[20*th July* 1838.]

ADAM MONTEITH and others, Appellants and Respondents.—*Sir William Follett—Dr. Lushington—Monteith.*

ROBERT M'GAVIN, Respondent and Appellant.—*Hill—Austin.*

Burgh—Process—Stat. 3 & 4 *W. IV. c.* 76.—A claimant for enrolment as a voter in a royal burgh was admitted by the sheriff to the roll of parliamentary voters, and his name was transferred to the list of municipal electors appointed by the municipal reform act to be completed on or before the 16th of September yearly, but the judgment of the sheriff admitting him was reversed by the Appeal Court, and his name struck out of the parliamentary roll in October thereafter:—Held (affirming the judgment of the Court of Session) that he was, notwithstanding, qualified to be elected a councillor of the burgh at the immediately ensuing election in November.

Question, Whether suspension and interdict be a competent mode of trying the validity of the election of a town councillor, under the municipal reform act, whose induction to the office had not been completed?

2D DIVISION.
L. Cuninghame.

BY the 2d and 3d Will. IV. c. 65., intituled "An "Act to amend the representation of the people "in Scotland," a new qualification is introduced for electors of members of parliament, both in counties and in burghs, and a mode of ascertaining that qualification

is established by means of an annual registration, to be conducted by the sheriffs of the respective counties. For this purpose each sheriff is to hold an annual court of registration both for county and city parliamentary voters, in which he is to decide all claims or objections on or before the 15th of September in each year; and by the 23d section it is enacted, "That the sheriffs judgments, granting or "refusing registration, shall, so long as they remain "unaltered, be conclusive of the rights of parties "claiming or objecting as above, but that it shall be "competent to any party considering himself aggrieved "by any such judgment to appeal, and apply for an "alteration thereof," in manner therein mentioned.

By section 25th it is provided, that appeals from the sheriffs judgments on any annual registration shall be made to certain sheriffs constituting Courts of Review, and it is enacted, "That the judgments of the "said courts of review shall in all cases be final and "conclusive, and liable to no process of review, and "shall, whenever they reverse or vary the judgments "of the sheriff appealed from, be warrants to him to "alter or correct his registers in conformity thereto; "and he shall, on such judgments being made known "to him by the parties, alter and correct such registers "accordingly."

By the same section it is provided, that the cases thus brought under review shall be decided on or before the 20th of October in each year.

By the 3d and 4th Will. IV. c. 76. sec. 1., intituled "An Act to alter and amend the laws for the "election of the magistrates and councils of the royal "burghs in Scotland," it is enacted, "That from and

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" after the period when this act shall come into opera-
" tion, the right of electing the town council in all
" such burghs respectively (except in those contained
" in schedule F. to this act annexed) shall be in and
" belong to all such persons, and to such only (except
" as herein-after excepted), as are or shall be qualified
" as owners or occupiers of premises within the royalty,
" whether original or extended, of any such burgh, to
" vote in the election of a member of parliament for such
" burgh, by virtue of an act passed in the 2d and 3d
" year of the reign of His Majesty King William IV.,
" intituled 'An Act to amend the representation of the
" 'people in Scotland,' and as are duly registered as
" such voters in the registers by the said recited act
" appointed to be kept, and also in all such persons
" who are possessed of the qualifications described in
" the said recited act, in respect of the property or
" occupancy of any house or other subject therein
" described, of the value thereby required, within the
" royalty of any royal burgh not now entitled to send
" members to parliament: Provided always, that all
" such electors who may be qualified as herein-before
" provided shall have resided for six calendar months
" next previous to the last day of June in this and all
" future years within the royalty of such burgh, or
" within seven statute miles of some part thereof:
" Provided also, that no person shall be entitled to vote
" who has been in the receipt of parochial relief, or
" who has been a pensioner of any corporation within
" twelve months of any such annual election, or for
" any burgh of which he may have been town clerk at
" the time of such election, or of making up the list or
" roll of electors with a view to such elections."

By the 4th section it is enacted, "That the re- "spective town clerks of each royal burgh shall, "on or before the 20th day of October in the "present, and on or before the 16th day of Sep- "tember in all future years, make up and complete "a list or roll of persons entitled to vote in the "election of the common council of such burgh, in "manner following; viz. the town clerk of each burgh "which, in virtue of the said recited act, sends, either "severally or in combination with any other burgh or "burghs, a member or members to parliament, shall "make up and complete such list by transferring from "the parliamentary register for such burgh to such list "or roll the names of all the voters contained in such "register entitled to vote in the election of a member "of parliament, as are so registered in respect of pro- "perties situated within the royalty, whether original "or extended, of such burgh, without requiring any "claim, or admitting any objections against the per- "sons so registered."

By sections 7, 8, and 15, it is provided that certain burghs (of which Glasgow is one) shall make their elections by wards, and that on the first Tuesday of November in each year "the electors qualified and "entered on the list or roll made up as aforesaid shall "choose from among such of their own number as "either reside within the boundaries assigned to such "burgh by the said recited act, or as may carry on "business or reside within the royalty thereof, such a "number of councillors as, by the set or usage of each "burgh respectively, at present constitutes the com- "mon council of such burgh."

In May 1837 Mr. M'Gavin, having removed from

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the premises in respect of which his name stood upon the register, lodged a claim at the proper time to be registered of new, which claim was admitted by the sheriff in September, and delivered to the clerks to be registered. Acordingly Mr. M'Gavin's name was inserted by the clerks in the register of parliamentary voters before the 15th of that month; and on the 16th, the clerks proceeded to make up the list of persons entitled to vote in the election of the council, by transferring the names from the parliamentary register to that list, and, among other names, they transferred that of Mr. M'Gavin. An appeal in the meantime was taken against the admission of Mr. M'Gavin by the sheriff, and on the 4th of October the claim was rejected by the Court of Appeal, and his name was accordingly expunged from the parliamentary list.

On the 4th November, being three days previous to that on which the election to municipal offices was to take place, and Mr. M'Gavin being then a candidate for the office of town councillor, the appellants, who were electors in an opposing interest, served upon the town clerks a requisition and protest, calling upon them to make the necessary alterations in the municipal list, so as to be in conformity with the parliamentary register as completed by the judgment of the Court of Appeal. The town clerks declined to do so, for the reasons stated in this answer:—"In terms of "the 75th section of the parliamentary reform "act, wherever the Court of Appeal reverses or "varies the judgments of the sheriff, the parliamen- "tary registers must be altered and corrected accor- "dingly; but there is no such direction or authority "given in the burgh reform act for the town clerks

" of the burghs contained in the parliamentary reform " act to alter the burgh list or roll directed to be made " up on or before the 16th of September annually.

" In these circumstances the town clerks, though of " course anxious to discharge, to the best of their " ability, the ministerial duties imposed on them, " consider that, under the terms of the statutes before " referred to, they are not empowered and would not " be warranted for the present year to make any " alteration whatever upon the list or roll for the " burgh, as compiled from the parliamentary register as " adjudicated by the sheriff, prior to the 16th of Sep- " tember, on or before which day the town clerks are " directed to make up or complete the said list or roll; " and the town clerks must therefore decline complying " with either of the requisitions contained in the said " schedule of protest until directed to do so by com- " petent authority."

The election of town councillors proceeded on the 7th November, and on that day the appellants served a protest on Mr. M'Gavin against his offering himself as a candidate, as being disqualified to be a councillor; and on the same day they presented a bill of suspension and interdict, on which the Lord Ordinary pronounced the following interlocutor:—

" Having considered this bill, appoints it to be inti- " mated, and answers thereto to be lodged betwixt and " Wednesday the 15th current; and in respect of the " novelty of the question, and of its importance as " possibly affecting the validity of the elections, and " other acts of the new council, when completed, " ordains the bill and answers to be printed, in order " that the case may be reported to the Inner House

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" as soon as possible—reserving consideration of the " interdict till the bill and answers are advised.

" *Note.*—The Lord Ordinary does not think that he is " entitled to give an interdict de plano against the recep- " tion of any councillor, as that might perhaps suspend " the election of any new magistrates necessary to be " supplied, and all the other acts of the new council, " while such a proceeding might be attended with con- " sequences, in a populous community like Glasgow, " which cannot at present be anticipated.

" But all parties will be aware that by the mere pre- " sentment of this bill the question as to Mr. M'Gavin's " eligibility is fairly mooted and rendered litigious; and " if the Court next week should grant an interdict par- " tibus auditis against Mr. M'Gavin's acting, a serious " question may arise as to the validity of any elections or " other corporate acts carried by his vote. Keeping that " contingency in view, the council will do well to confine " their proceedings to such acts as the police of the city " and the necessary business of the corporation require, " till the opinion of the Court is obtained, after a full " hearing of both parties on the bill and answers."

Mr. M'Gavin, having been elected by a majority of the voters, was, on the 7th, declared by the chief magistrate duly elected, and received a written intimation from the town clerk to that effect. The bill of suspension and interdict was on the same day (the 7th) duly intimated, both to Mr. M'Gavin and the chief magistrate. On the following day Mr. M'Gavin attended in the town hall, and declared his acceptance of the office, and having taken the necessary oaths was inducted into the office of a town councillor.

Mr. M'Gavin objected to the competency of the bill,

on two grounds; 1, that the Court of Session had no jurisdiction in the matter; and, 2, that at all events the bill was too late, as he had been elected before it was intimated. On the merits he maintained, that as the act directed the municipal list of voters to be completed by the town clerk on the 16th September, it could not be affected by any judgment pronounced in regard to the parliamentary list by the Appeal Court in the ensuing month of October.

On the 29th November 1837 their Lordships of the Second Division pronounced the following judgment:—
" Sustain the competency of the bill of suspension and
" interdict, but on the merits refuse the bill; find
" expenses due."

Against this interlocutor, in so far as it had reference to the merits, Mr. Monteith and others appealed; and in so far as it sustained the bill of suspension and interdict, Mr. M'Gavin presented a cross appeal.

Appellants.—1. (As to the competency of proceeding by suspension and interdict.)—It is a general principle of law, that for every wrong there must be a judicial remedy. The legislature may restrain the remedy within certain limits, but it is not to be presumed that recourse to judicial tribunals is excluded where a wrong has been done. In the present case, if it is not competent to apply to the Court of Session for redress, there is no other judicial authority that can give it. The appellants do not complain of the judgment of the sheriffs; that judgment, they admit, is not subject to review of the Court of Session, but what they complain of is, that it has not been given effect to by the town clerk.

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The making up of the municipal lists has been committed to the town clerk of the burgh, and this he is to do "without requiring any claim or admitting any "objection against the person so registered." If a wrong, therefore, is committed by him in doing so, there must either be a power of redress in the Court of Session, or the parties aggrieved have no judicial redress at all.

But as the Court of Session is a Court of equity as well as of law, it can interfere to prevent as well as to redress injuries; and the Court ought to prevent the party from violating the law, where they can do it, rather than first permit him to violate it, and then endeavour to give a tardy redress after perhaps irreparable injury has been committed.

An application by bill of suspension and interdict is the ordinary remedy by common law for stopping any illegal proceeding, and in particular any undue encroachment on legal rights. Indeed suspension and interdict is the only remedy now open. Under the old law there were certain statutes in force which gave a remedy by petition and complaint; but that remedy does not, either by its words or by its machinery, apply to the new law; and, accordingly, it has been found by the Court of Session that those statutory modes of procedure are now inapplicable.[1]

It being thus clear that the Court of Session has jurisdiction, and that bill of suspension and interdict is the proper remedy, it is equally undoubted that the bill was not too late. The respondent had, it is true, been elected by the voters before the bill was intimated, but he had not declared his acceptance, or been in-

[1] Thomson and others v. the Magistrates of Wick, 8th July 1836, 14 D. B. & M., 1118.

ducted into the office till after it was intimated. The proceeding being therefore in progress, the intimation of the bill kept matters entirely open.

2. (On the merits.) There can be no doubt that, on a proper construction of the first clause of the municipal reform act, the respondent was not a qualified elector. He had indeed claimed to be admitted as an elector to the parliamentary register, and his claim had been allowed by the sheriff, who originally considered it; but upon an appeal to the reviewing sheriffs that judgment was altered, and the claim was rejected. This was done before the 20th of October 1837, and his name was thereupon expunged from the parliamentary register, where it had only been inserted for a time, subject to the appeal that had been taken against his admission; therefore on the 7th of November, being the date of the election, his name did not stand on the parliamentary register. But the statute declares that those only who have been admitted to that register shall be qualified as municipal electors, and no person can be elected as a councillor who does not hold that qualification. This is confirmed by the circumstance, that in the case of burghs where there is no parliamentary list, the decision of the original court as to municipal electors is subject to review, and those persons only are qualified whose right is sustained by the court of review.

It is said that the 4th, 5th, and 8th sections change the interpretation and annul the effect of the first clause of the municipal act. But this is erroneous, for the town clerks lists may and should in each year exhibit the result of the judgments on appeal, in so far as these alter the judgments originally pronounced; and on the day of election in November

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the lists ought to contain the municipal portion of the parliamentary register, as ultimately completed, according to the latest judgments pronounced. Besides, supposing there is no authority in the municipal act for any alteration of the lists by the town clerks subsequent to the 16th of September, so that thereby those lists are not affected by the judgments on appeal, still this defect in the machinery of the act will not overrule the leading declaration of the statute as to the franchise; and consequently a party, even though remaining on the municipal lists, will be disqualified from voting in November, if he has been struck off from the parliamentary register in the intervening month of October.

The case of Orr against Vallance is no authority to the contrary, as it was decided prior to the passing of the late act, and Mr. Vallance had actually been inducted and filled the office before the bill was intimated.[1]

Respondent.—1. (Competency of the bill.) Supposing that any right of review of the proceedings of municipal elections exists in the Court of Session, it can only be competent by an action of reduction and declarator. The whole tenor of the bill of suspension and interdict shows that the merits of the election are directly put in issue; and in consequence the Court below must, in the form of a suspension and interdict, if it were competent,

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[1] Orr, 2d Dec. 1831, 10 S. D. 93; Buchney and others v. Ferrier, 10th March 1753, Mor. 1854; Dalrymple v. Stodart, 7th August 1778, Mor. 1861; Chalmers v. Magistrates of Edinburgh, 24th July 1782, Mor. 1863; Magistrates of Anstruther Wester, 29th June 1819, Fac. Col.; Provost of Glasgow v. Abbey, 3d December 1825, 4 S. and D., 270 (new ed. 271); Watson v. Commissioners of Police, 10th March 1832, 10 S., D., and B., 481.

try and determine the validity of the election; for before they could arrive at the conclusion that the application was competent, they must hold that the election of the respondent ought to be set aside, because otherwise the appellants could have no right to maintain that he ought to be interdicted from encroaching upon their rights by acting as a councillor.

There is a long series of precedents which establishes the incompetency of the mode of procedure by suspension and interdict, while there is no case which can justly be deemed adverse. The cases on the subject of review in election questions appear to amount to ninety-two, commencing with that of Milne v. Reid.[1] Of these about twenty were actions of reduction, or of reduction and declarator, which, although scattered throughout the whole period, are more numerous towards the commencement of it; in about sixty-five cases the procedure was by petition and complaint[2]; and in five the precise form is not shown by the reports, but apparently it was reduction or complaint; in one there was a suspension and reduction conjoined[3]; and in another there was a suspension resorted to as the form for reviewing the decision of a town council vested with powers of an inferior judicatory; but no case has been discovered in which the procedure was by suspension and interdict.

A suspension and interdict was for the first time attempted in the case of Orr v. Vallance, 2d December 1831, and the Court of Session decided that it was incompetent, and that the proceedings could be chal-

[1] May 1723, Robertson's Appeal Cases, p. 452.
[2] Under Stat. 7 Geo. II. c. 26.
[3] Buchney v. Ferrier, 10th March 1753, Mor. 1854.

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lenged only in the form of a petition and complaint or reduction; and the rule thus laid down was subsequently referred to and approved of in the case of Watson v. the Commissioners of Police of Glasgow.[1]

But supposing that the remedy of suspension and interdict was competent, still it was too late in being resorted to. Such a proceeding is only competent where the matter complained of is in progress. But the election of the respondent was complete before the bill was intimated. It is true he had not taken his seat as a councillor before that time, but this cannot affect the completion of the election.

2. (As to the merits:)—The most important object, next to the creation of the franchise, contemplated by the legislature, in conferring upon the royal burghs a new municipal constitution, was the adoption of a simple and decisive method of making up and completing the list of electors. Elections were to take place annually, and to be finished in one day, and upon the succeeding day the result of the poll was to be declared; the councillors elected were thereafter to declare whether they accepted or declined to accept the office, and persons failing to attend were to be held as having declined. And in strict conformity with the object and spirit of the statute, it is enacted, that a list of the municipal electors shall be made up and completed by a day specified; that it shall remain without alteration; that it shall form the basis of the right of electing and

[1] 10th March 1832, 10 S. & D. 481. See also Drysdale v. Magistrates of Kirkaldy, 10th June 1825, 4 S. & D. 658; Banks and Co. v. Jeffrey and Co., 4th July 1792, Mor. 9384; Chalmers v. Magistrates of Edinburgh, 24th July 1782, Mor. 1863; Gray v. Magistrates of Anstruther Wester, 29th June 1819, Fac. Col., No. 234. p. 761.

being elected, and of the right of examination into the affairs of the municipality.

The town clerk is appointed to be the custodier of the list of electors. The mode in which he is to deal with it is distinctly specified, for he is to correct and complete it on or before "the 16th day of September," by adding the names of those who before that date shall have been inserted in the register since it was made up in the previous year. When the list shall thus have been made up and completed, it becomes on the 16th of September a final and closed record.

Where an enactment is directory, the persons who are to fulfil its injunctions must literally obey it; for a person possessing a ministerial character only cannot construe or otherwise deal with the statute by which his powers are created, and by which they must be measured. In consequence, the town clerk, in correcting the municipal list under the 5th section of the statute, must take the act of parliament for his sole guide. He must complete his duty on or before the 16th of September, after which he is functus officio.

Throughout the whole of the enactments relative to the right of electing and being elected, the list completed by the town clerks on the 16th of September forms the only rule. The phraseology is, "foresaid list or roll," which leads back, by necessary inference, to the 4th and 5th sections embodying the description of that list or roll. No other criterion is or can be in existence; and according as the name of a person shall or shall not be found in that list, he has or has not the statutory qualification to elect or be elected. According to that list the votes are to be taken; and so conclusive is it, that it shall not be competent at

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the poll to inquire into any other facts but the identity of the person mentioned in the list, his still holding the qualification there mentioned, and his not having previously voted at the same election; which facts can be proved only by his oath, if required by any other voter on the roll.

LORD CHANCELLOR.—My Lords, I am anxious to draw your Lordships attention to this case, or at least to one of the appeals in this case, because, as it involves the question in certain cases of the right of election in the burghs in Scotland, and as those elections must take place before the next session of parliament, it might be very inconvenient that the question which has been discussed at your Lordships bar should remain undecided till the following session.

My Lords, the case arises upon the election in Glasgow of Mr. M'Gavin, who was upon the parliamentary list of electors on the 16th of September; but between the 16th of September and the time of the election of the burgh officers his name had been erased from the parliamentary list by an appeal which is provided for by the reform act for Scotland. When the election of burgh officers took place, the objections were made that he was no longer qualified to be elected, inasmuch as his name had been at that time struck off the parliamentary list. The election, however, proceeded, and he had a majority of votes. After the act of election, but before he was completed in his office by taking the oaths, a bill of suspension and interdict was presented to the Court of Session for the purpose of preventing the completion of his election, and for the purpose of preventing him from acting as such town councillor.

The Lord Ordinary very properly refused to interfere by interdict, seeing the consequences to which that might lead. In consequence of that interdict being refused Mr. M'Gavin was completed in his office.

My Lords, when the case came before the Court of Session two questions were raised. The first, as to competency, namely, whether the Court of Session was competent to entertain a bill of suspension and interdict under the circumstances of the case; and if the Court were of opinion that they were competent, then whether, according to the facts which the Court were bound to assume for the purpose of decision in that stage of the suit, the case was such as to entitle the complainers to the remedy for which they prayed. The Court of Session were of opinion that they were competent; but, upon the merits, they were of opinion that they ought to decide against the complainers.

My Lords, against that decision the first of these appeals was presented, namely, upon the merits. The respondent in the case then presented his appeal, namely, an appeal against the decision of the Court of Session, deciding that they were competent to entertain that suit. That second appeal was presented provisionally, inasmuch as it would only become necessary for Mr. M'Gavin to resort to that appeal, and to raise that question, in the event of your Lordships being of opinion that the Court of Session were wrong upon the merits; and then of course it would be necessary for him to show, if he could, that the Court of Session were not competent to entertain that suit.

My Lords, the question upon the first of these appeals is the one that presses for decision, inasmuch as it touches the rule by which the elections are to be

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conducted in the ensuing autumn, and that turns entirely upon the construction of two acts, or perhaps three acts, namely, the two acts regulating the election of municipal officers, and also the reform act of Scotland. The real question is this, whether the list of burgh electors, which by the act is directed to be made out on the 16th of September in every year, is or is not a final or conclusive list by which the elections are to be regulated in the following month of November; or whether the burgh list so made out in the month of September is or is not to be corrected, by having transferred to it any correction that may take place in the parliamentary list of electors which may happen between the 15th of September and the 25th of October in one of those years.

Now, I have only to call your Lordships attention to some, and not many, of the sections of those two acts. The municipal reform act, 3 & 4 W. 4. c. 76., enacts, that the electors shall be such only as are qualified to vote in the election of a member of parliament for such burgh by virtue of an act passed in the second and third year of the reign of His Majesty King William the Fourth, intituled "An Act to amend the representa-" tion of the people in Scotland," and as are duly registered as such voters in the registers by the said recited act appointed to be kept.

That section has been much relied upon. It has been contended that the provisions of that section cannot be carried into effect if any person is permitted to vote in the election of municipal officers who is not qualified to vote in an election for a member of parliament. But it is to be observed that that is only one of the qualifications required, because the section goes

on to provide that they must be duly registered in the register by that act appointed to be kept; and the real question is not, whether they are de facto qualified to vote in the election of members of parliament, but whether this section has not provided a test by which alone inquiry can be made whether they are or are not duly qualified.

Then, my Lords, the fourth section directs that the town clerk shall on or before the 16th of September make up and complete a list or roll of persons entitled to vote in the election of the common council of such burgh in manner following; viz.—"The town clerk of "each burgh which by virtue of the said recited act "sends, either severally or in combination with any "other burgh or burghs, a member or members to "parliament, shall make up and complete such list by "transferring from the parliamentary register for such "burgh to such list or roll the names of all the voters "contained in such register entitled to vote in the "election of a member of parliament as are so regis-"tered in respect of properties situated within the "royalty, whether original or extended, of such burgh, "without requiring any claim or admitting any objec-"tions against the persons so registered."

That section contains very specific directions. It fixes a particular day, the importance of which your Lordships will see when I come to the parliamentary reform act. It fixes the 16th of September as the day on which the town clerk is bound to look at the parliamentary register, of course as it exists on that day; and his sole duty is to transfer from that parliamentary list into his burgh list the names of all such persons who, upon the face of that parliamentary list, are entitled to

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vote in the election of members of parliament. And it is expressly provided that he shall exercise no discretion, that he shall not consider any claim or look to any objection, but confine his duty to merely transferring from the one list to the other the names of the persons found on that day upon the parliamentary list.

Now, what does the fifth section provide? Having directed that the town clerk is to make his list upon the 16th of September, the next section provides what he shall do with the list so made up. Each town clerk shall keep his list in the town clerk's office. Now, it is said by the appellant in the first appeal, that he is to correct this list from time to time, to vary and alter it according to the alteration in the parliamentary list. This section, after directing him to keep the list, says that he shall annually correct and complete his list on or before the 16th of September. How is he to do this? He is to do it annually on or before a particular day in each year, and he is to do it by removing therefrom the names of such as may have died, and adding the names of those who may have been inserted in the register appointed by the said recited act (which is the reform act), since it was made up in the previous year. Then he is on the 16th of September in each year to take the list which he had completed on the 16th of September in the previous year, and to correct it by omitting the names of those who are dead, and by making such alterations as may have been made in the parliamentary list since it was made up in the preceding year; a provision which appears utterly inconsistent with that which is contended for on the part of the appellants, namely, that he is not to do this for the

purpose of completing his list on the 16th of September in every year, but to do it from time to time as alterations may be made on the parliamentary list.

Then the eighth section provides, "that upon the "first Tuesday in November the electors qualified and "entered in the list or roll made up as aforesaid shall "elect, from and amongst the persons contained in the "list or roll of the whole electors for such burgh, the "councillors for such burgh, by open poll; and it shall "not be competent at such poll to inquire into any "other facts but the identity of the party tendering a "vote and the person mentioned in the list or roll, his "still holding the qualification there mentioned, and "his not having previously voted at the same election."

Now, the elections are, in express terms in that section, to take place according to the list made up as aforesaid. And looking at the previous sections in the act, there is no list made up as aforesaid, except the list made up on the 16th of September in each year, by transferring from the parliamentary register to the burgh lists the names of those qualified to vote for members of parliament. Now, it appears to me to be clear, in the first place, that this list is to be made up from the then existing parliamentary list; that there is no power in the town clerk to make any alteration, except when he comes to make out the list for the succeeding year; and that the alteration in the parliamentary list between the 16th of September in one year and the 16th of September in the following year are not to be regarded till making up the list for the following year; and that the elections to take place in November are to proceed upon the list so made up upon the 16th of September.

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My Lords, if that be so, it only remains to be inquired, (and that is to be ascertained by looking at the reform act,) what was the list that did exist on that day, namely, the 16th of September, when the town clerk was directed to transfer from the parliamentary list to the burgh list the names of persons entitled to vote? The act provides, that for the purpose of making out the parliamentary list (I am at present confining myself to those parliamentary burghs), all the claims and objections shall be laid before the sheriff on the 12th of August, who is to decide upon the same on or before the 15th of September, the day immediately preceding the day on which the town clerk is directed to go and see what names are to be found upon the parliamentary list; that then he shall correct any errors or omissions which may be pointed out; that he shall have his register finally corrected and completed on or before the 15th of September in every year; and that after that day no alteration shall be made but in consequence of the judgment of some court of law.

The 23d section provides, that any party who may complain of the decision of the sheriff may, upon notice within five days after the judgment of the sheriff, appeal. The 25th section provides, that the Court of Appeal is to sit between the 15th and 25th of September, and finally to determine on all appeals on or before the 20th of October. Then it provides for the mode in which any alterations made upon appeal are to be carried into effect, so far as respects the parliamentary list, that the sheriff, upon the judgment of the court of review, being made known to him by the parties, is to alter and correct the parliamentary register

accordingly; so that all elections are to proceed upon the list as completed before the date of the alteration.

My Lords, from the provisions of this act it appears to me clear that the parliamentary list from which the burgh list is to be made up on the 16th of September is the list as settled by the sheriff on the 15th of September; that any alterations in the parliamentary list afterwards made are to be inserted in the burgh list of the next year, but are not to affect the burgh list as made up on the 16th of September; and that the elections in November are to proceed upon that list.

It was urged in argument, that although there is no express provision in the act for making those corrections in the burgh list, it must necessarily be inferred that the legislature so intended, because it has in another case provided for appeals by which the burgh list may be corrected, namely, in burghs which are not parliamentary. It does appear to me that that affords the strongest possible argument the other way, because when parliament provides for a particular mode of proceeding in one particular case, and makes no such provision in another case, it must be assumed that that is not mere negligence or inattention in the framers of the act, but there is some ground for the distinction between the two cases.

Now, does not a distinction exist between the two cases. In the burghs not parliamentary there is no list to resort to; it is to be made in the first instance by the officer of the town; and, inasmuch as it may be incorrect, the parties are entitled to a more solemn adjudication upon their rights, and therefore from the first list so made there is an appeal given. But in parliamentary burghs you have the parliamentary list to refer to first,

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which has gone through all the operation which the list of burghs not parliamentary has under the act to go through, namely, the claims have been brought under investigation by the sheriff, and the final settlement and correction of that list has taken place on or before the 15th of September in each year. It is therefore putting the claims identically upon the same footing in point of principle, though not the same in point of form; and in the first set of cases, namely, in parliamentary burghs, the list passes through the Court of the Sheriff; in the cases of burghs not parliamentary it goes through another mode of investigation. In both cases the list upon which the elections are to take place is a list that has undergone the operation of revision in the first instance, and if necessary, of subsequent appeal.

My Lords, a question was raised which, in the view I take of the case, if your Lordships should concur in that view, it will not be material to consider, namely, that although there is no power given to the town clerk to correct this list, it was competent to the Court of Session to order it. If I am right in the construction of this act it is immaterial to consider that question, because I am clearly of opinion that the election took place according to the right list. And if the Court of Session had the power of investigating the validity of the claims of the electors, and consequently the qualification of those to be elected, the Court of Session must have come to the same conclusion; and it is immaterial, therefore, to consider whether the Court of Session have or have not the power of correcting any error that appears upon the list, inasmuch as, according to the construction I put upon this act, there is no

error in the list for the purpose of regulating the election that took place.

My Lords, that being the view I take of the original appeal, it will be sufficient if your Lordships concur in the view I take to dispose of all that portion of these two appeals which is at all pressing in point of time. And I apprehend it will not be necessary for your Lordships to come to any conclusion as to the provisional appeal, namely, the appeal presented by Mr. M'Gavin. It was presented only in contemplation of the possibility of your Lordships delivering an opinion contrary to that of the majority of the Court of Session, who are in favour of that which appears to me to be the true construction of these several acts. No question as between the parties depends upon the second appeal, if your Lordships concur in the view I now take; nor is there any question in point of costs, because, looking at what took place below, and looking at the difficulty of parts of the case, I think that whether your Lordships affirm or reverse the judgment of the Court of Session below, it is not a case in which your Lordships would be justified in giving costs on either side.

I am desirous, therefore, of avoiding saying much upon the subject of that second appeal; but I think it right to say this much, that if there be difficulty upon the question of competency, it is a difficulty which I cannot but think your Lordships are not very likely to solve; because, even if such a suit be competent, it is not easy to conceive a case in which the Court could exercise a sound discretion in acting upon that power, either by interdicting an election which actually is in progress from taking place, or by interdicting the party

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elected from exercising the duties of his office in a proceeding in which the Court has not the power of declaring the office void, and therefore enabling the parties to proceed to a new election. It is not a proceeding in which the Court of Session can do that; the extent of their power would be to prevent one man performing the duties of the office without having the means of putting another person in his place.

The Lord Ordinary felt the danger which might arise from his interfering by interdict. And with great judgment and propriety, although the competency of the suit was maintained, he refrained from exercising the power of the Court of interfering by interdict.

My Lords, there certainly appears to have been a material error in an assumption made in the discussion of this matter in the Court of Session, namely, that in this country any such power exists in the way of interdicting or preventing the election of officers before the election takes place. Ample power exists for the purpose of correcting an erroneous election; but for the purpose of interfering before the election takes place, there is no power exercised by the Court of Queen's Bench in this country. If the Judges of the Court of Session, in coming to a decision upon the question of competency, were at all influenced by the supposition that such jurisdiction is exercised in this country, it may be right that they should re-consider their view of the case, if any other question of this sort should come before them. They are the best judges, in the first instance, of how far their Courts are competent to decide upon that point. But if they at all come to that decision upon any supposed analogy between the juris-

diction which they were called upon to exercise, and a jurisdiction of that kind supposed to exist in this country, it is proper that they should inform themselves accurately upon that subject, before they act upon any such analogy. I am satisfied that they will take an opportunity of doing so, if the case should again occur.

The Court of Session have ample power, as the Court of Queen's Bench has in this country, of investigating the legality of elections of this description, and setting those aside which may have been made contrary to law; a more wholesome mode of proceeding, undoubtedly, as the Judges of that Court will probably feel, than by proceeding before the election is completed to prevent its taking place, the consequence of which may be, that the town may be left entirely without its municipal officers during a suit, which may and probably will last longer than the period for which those municipal officers were to be elected.

My Lords, I do not go further in that cross appeal. It is not at all material to the interest of the parties that your Lordships should ever give any opinion upon that mere speculative question; for if your Lordships concur in the view I take, it is a mere speculative question, how far that competency may or may not exist in a case where it becomes perfectly immaterial in consequence of a decision against the pursuer upon the merits; but if it should come to be a material question it would require, in my view of the case, very serious consideration. At present, therefore, I shall move your Lordships to affirm the interlocutor which is the subject of the first appeal. Of course there being a majority of the Judges one way, and one Judge

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the other, it is not a case in which your Lordships would think it right to give any costs.

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The House of Lords ordered and adjudged, That the said original appeal be and is hereby dismissed this House, and that the several interlocutors, as far as therein complained of, be and the same are hereby affirmed.

DEANS & DUNLOP—ARCHIBALD GRAHAM, Solicitors.