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Saturday, October 17, 1896.

FIRST DIVISION.

M'CALLUM AND OTHERS v. LOCH-
HEAD AND OTHERS.

*Burgh — Magistrates — Election — Burgh
Police (Scotland) Act 1892 (55 and 56 Vict.
cap. 55), sec. 17.*

At the first election of commissioners held in a police burgh, subsequent to its division into four wards, four of the commissioners were about to retire under section 37 of the Burgh Police Act 1892, so that one commissioner was to be elected by each ward. A further vacancy having been caused by the resignation of a fifth commissioner, an application was made to the Court for an order under section 17 of the same Act, which empowers the Court, "wherever in any burgh it has from any . . . cause become impossible to proceed with the execution of this Act," to "pronounce any order which in their judgment will enable the proceedings for the execution of this Act within such burgh to be continued as nearly as possible as if the said . . . cause had not taken place."

The Court ordered the election of two commissioners by the first ward.

This was a petition presented by the Police Commissioners of Dunoon for an order to regulate procedure at a forthcoming election of Commissioners.

The application arose out of the following circumstances:—In 1892 the Sheriff of Argyllshire fixed the number of Commissioners for Dunoon (a police burgh

under the General Police Act of 1862) at twelve.

In December 1895, in terms of section 11 of the Burgh Police Act 1892 (55 and 56 Vict. cap. 55), the Sheriff divided the burgh into four wards.

In terms of section 37 of the Burgh Police Act, one-third of the Commissioners, who all represented the burgh as a whole, were to retire on the first Tuesday of November 1896, and thus each of the four wards was to have the opportunity of electing one Commissioner.

In September 1896 Mr Shields, one of the Commissioners, but not one of the four who were to retire in ordinary rotation, resigned office, and it became necessary that another Commissioner in addition to the four should be elected in his stead.

After reciting these facts the petition continued—"The Act makes no provision for apportioning the existing Commissioners among the wards, so as to indicate by which ward casual vacancies are to be supplied during the period of three years immediately succeeding the division into wards, and in the present circumstances the question has arisen whether one of the four wards into which the burgh is now divided shall return two members at the forthcoming election."

The petitioners accordingly craved the Court, under section 17 of the Burgh Police Act 1892, "to pronounce an order directing by what ward or wards the places of the five retiring Commissioners shall at the forthcoming election be filled up."

Answers were lodged by certain rate-payers of Dunoon, in which the facts stated in the petition were admitted, but the suggestion was made that the Court should pronounce an order directing all the Commissioners to retire prior to the election in November. The respondents averred their belief that in this matter they

represented the large majority of the rate-payers of the burgh, and that the course suggested by them was the only one which would avoid future difficulties and subsequent applications to the Court.

Section 32 of the Burgh Police (Scotland) Act 1892 enacts that "There shall be an annual election of commissioners under the Act on the first Tuesday of November, and such annual election in the burgh, or if it is divided into wards, in the several wards thereof, shall be conducted under the rules, regulations, and provisions applicable by law to the election of town councillors in burghs in Scotland; and for all the purposes of such annual election, first meeting of commissioners and election of magistrates, and after procedure consequent upon such annual election, a burgh under this Act shall be deemed a burgh having to provide for the appointment and election of magistrates and councillors therefor, in terms of the Acts relating to the election of magistrates and councillors in royal and parliamentary burghs in Scotland which may be in force at the time."

Section 37 enacts that "One-third of the commissioners shall on the first Tuesday of November annually retire in order prescribed by law for the retirement of councillors in burghs having to provide for the election of magistrates and councillors as aforesaid."

The statutes regulating the election of town councillors in burghs in Scotland are 3 and 4 Will. IV. cap. 76 and 77, and the Municipal Elections Amendment (Scotland) Act 1868 (31 and 32 Vict. cap. 108). Section 17 of the last named Act provides for the division of a burgh into wards; but none of these Acts make any provision for the conduct of the first election taking place after a division into wards.

Section 25 of 3 and 4 Will. IV. cap. 76, provides for the filling up of vacancies in town councils, and sec. 26 enables members to resign.

The Burgh Police Act 1892, sec. 17, provides that "Wherever in any burgh in existence before the passing of this Act, and which thereafter continues to be a burgh . . . it has from a failure to observe any of the provisions of this Act, or any other Act, or from any other cause, become impossible to proceed with the execution of this Act," the Court of Session may, upon application made to them, and after certain procedure, "(3) . . . pronounce any order which in their judgment will enable the proceedings for the execution of this Act within such burgh to be continued as nearly as possible as if the said failure to observe the provisions of this Act, or any other Act, or other cause, had not taken place."

Argued for the petitioners—The Court should pronounce an order to the effect that two Commissioners should be elected by the First Ward, and not one only. To compel all the Commissioners to resign their seats and seek re-election would be

unjust. It was true that the General Police and Improvement (Scotland) Act 1862, Amendment Act 1868 (31 and 32 Vict. cap. 102), sec. 6, provided that when a burgh was divided into wards the commissioners in office at the time of such division should remain in office only till the expiration of the current year of office; but that Act was repealed by the Burgh Police Act 1892, sec. 6. The "cause" of the difficulty here was Mr Shields' resignation, and sec. 17 empowered the Court to pronounce any order which would enable the proceedings for the execution of the Act to be continued "as nearly as possible as if" that "cause had not taken place." That object would be attained by the Court ordering an additional election in one of the wards.

Argued for the respondents—The simplest way out of the difficulty was for the whole commission to retire, and for each ward to elect three members. The new system of election by wards, which was the true "cause" of this emergency arising, would thus get a fair start, and no confusion would occur in the future.

LORD PRESIDENT—If our province under section 17 were to fill up and complete the scheme of legislation contained in the Act of 1892 as regards burghs divided into wards, there would be much to say for our holding, that there being no provision for the next election after such a division, we should order that there be an election for all the seats according to wards. But when I turn to the section which we have to administer, I find that there is a narrower province assigned to us in this matter. We are only entitled to act if and in so far as it appears that in the burgh which we are considering, it is impossible to execute the Act at the coming election owing to some cause which has occurred. Now, I would first consider the case as if Mr Shields had not resigned. Could it be said that if Mr Shields had not resigned, it was impossible to proceed with the execution of the Act? Most certainly it could not, for we are told by both sides at the bar that the authorities were going on to execute the Act in the very sensible way of filling the vacancies caused by the retiral of four councillors by holding an election in each of the four wards. Things would have run quite smoothly, and we are not to consider what might have happened if things were in a totally different position. Therefore the thing seems to me to be limited to the case arising from the resignation of Mr Shields. That I think is the cause which in the sense of section 17 has made it impossible to proceed with the execution of the Act without an order.

Well, now, Mr Shields having resigned, we are not merely to enable the Act to be carried out, but to enable it to be carried out in such a way that matters should go on as nearly as possible as if Mr Shields had not resigned. My observation

on that is that to order an election to fill all the seats on the council would be to wander very far indeed from the ambit of our duty; and it seems to me that all we have to do is to find some means ready to hand for getting an election to fill Mr Shields' vacancy. It must be by one of the wards, for the town is now divided into wards, and it cannot, I think, be suggested that we should revert to the old system which has been abolished. Now, if it be by a ward, it seems to me that the first ward has a clear ground of preference merely by reason of its being the first ward. In some of the Acts of Parliament there is a provision that where there is equality, on some similar emergency arising, the decision should be by lot. We are not required to do that, and accordingly we proceed to take the first ward that comes, and the first ward that comes is the First Ward. And I therefore think that we should order that an additional election of a councillor take place in the First Ward.

LORD ADAM concurred.

LORD M'LAREN—I agree, and shall only add that the principle of ward elections in this Act, as also in the Municipal Corporation Act of 1833 and subsequent statutes, is that of rotation, a certain number of members retiring each year from the bottom of the list. It seems to me that we are carrying out the principle of rotation if in this matter we take the wards in numerical order.

LORD KINNEAR—I agree with your Lordship.

The Court pronounced the following interlocutor:—

“Order that at the next ensuing election of Police Commissioners in Dunoon, two Commissioners, and not one only, shall be elected by the electors in the first ward, and decern: Allow the expenses of both parties to be paid out of the funds of the Burgh General Assessment.”

Counsel for the Petitioners—Sol.-Gen. Dickson—Craigie. Agent—Alexander Campbell, S.S.C.

Counsel for the Respondents—Salvesen. Agents—Sturrock & Sturrock, S.S.C.

Tuesday, October 20.

SECOND DIVISION.

ROBERTSON v. PARK, DOBSON & COMPANY.

Inhibition—Expenses—Expenses of Petition for Recal of Inhibition.

The pursuer of an action who had used inhibition on the dependence accepted a composition upon the defender's estate in respect of the debt upon which the action was founded, and the action was not called in Court. Held that the defender was entitled to have the inhibition discharged extrajudicially, and that the pursuer, having refused to do so, was liable to the defender for the expenses of a petition for recal.

This was a petition presented by Robert Robertson, builder, Leith, for recal of inhibition. The petitioner craved that Park, Dobson, & Company, merchants, Leith, should be found liable in the expenses of the petition.

The circumstances in which the petition was presented were as follows:—On 23rd September 1892 Park, Dobson, & Company had served a summons on the petitioner for the price of timber supplied by them to him. The summons contained warrant to inhibit, and inhibition was used thereon, the summons with warrant and execution of inhibition being duly registered on 7th October 1892.

Shortly after the summons had been served it became apparent that the petitioner was unable to pay his debts, and the summons on the dependence of which inhibition had been used was never called in Court. After sundry negotiations and proceedings a composition arrangement was ultimately arrived at, all the creditors, including Park, Dobson, & Company agreeing by minute of concurrence duly signed by them to accept 2s. 6d. per £ in full settlement of this claim against the estate.

On 9th May 1896 the petitioner's agents wrote to the agents of Park, Dobson, & Company reminding them of the composition agreement and other circumstances, and sending them a discharge of the inhibition for signature, and intimating that on receipt of the discharge, which they stated was required to enable payment to be made, they would settle with them. On 11th May Park, Dobson, & Company's agents replied, saying that they were not aware whether their clients had agreed to accept the composition, but that they would communicate with them. On 19th May they wrote saying that Mr Dobson had no recollection of agreeing to take the composition. In reply the petitioners' agents wrote sending the formal concurrence to the arrangement duly signed by Park, Dobson, & Company. After further correspondence the petitioners' agents wrote sending a cheque for the amount of the composition due to Park, Dobson, & Company in full settlement of