

Thursday, November 15.

FIRST DIVISION.

[Lord Curriehill, Ordinary.]

SIME V. COGHILL AND OTHERS.

Burgh—Police Act, 13 and 14 Vict. cap. 33, sec. 36
—*Filling up Vacancies where Police Commission
reduced below a quorum.*

Where the Police Commission of a burgh which had adopted the Police Act 13 and 14 Vict. cap. 33, became reduced in numbers by resignations below the statutory quorum, —held that under the 36th section of the Act it was the duty of the remaining members, in the method most convenient to them, to fill up the vacancies, and that the statute does not justify the proposition that in so doing the filling up of any number short of the whole vacancies is illegal.

Observed (per the Lord President) that the words "it shall be lawful" occurring in the 36th section of the Police Act 13 and 14 Vict. cap. 33, and in similar Acts, are not to be regarded as merely permissive, but rather as imposing a duty on such persons, as from the office they hold are bound to work for the public good.

The householders in Thurso, a burgh of barony, in the year 1852 adopted the Police Act 13 and 14 Vict. cap. 33, and fixed the number of Police Commissioners under the Act at nine. At a meeting of the Commissioners on 13th November 1876 seven members, including the senior and the two junior magistrates, resigned office, and on the 20th November the two remaining Commissioners, who are the defenders in this action, John Coghill and James Tytler Cramond, in pursuance of the 36th section of the Act, nominated the other defenders, Matthew Waters and William H. Sutherland, to act as Commissioners of Police in room of those who resigned. They did this in a letter which they addressed to Messrs Brims & Macdonald, Clerks to the Commissioners of Police, in the following terms:—"Gentlemen,—In terms of the powers given us by 36th section, Act 13 and 14 Vict. cap. 33, we hereby nominate Mr William Sutherland, blacksmith, Barrock Street, Thurso, and Mr Matthew Waters, merchant, Traill Street, Thurso, to act as Commissioners of Police in room of those who resigned. As the above named gentlemen, in virtue of said nomination, are now Commissioners of Police, we hereby request you to give them notice as such to attend the meeting to-day." On 11th December, the four, as Commissioners, nominated Mr Coghill to be interim senior magistrate until the annual election of Commissioners, which was to take place on 27th December, and directed him to act as polling sheriff or returning officer at the election. The necessary notices of the day of election and of the names of the candidates were given by the clerk; and on the day of election Mr Coghill, as acting senior magistrate declared the candidates (who did not exceed in number the vacancies to be supplied) to be duly elected. At subsequent meetings magistrates were elected, and certain assessments were imposed.

The pursuer Robert Sime, who was a ratepayer in the burgh assessed on a rental of £5, raised this action to have the whole of these proceedings from and after the nomination of the interim Commissioners on the 20th November reduced and set aside, and to have the assessments quashed, and interdict granted against the collection thereof, mainly on the ground that the said nomination on 27th December 1876 was wholly illegal and invalid, and that consequently all that followed thereon was equally inept.

The pursuers, *inter alia*, pleaded—“(1) There having been no quorum of the statutory number of the said Commissioners of Police after the resignation of the seven Commissioners on the 13th November 1876, operation of the said Statute 13 and 14 Vict. cap. 33, was suspended in the said burgh, and the defenders John Coghill and James Tytler Cramond were not entitled, after said resignations, to act as Police Commissioners, or exercise any of the powers or functions of that office. (2) The said defenders had no power or authority to fill up the vacancies caused by the said resignations, and the pretended nomination or appointment by them of the other defenders William Sutherland and Matthew Waters is null and void. (3) Assuming the said defenders to have had power to fill up the other vacancies, the said nomination or appointment of the other two defenders to supply seven vacancies was null and void. (4) The nomination or election of the defender John Coghill as interim senior Magistrate of Police of the said burgh was illegal, invalid, and inept, in respect (first) That the parties by whom the appointment was made had no power or authority to do so; (second) That no such office is recognised or sanctioned by the said statute.”

The clauses of the Statute 13 and 14 Vict. cap. 33, upon the construction of which the case turned, and the arguments on either side, are fully stated in the Lord Ordinary's note and in the opinion of the Court.

The Lord Ordinary (CURRIEHILL) assolized the defenders from the conclusions of the summons, and added the following note:—

“*Note.*—[After stating the facts]—The questions thus raised are not free from difficulty, and are of very general importance. The main grounds of reduction are those set forth in the first four pleas-in-law for the pursuer—indeed, if these are not well founded the whole action is untenable.

“On referring to these pleas it will be seen that the whole questions raised turn upon the constructions of sections 27 to 43 of the Act 13 and 14 Victoria, cap. 33, which occur in the subdivision of the statute which deals with the election and duties of Commissioners and Magistrates of Police.

“Section 27 provides that in any burgh adopting the Act the Commissioners to be elected should be in number either 6, 9, or 12, as might be determined by the householders; and by the 41st it is provided that one-third of the Commissioners must be present at all meetings to constitute a quorum. Three Commissioners therefore constituted a quorum of the entire statutory number of Commissioners fixed for the burgh of Thurso; and the first and leading objection of the pursuer is that, after the resignation of the seven Commissioners on 13th November 1876 there existed no quorum of the statutory number of Commissioners;

that in consequence thereof the operation of the statute was suspended in the burgh; that the defenders John Coghill and James Tytler Cramond were not entitled, after said resignations, to act as Police Commissioners or exercise any of the powers or functions of that office; and, in particular, that they had no power or authority to fill up the vacancies caused by these resignations. I am of opinion that, according to the sound construction of the statute, this objection of the pursuer is ill founded. The statute provides in sections 29, 30, and 31 for the first election of Commissioners under the Act, and for the first meeting of the Commissioners so elected. Section 32 provides that the Commissioners shall at that meeting, or an adjourned meeting, elect from among their own number a senior and two junior magistrates of police. Sections 33 and 34 provide that one-third of the Commissioners shall go annually out of office, and that their places shall be annually supplied by an equal number of new Commissioners—the outgoing Commissioners being eligible for re-election. And section 35 provides that where any Magistrate of Police shall be in the third of the Commissioners going out of office, the place of such magistrate shall be supplied by election by the Commissioners as soon as the full number thereof shall have been completed by the annual election of the new third—it being provided that the senior magistrate should always remain in office for the period of three years.

“After thus providing for the first election of Commissioners and Magistrates, and for the ordinary annual election of these officers, the statute, in section 36, makes special provision for supplying vacancies occurring before the period for the annual election arrives. The words of the section are—‘That in case the place of any of the Commissioners or Magistrates of Police, elected as aforesaid, shall become vacant by death, refusal to act, disqualification, or resignation, then and in such cases it shall be lawful for the remaining Commissioners and Magistrates of Police to nominate persons duly qualified to supply such vacancies, and each person so nominated shall have and enjoy the same powers and privileges as the person in whose stead he is nominated, and shall remain in office until the next period of election, when he shall go out of office, and the vacancy shall be supplied by the householders of the burgh.’

“Now, unless the section is controlled or modified by some other part of the statute, it appears to me to be clear that the appointment of interim Commissioners by Messrs Coghill and Cramond, the two who remained after the resignation of their seven colleagues, was fairly within the powers conferred by the section. It is the Commissioners and Magistrates, be they few or many, who remain after the resignation ‘of any of the Commissioners or Magistrates,’ that are to have power of supplying the vacancies by nominating qualified persons to hold the vacant offices until the next annual election. There is no duty imposed upon them of filling up the vacancies, and they may, in my opinion, supply them in whole or in part, or at all.

“But the pursuer alleges that this power cannot be exercised by any less number than three, being one-third of the statutory number of Commissioners; and he refers to section 41 in support

of that proposition. The words of that section are—‘That the whole Commissioners shall be cited to attend all meetings, both special and statutory, . . . and the senior magistrate present, or in the absence of any magistrate, such one of the Commissioners as shall be chosen by the meeting shall preside in all meetings of the Commissioners, . . . provided always that one-third of the Commissioners must be present at all meetings to constitute a quorum.’ If the pursuer’s construction of this section is the sound one, it necessarily follows that the burgh of Thurso is at present disfranchised—a most undesirable result. And if the section can be read in such a way as not to produce that result, it is the duty of the Court to place upon it such favourable construction. The pursuer maintains that the words ‘the whole Commissioners’ and ‘Commissioners,’ where they occur in the section, mean the full statutory number of nine. But it is obvious that where, from any cause, the number of the Commissioners actually holding office is less than the statutory number, this section could not be literally and strictly complied with, and no legal meeting of the Commissioners could be held at all. This, however, is not, in my opinion, the true reading of the statute. I think that when the section directs ‘the whole Commissioners to be cited to attend all meetings,’ what is meant is that the whole Commissioners actually holding office for the time shall be cited; and, if so, it follows that ‘the quorum’ mentioned at the close of the section is one-third of the Commissioners actually holding office at the time. And I am therefore of opinion that, as the new or interim Commissioners were nominated by the whole Commissioners actually holding office on 20th November 1876, the requirements of sections 66 and 41 have been duly complied with. It must not be forgotten that any nomination under section 36 is merely an interim arrangement to enable the business of the burgh to be carried on until the next annual election, and I think that section was enacted for the very purpose of obviating the difficulties which had often been in former times experienced in municipal bodies as to the number necessary to form a quorum where the number of members had been reduced by death or resignation below the number fixed by the set of the corporation. On this point reference may be made to the case of *Fraser v. Rose*, 15 Sh. 1250.

“But the pursuer farther maintains that, even if the two defenders Coghill and Cramond, as the remaining two Commissioners, had power to fill up the vacancies, the nomination or appointment of only two persons to supply seven vacancies was null and void. I confess that I have more difficulty in dealing with this than with the former objection. On the one hand, as I have already said, I think that the two remaining Commissioners were not bound to fill up any of the vacancies, and that they were entitled to leave the whole unsupplied, or to fill up only some of them. But, on the other hand, I think section 36 seems to point at each interim nomination being expressly made in room of some former individual Commissioner. But whether this be the right view of the statute or not, I have come to be of opinion that, even if the interim nomination in question of the two new Commissioners made on 20th November was irregular, the subsequent proceedings of Messrs Coghill and Cramond were

not thereby vitiated. These two Commissioners were, as I think, entitled still to execute all the powers conferred upon them 'as remaining Commissioners' by section 36; and in virtue of these powers, they being both present at the meeting on the 11th December, were entitled to appoint, and did validly appoint, Mr Coghill to be interim senior magistrate, and to preside at the annual election on 27th December. I cannot hold that in the circumstances the presence of the two new Commissioners, even assuming them to have been irregularly nominated, invalidated the proceedings of the two old Commissioners. If so, all the subsequent procedure was unchallengeable; and on the whole matter I am of opinion that the defenders are entitled to absolver, with expenses."

The pursuer reclaimed.

Authorities—*Meiklejohn v. Masterton*, M. App. 17; *Anderson v. Masterton*, Nov. 6, 1868, 7 Macph. 81.

The defenders' counsel were not called on.

At advising—

LORD PRESIDENT—I am of opinion that the Lord Ordinary's interlocutor is right on the whole, but I do not take exactly the same view as regards the 41st section of the statute that his Lordship does. If it were necessary for me to say anything as regards the question whether a quorum might in any circumstance be less than one-third of the whole members of the Police Commission, I should have considerable hesitation in coming to a conclusion. But it appears to me that the question depends entirely upon the reading of the 36th section, and not upon the 41st.

The facts of the case are very simple. At a meeting of the Police Commission, held on the 13th November 1876, seven out of nine of the members resigned, and consequently, the number of members being reduced to two, the business could not go on unless the remainder had power to elect others, and accordingly the two remaining members, being advised that they were entitled by section 36 to nominate new Commissioners, did so in a letter to the Clerk of the Commissioners of Police, by which they nominated Messrs Sutherland and Waters to act in room of the resigning members. They certainly only elected two new members, but these two with the other two who had not retired brought up the number to four, which is one more than the quorum required by the statute. Now, what followed was that the newly constituted Commission elected one of their number to be chief magistrate. The annual election for the Commission then came on, and the chief magistrate duly acted in his new capacity. If he himself was duly elected, then the annual election was perfectly competent and rightly carried through. The validity of the existing magistracy depends upon whether the election in November was lawful under section 36.

Two objections are urged by the pursuer to the proceedings—1st, It is said that the remaining Commissioners could not nominate new members except as a corporate act and at a meeting called under the statute, and that such a corporate act could not be performed by the remaining two members, but only by three members, being a quorum under section 41. 2dly, Even supposing

that these two gentlemen were entitled to fill up vacancies, the power granted to them is to fill up existing vacancies—that is, all the existing vacancies, and that therefore there was no option but to appoint seven new members. Neither of these objections seems to me to be tenable. In the first place, the statute does not appear to me to require that the appointments be made at a meeting. That they be made somehow appears to me to be a statutory duty imposed on the remaining Commissioners, but it may be performed in the way most convenient, if only it is done in a distinct way. The words of the Act do not suggest that a meeting is required, and in this respect it stands in direct contrast to the provisions of the Municipal Act of 1833, where it is specially directed that, in such circumstances as we have here, a meeting must be called by the town clerk. Whether, even under that Act, the election would be a corporate act, I give no opinion, but certainly there seems to be more ground for supposing that it is so there than in the present case. It seems to me that these two gentlemen had no discretion to do what they did, or leave it undone; on the contrary, had they left it undone, the burgh would have had no one to take care of its police arrangements; and they were accordingly bound to do what they could to obviate that result, and at least to make a quorum in the committee. The words "it shall be lawful" in cases such as these are not merely permissive, but they impose an absolute duty on persons who hold public offices, and who are bound to work for the public good. These two gentlemen in doing what they did only did their duty.

But it is further objected that they should have filled up all the vacancies, and there is some plausibility in this at first sight, but the statute does not really justify the proposition that the filling up vacancies to any amount short of the whole vacancies is a fault. Great difficulty might be experienced in a small burgh such as this in finding sufficient persons to fill up all the vacancies, especially when the duties would only be imposed for a very limited time—little more than a month in this case. In ordinary circumstances persons might be found, but not to act as mere stop-gaps as in this case. Therefore to say that because these two gentlemen could not find a sufficient number of persons to fill up all the vacancies, that therefore they could not avail themselves of the powers in section 36, is unreasonable. Perhaps it would have been better if they had filled up the larger number, but if it is not absolutely necessary to fill up all the vacancies, it is impossible to hold that these gentlemen acted unlawfully when they filled up vacancies sufficient to make a quorum for a month before the regular election. I therefore agree with the Lord Ordinary that the objections are not well founded.

LOBBS DEAS, MURE, and SHAND concurred.

The Court adhered.

Counsel for Pursuer (Reclaimer)—Lord Advocate (Watson)—Kinnear. Agent—David Milne, S.S.C.

Counsel for Defender (Respondent)—Asher—Harper. Agents—Morton, Neilson, & Smart, W.S.