away which were given for Kay? That is what was before the Court of Session; but the scrutiny was not before the Court. The Court had no right to say, " If you had scrutinized, you would have found Lindsay had " the majority;" for non constat he would be found to have the majority. But then is it meant to be said, " the Court ought to " have sent the matter back to the council, and let them go into " the scrutiny?" My Lords, it has been clearly and demonstratively shewn to you that they could not have sent it back, because the council cannot scrutinize. You might as well send back to the crown office to scrutinize the return of a knight of the shire. The scrutiny ought to be, and can only be, in the guildry, which is the elective body, and before whom Lindsay ought to have taken his objections to Kay's majority; and if he had chosen then to object, and to demand a scrutiny, they were bound to have given it him, and they were the persons to have expedited the proceeding; but

March 17, 1831. we have no evidence whatever, and the principle is all against it, that the council had the organs,—the instruments or powers necessary for entertaining the question of scrutiny, or conducting it in any way whatever. Then, my Lords, it might be said, and at first that struck me with some force; "You ought to lean against dis-" franchisement;—you saw you were about to do a thing exceed-" ingly to be avoided—to disfranchise the borough; you ought to " have sent it back to elect Kay, because he had the majority of " votes, and Lindsay ought not to be put in his place." But the answer is, that Kay, although he had the majority of votes, had not complied with the requisite of producing his guildry and burgess ticket. There the council were quite right; by the sixth article of the sett, unless he produces the guildry and burgess ticket, he shall not be a councillor; and he was not elected a dean of guild any more than a councillor, because the sixth article, although it in no way shews that the burgess ticket or the qualification is to be produced at the election, clearly shews that he must be a burgess at the time of the election; for it says, a burgess (a guild-brother being a burgess) to be dean of guild; consequently, I do not see how it was possible for the Court of Session to have remitted to the council to elect Mr. Kay in the room of Mr. Lindsay, whom they displaced. But it must also be observed, that the council is over,—the elections are at an end. The nature of the election is annual by the act of parliament, by the sett of the borough, and by the common law of the land in Scotland; and you could not have sent back, and have them to do any thing, either to scrutinize or to place Kay on the poll, as it were; because there was an end of those parties as a council,—there was an end of their whole election. The whole election is to be conducted once a year, at a particular time; and we all know that in England the common law said, however inconvenient, however hard, it may prove, still if the day has passed over, no mandamus shall lie to remedy that difficulty, though there should be a disfranchisement of the corporation; so that a statute had to be passed, for applying the remedy, by mandamus.

Then last of all shall it be said that jus devolutum occurred? My answer is, if it had occurred, and if Lindsay had been elected by the council in virtue of any jus devolutum, that would have been a complete answer to the petition and complaint, as far as the disfranchisement of the borough goes. It would then have been a complete election by the jus devolutum; but I deny that it occurred here. The jus devolutum occurs under the sixth article of the sett (which is the governing part of the charter here), either if they shall fail to appear on the day appointed, or, appearing, shall fail to produce the requisite evidence of their several elections, and of their qualifications. They did produce the evidence of the election,

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and one of them produced the evidence of the qualification, although needless, for it does not appear that the same party who was elected produced his qualification. The truth is, that the council thought the person who had been duly elected was Lindsay, with a qualification; but they thought that the person who had produced no qualification, and yet was elected apparently, was not duly elected. But they never went on with the proceedings, on the supposition that no man had appeared, or, appearing, had failed to produce, both election and qualification; on the contrary, their interlocutor affirms that Lindsay was elected, and that he was qualified, and consequently they themselves exclude their jus devolutum; they do not elect on the principle of jus devolutum, as the jus devolutum gave them a right to elect; but they do not elect,—they say, "The guildry "elected you. The guildry tried to elect Kay, but they could not; "and we set aside Kay and elected Lindsay, who had a minority, in "an error. We do not proceed to elect, ourselves, by virtue of the "jus devolutum devolved on us." I am inclined to think they might, if they had chosen to say, "The jus devolutum comes to us, and by "virtue of that we elect Lindsay;" but they did not do so, and that is enough for the purpose of the argument. The law means to invest the council, in one of certain events, with the right of election; but they must elect, in order to comply with that part of the sett. They did not elect; but they say, "Lindsay was elected by the guild," which he was not.

Upon these grounds, my Lords, I have a clear opinion respecting this case. I think I have listened attentively to the argument; I am sure I have listened impartially. It is said to be a political question. I know of no politics in this place. But partiality, as between the conflicting interests, I can have none. Towards one party, supposed to be interested in the question, I stood in the relation of counsel to a client; towards the other party I stand in the relation of a very old friend. Thus situated, if I had felt any doubt upon the subject, I should have declined troubling your Lordships, as not a safe adviser; or, at all events, should have declined giving my opinion until I had had the opportunity of further consultation on the question. But as I entertain no doubt whatever on any of the points, I feel myself bound to give your Lordships the best of my advice; and I have no hesitation in moving that the interlocutor be affirmed.

Lord Wynford.—After the very elaborate judgment which has just been pronounced, it is hardly necessary for me, my Lords, to add any thing. The only one doubt that I ever entertained on this case was, whether the Court of Session ought not to have directed an inquiry as to whether Mr. Lindsay had the majority of legal

March 17, 1831. votes; but I am now satisfied that Mr. Lindsay lost the opportunity of having that inquired into. If he wished for inquiry, it should have been by scrutiny before the electors. A scrutiny was begun by him, but was abandoned; and the two questions that are raised in this case are on the limitation of time, and on the merits. As to the limitation of time, the words of the act of parliament are, that the proceedings shall be had within two months after the election. When was the election terminated? Not until it was ascertained who was to fill the office. This cannot be known until it be determined who has the votes of the majority of the electors, and whether the person who has this majority is duly qualified to fill the office. If he be not so qualified, the election by the voters goes for nothing. When was the election in this case complete? Mr. Kay was elected, but Mr. Kay was afterwards found not to possess that which was requisite to make a complete election — the qualification to serve the office. Mr. Lindsay was not thought to be elected until the meeting of the 8th of October. That is the only possible day from which to date with reference to the election of Mr. Lindsay, for until this 8th of October it was supposed that Mr. Kay was the person elected, and not Mr. Lindsay. Would it not be absurd to say, therefore, that the time should begin to run, with regard to the election of Mr. Lindsay, from a period when Mr. Lindsay was not supposed to be the person elected? I therefore agree with the Court below, that we are to consider the election as ended when the last act is done which is essential to ascertain who is the successful candidate. This is very distinguishable from cases of the elections of members of parliament. The election of a member of parliament is completed in England from the moment the return is made by the returning officer. Here it appears to me, looking at the setts, that the election is not completed until the party elected has proved his qualification. The votes of the electors are to be ascertained by the guildry, but the election is not completed until you know whether the party who has the majority of votes has the qualification to serve the office: that is not to be done by the guildry. The words of the sett require that the candidate should prove his election and his qualification. Until that qualification is proved, I think, in the language of common sense, the election (under these setts regulating the rights of the corporation) is not completed. That being so, it appears to me that the Court below was perfectly right in saying that the petition was lodged in due time; and then upon the merits I do not think there can be the least doubt, because it is quite clear in this case, that unless the argument which was urged in the Court below could have prevailed, (which cannot, consistently with the election law of Scotland and of England,) that where a party is disqualified, that the other party,

although in the minority, although no notice is given, can claim to be returned, there is no pretence for considering Mr. Lindsay as duly elected. Mr. Lindsay was in the minority; and probably if the other electors of the borough had known that the person who had most votes was not a person qualified to serve, another candidate would have been put up, and Mr. Lindsay would not have been elected. That is the principle on which it has been decided, that unless notice be given of the disqualification of a candidate, the person having the minority of votes shall never be considered as duly elected, but the election shall be annulled. It is not necessary to say whether the question of the right of devolution had arisen or not, because that which was done was an act completing the election of Lindsay on that day. That act is appealed against, and I think that it has been disposed of properly by the Court below. It has been said the effect of this will be to disfranchise the corporation. We have been in the habit in Westminster Hall of moaning over corporations as if they were individual persons. There is, however, between a corporation and an individual this distinction, that a corporation may be revived again by the ordinary authority of the sovereign, whereas an individual person, if his dissolution has taken place, cannot be restored to life but by a miracle. I do not apprehend that any great injury will follow from this corporation being disfranchised, because his Majesty can call it back into existence again, either with the same powers, or, if he chooses to amend the corporation, by giving it such a new amended form as his Majesty in his wisdom shall think proper. My Lords, for these reasons I concur with my noble and learned friend in giving my vote for the confirmation of the judgment which has been pronounced in the Court below.

The House of Lords ordered and adjudged, That the interlocutors complained of be affirmed.

Appellants' Authorities. — Henderson, July 3, 1821; 1 Shaw & Dun. No. 125.; Glass, Feb. 28, 1754 (1875); Pratt, June 9, 1824; 3 Shaw & Dun. No. 85.; Learmouth, June 1, 1826; 4 Shaw & Dun. No. 401; Kidd on Corporations, p. 15—20; Perth, Feb. 11, 1741 (Elchies v. Burgh Royal, No. 16.)

Respondent's Authorities.—Wight, 337; Perth, 16 Feb. 1780; Connell, 385.

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