

SCOTLAND.

COURT OF SESSION.

ROBERT ANGUS, JAMES TOD, WIL-
LIAM CURRIE, JAMES BARCLAY,
sen., JAMES BARCLAY, jun.,
JOHN ALLAN, JOHN FLEMING,
HENRY ARNOTT, ROBERT WAL-
KER, and WILLIAM STEWART. } *Appellants.*

DUNCAN MONTGOMERIE, DAVID
WISHART, JOHN MONTGOMERIE,
and JOHN GULLAND. } *Respondents.*

In a summary complaint under the act of 16 Geo. II, c. 11, s. 24, respecting a wrong alleged to have been done upon the election of magistrates and councillors of a Scotch burgh, by the express provisions of the act it is necessary that all the magistrates and councillors, should be parties in the proceeding below, and, as Appellants or as Respondents, upon appeal to the House of Lords; as, upon a similar proceeding before the act, by action of declaratur, all persons interested must be parties. Where the whole body are not before the House no judgment can be given. Cases which have been decided contrary to this doctrine (*semb.*) are of doubtful authority.

Whether a special objection should be taken, at the election, and a vote, put upon the objection as a necessary preliminary to found the complaint under the act.—*Quære.*

The 7 Geo. 2, c. 16, s. 7, does not expressly require such notice to, and summons of, magistrates and councillors as the 16 Geo. 2, c. 11, s. 24; but the latter act being passed to explain and amend the former (*semb.*), they may be considered in many respects as one act.

The proceeding under the act 16 Geo. 2, must be within two months after the election or wrong done. Whether this can apply to a case of continuance upon the roll, upon an election many years before, without actual re-election. *Quære.*

In the case of a party, not a magistrate or councillor, but having a vote, where the election is for life, and the party has demitted his office, being struck of the Roll, (*semb.*) there is no authority under the act to summon, and *à fortiori* no authority to hear and decide the case on summary application.

Whether this provision of the act is not confined to summary complaints under the act, and whether there is authority to extend the provisions to actions of declaratur not under the act.—*Quære.*

Upon a summary complaint under the 16 Geo. II, c. 11, s. 24, the Court of Session have no power to award *costs in part*, the act directing that they shall allow to the party who prevails *full* costs of suit.

ACCORDING to the set or constitution of the burgh of Inverkeithing the council consists of fifteen persons at least, viz. the provost, two bailies, the dean of guild, and treasurer, and ten or more inhabitant burgesses.

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The number of the ordinary councillors is indefinite, they must be at least ten. There is no annual election of councillors, as in most burghs; when those of the old council, who are desirous to resign have demitted their offices, the magistrates and old council choose new councillors in the room of those who have resigned.

The *set* further provides, with regard to the election of magistrates and office-bearers on the 29th September yearly, in the following terms: “ First, “ they elect the provost, then leets five of the coun- “ cil, and chooses two out of them for the ensuing “ year; next leets three, and chooses the dean of “ guild; and last two, and chooses the treasurer.”

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It has been the practice of the burgh to follow the order here prescribed.

According to custom of the burgh, although there has been no re-election of councillors, those who are duly qualified continue in office during life.

At a meeting of the council on the 29th Sept. 1811, the minutes bear, that the following persons were present, viz. General A. Campbell, provost; W. Turnbull and Alex. Montgomery, bailies; J. Todd, dean of guild; Malcolm Brown, treasurer; Duncan Montgomery, W. Currie, J. Henderson, J. Adamson, Hugh Dawson, Will. Fulton, W. Lillie, D. Wishart, W. Ridley, Andrew Kirk, J. Barclay sen., J. Barclay jun., R. Angus, W. Bouthron, J. Gulland; and deacons J. Dove, D. Wishart, G. Grindlay, and R. Gowie.

At this meeting, after the ordinary forms of procedure were gone through, the council proceeded to the election of magistrates for the ensuing year; and, by a majority of twenty to four, re-elected Mr. Alexander Montgomery second bailie.

The following persons were also allowed to remain upon the roll of councillors:—Duncan Montgomery, John Gulland, William Fulton, David Wishart, Capt. John Montgomery, and John Muckersie.

A summary petition was presented to the Court of Session by the Appellants, in Nov. 1812, complaining of the proceedings at the then last Michaelmas election of magistrates and councillors of the Burgh; and praying the Court to find and declare,

“ *Primo*, That the election of Alexander Montgomery, as bailie, was void and null, and also,
“ that Alex. Montgomery had no right to continue

“ upon the roll of councillors of that burgh upon the
 “ 29th of September last, or to sit, act, or vote in
 “ that capacity, and ought to be struck out of the
 “ list of councillors.—*Secundo*, That Duncan
 “ Montgomery was also disqualified from acting as
 “ a councillor of the burgh, or continuing on the
 “ roll of councillors, and that he ought to be struck
 “ off the same.—*Tertio*, That John Gulland, Wil-
 “ liam Fulton, and David Wishart, were disqualified
 “ from being councillors of the burgh, and that they
 “ had no right to sit, act, or vote upon the 29th of
 “ September last, and ought to be struck off the roll
 “ of councillors.—*Quarto*, To find that Captain
 “ John Montgomery, a pretended councillor, is not
 “ qualified to sit, act, or vote in that capacity, and
 “ that he ought to be struck off the roll of councillors
 “ of the burgh.—*Quinto*, That John Muckersie,
 “ a pretended councillor, is not qualified to sit, act,
 “ or vote in that capacity, and that he ought to
 “ be struck off the roll of councillors of the burgh.
 “ —*And lastly*, To find the complainers entitled to
 “ full costs of suit; and find, decern, and declare
 “ accordingly.”

This petition was founded on the 16 Geo. 2, c. 11,
 s. 24, which provides, “ That it shall and may be
 “ lawful to and for any constituent member, at any
 “ meeting for election of magistrates or councillors,
 “ or of any meetings previous to that for the election
 “ of magistrates and councillors respectively, who
 “ shall apprehend any wrong to have been done by
 “ the majority of such meeting, to apply to the Court
 “ of Session by a summary complaint, for rectifying
 “ such abuse; or for making void the whole election.

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“ made by the majority ; or for declaring and
 “ ascertaining the election made by the minority,
 “ so as such complaint be presented to the Court
 “ of Session within two calendar months after
 “ the annual election of the magistrates and coun-
 “ cillors ; and the Court shall thereupon grant
 “ a warrant for summoning the magistrates and coun-
 “ cillors elected by the majority, upon thirty days
 “ notice, and shall hear and determine the com-
 “ plaint summarily, without abiding the course of
 “ any roll ; and shall allow to the party who shall
 “ prevail their full costs of suit.”

Answers were given in to this petition and com-
 plaint on the part of Gen. A. Campbell, provost ;
 W. Turnbull, and A. Montgomery, bailies ; And.
 Kirk, dean of guild ; and Malcolm Brown, treasurer ;
 D. Montgomery, W. Bouthron, W. Fulton, J. Hen-
 derson, J. Adamson, D. Wishart, W. Lillie, J. Mont-
 gomery, J. Muckersie, H. Dawson, J. Gulland, and
 Major-General D. Ballingall, councillors ; and J.
 Dove, deacon of the incorporation of bakers ; and G.
 Grindlay, deacon of the incorporation of weavers ;
 all of the said burgh, at Michaelmas 1812 ;—and
 replies were given in by the Appellants ; on advising
 which papers, the Court appointed the Appellants
 “ to lodge, print, and box, within eight days, a con-
 “ descendance, in terms of the Act of Sederunt, of
 “ the facts and circumstances which they aver, and
 “ offer to prove in support of their several objections
 “ to the several councillors and others objected to.”

In their condescendance, the Appellants averred
 that the parties to whom they objected were dis-
 qualified by non-residence.

To this condescendence answers were given in for the respondents, and the other parties then defenders.

A proof was allowed to the parties ; and after some further procedure, pending which A. Montgomery, one of the original defenders, died ; and General Campbell petitioned the Court to allow his name to be withdrawn from the list of Respondents to the complaint, on the ground of his having, on the 17th December 1814, addressed a letter to the provost, magistrates and council of the burgh of Inverkeithing, in which he resigned then, and for ever, any right he might have to the office of councillor in the said burgh : the proof was reported.

Having heard counsel on the import of the evidence, the Court ordered memorials ; on considering which, they pronounced the following interlocutor :

“ The Lords having advised the petition and complaint of R. Angus, J. Todd, and others, with the answers thereto, replies and duplies, depositions of witnesses adduced, and writs produced, and memorials for both parties ; they find that the said complaint is competent against such of the Respondents as were continued on the roll of councillors of the burgh of Inverkeithing at Michaelmas 1812, in so far as they, or any of them, were by law disqualified from being so continued : Find, that by the set and constitution of the said burgh, the councillors thereof must be inhabitant burgesses, and, therefore, sustain the objections of non-inhabitancy made by the complainers against the continuance of the following persons on the said roll at Martinmas 1812, viz. J. Muckersie, J. Gulland, D.

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“ Wishart, W. Fulton, and Capt. J. Montgomery :
 “ Find, that the said persons, and each of them,
 “ were disqualified from being so continued, or from
 “ acting as councillors of the said burgh, and grant
 “ warrant to, and ordain the clerk of the said burgh.
 “ to expunge their names from the said roll, and
 “ decern accordingly. Repel the whole objections
 “ to the continuance of D. Montgomery and Alex.
 “ Montgomery on the said roll of councillors at
 “ Michaelmas 1812 ; and also repel the whole objec-
 “ tions to the election of Alexander Montgomery
 “ as a bailie of the burgh at Michaelmas 1812 ;
 “ and assoilzie them, and each of them, from the
 “ conclusions of the said complaint, and decern ;
 “ but find none of the parties on either side entitled
 “ to expenses of process.”

Against this interlocutor the Appellants presented a petition, praying the Court “ to alter the interlocutor complained of, so far as regards Duncan and Alex. Montgomery ; and to decern in terms of the petitioners complaint, and to find them entitled to expenses.”

This petition was refused.

The Respondents also petitioned against the interlocutor, and prayed the Court “ to alter the interlocutor complained of, to dismiss the complaint, and find the petitioners entitled to expenses ; at least, to repel the objections to the qualifications of Capt. J. Montgomery, D. Wishart, and J. Gulland.”

This Petition being answered by the Appellants, the Court pronounced the following interlocutor :

“ The Lords having resumed consideration of this
 “ petition, with the additional petition, answers
 “ thereto, and whole cause, they alter the interlo-
 “ cutor reclaimed against, and find the complaint
 “ incompetent, in as far as the same concludes
 “ against Capt. J. Montgomery, D. Wishart, and J.
 “ Gulland, in respect there was no special objection
 “ stated against them at the Michaelmas election
 “ 1812, no vote put upon such special objection, and
 “ consequently no wrong done by the magistrates at
 “ that election : therefore dismiss the said complaint,
 “ assoilzie the said Capt. J. Montgomery, D. Wishart,
 “ and J. Gulland, from the conclusions of the said
 “ complaint, and decern : Find the complainers liable
 “ in expenses, in as far as respects those incurred
 “ in discussing the point of competency ; allow an
 “ accompt to be given in, and remit to the auditor
 “ to tax the same upon the principle above expressed,
 “ and to report.”

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A petition against this interlocutor on the part of the Appellants was refused ; and the appeal was presented from these interlocutors.

For the Appellants :—

The Respondents having in the pleadings below 5 Feb. 1821. joined issue on the question of residence, have thereby waived the objection to the competency. It is not an objection which nullifies the proceedings, or which the Court is bound to notice. The defenders having proceeded on the question of residence, it must be taken for granted that the special objection, if necessary, was taken at the election. As to the argument upon which the judgment below proceeds, it is

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a fallacy. It has been decided * that persons not present at the election may complain of wrongs done by those who were present. If so, a specific objection to be made at the election cannot be necessary. In many cases † persons present, and not objecting, and even concurring in the proceedings at an election, have afterwards raised a complaint under the statute without objection. As to the argument that no wrong was done at that election, because the parties had been elected for life at former elections, the re-election or continuance of those persons as councillors is a wrong within the statutes, and the continuance is equivalent to a new election. If objection were necessary, the general protest made against illegal votes was sufficient. There was in fact an election of magistrates, and Wishart and Gulland; two of the persons against whom the complaint is made, did vote. The fallacy seems to have grown out of the misapplication of the statutory enactments in the case of freeholders of a county ‡. But as to them, the statute has not said generally if *any wrong be done* it shall be competent to complain. The statute refers to the four cases of a claim rejected, an enrolment made, a continuance on the roll where there ought to have been a removal, and a removal where there ought to have been a continuance. It points out the mode of proceeding

* Wight. on Elect. 340, 341, citing the case of St. Andrew's, Kilk. p. 107.

† *Andrew v. Provost of Linlithgow*, Jan. 24, 1775, Dict. 1885; *Marshall v. Carr*, Dec. 4, 1782, Id. 1887; *Tenant v. Johnston*, Feb. 23, 1785, Id. 1888; *Harrower v. Meiklejohn*, 5th Dec. 1812. Not reported.

‡ 16 Geo. II, c. 11, s. 1 to 21.

in each of these cases. But there is no such provision in the case of burgh elections*. In one † case as to a freeholder, where he had altered his status by parting with his freehold qualification, the complaint against the continuance of a person on the roll was found competent, although no special objection had been made at the meeting ‡.

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For the Respondents.—The conclusion of the petition and complaint, so far as it complains of the continuance of Alexander Montgomery and the other persons mentioned on the roll as councillors, and prays that they may be struck off the roll, is incompetent.

This is a summary proceeding under the statute not according to the ordinary course of the Court.

* 16 Geo. II, c. 11, s. 22 & seq.

† *Dempster v. Lyall*, March 3, 1791. Dict. 8868.

‡ Whether actual residence is essential, and whether councillors elected for life were removable upon ceasing to reside, were questions not much discussed upon the hearing of the appeal, which was decided upon a preliminary question of form. On the heads of annual election and residence, see the following authorities *pro*:—

Leges Burgorum, c. 77; stat. 1469, c. 30; stat. 1487, c. 108; Wight. pp. 333. 344; Bankton, v. 2, b. 4, tit. 19, par. 8; case of the Mayor of Inverkeithing, Elchies Decis. Burgh Royal, No. 22; Falconer, vol. 1, p. 60; *Holburn v. Haldane*, D. P, July 11, 1761; Kames, Dec. *voce* Citation; *Dalrymple v. Stoddart*, 7th Aug. 1778. *Lamb v. High*, citing *Millar v. Nicholson*, 29 July 1789; *Cochrane v. Henderson*, 6th Feb. 1807.

Con:—The case of Dumfries, *dict.* of Dec. v. Burgh Royal, p. 1840. That necessity of residence applies only to office-bearers, not to councillors; Anderson, 17 Feb. 1749; Dunbar, 7 Jan. 1757; Id. p. 1842; *Munro v. Forbes*, 10 July 1784; D. P. 3 May 1783; and the Records of the Borough.

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The proceeding intended by the Legislature is not one for determining a question of right. In such a case the party must be left to his remedy by the common course of the law, viz. to his action of declarator*.

The complaint admits that the parties were on the roll of councillors previous to the election complained of; and it admits, that by the set or custom of the burgh the councillors *continue during life, without re-election*. But it affirms, that if they cease to be inhabitants *it is competent to object to them, and to apply to the Court to have them struck off*; and it concludes accordingly, by praying the Court, upon the merits of the case, *to find and declare as in a declaratory action*.

A meeting which adopts a practice sanctioned by long usage have not committed a wrong for which an immediate remedy is necessary, and which, if they attempt to defend, they must be *vi statuti* liable in costs. The whole frame of the statute shows that it had in contemplation those acts of injustice, or of culpable mistake, which were plain, and which tended to produce immediate injury to the individual complainers, or to the community; a description which cannot apply to the *bonâ fide* continuance of an usage which has long subsisted.

There is no re-election, or act of continuance of the old councillors on the roll. No such act is necessary by the constitution of the borough. The wrong therefore complained of was at the election of Michaelmas 1812, and the statutes require the summary proceeding to be within two months.

* Anderson, 7th Feb. 1749, Dict. 1842; Dunbar, 7th Jan. 1757; Dict. 1855.

For the Appellants, *The Attorney-General*, and
Mr. W. Adam.

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For the Respondents, *Mr. C. Warren*, and
Mr. J. P. Grant.

[In the course of the argument the following observations were made by the Lord Chancellor and Lord Redesdale.]

The discretion which the Court below has exercised on the subject of costs is not given by the act *, which provides that full costs of suit shall be given.

The 7th Geo. II, c. 16, s. 7, does not name and limit the parties to be summoned on the complaint given by that act. But the 16th Geo. II, c. 11, s. 24, requires that the magistrates and councillors elected by the majority should be summoned upon a warrant issued by the Court. It requires, therefore, expressly, that all of them should be parties. How the decisions are to be reconciled with the provisions of the act it is difficult to see. Suppose a man had been struck off the roll who had a vote, not being a magistrate or councillor, how could he be summoned under the act? Or where the election is for life, and the party has demitted his office, if he is struck off the roll, it may be doubted, notwithstanding the decisions, whether the Court has jurisdiction to summon the party, much less to hear and decide the case. In these acts giving summary jurisdiction, the power must not be extended beyond the cases for which express provision is made. Where are the words of the act which give jurisdiction to strike off the Roll?

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especially if the disqualification of non-inhabitancy may be purged by subsequent residence. That is a very important question. The 16th Geo. II. being an act to explain and amend the 7th Geo. II, they may be considered in many respects as one act. In the proceeding by action of declaratur before the act all persons interested were made parties. But as the act directs who are to be parties, that direction is conclusive. It has been argued that the proceedings being penal in their nature, cease as to Alexander Montgomery by his death. But it may be doubtful, under the requisition of the statute, whether it is not necessary to revive against the representatives in case of death; although in a case where no costs are given it might be difficult to assign any cause for the revivor.

According to the act, in these cases of summary complaint, the proceeding must be commenced two months after the election. How can that provision be applied to the case of an election which took place twenty years before? The act speaks of a wrong done by the majority. In this case, so far as concerns the act of continuing the councillors on the Roll, it must be considered unanimous; for it does not appear that there was any separation or dissent expressed. How can a party complain of a wrong, to which, by implication, he was accessory?

With respect to actions brought before the passing of the acts of Geo. II, it was not necessary that they should be brought within two months. Where is the authority for limiting that time in such actions since the statutes, which apply only to summary complaints? In the case* cited by Wight. who

* *Young v. Johnston*, Wight. 339, in C. of Sess. Jan. 1766, in D. P. 1767.

is generally an accurate writer, it does not appear that in the House of Lords there was any question or decision as to the limitation of two months on such actions. It was an action of reduction at common law. The decision is in general terms, no special ground being stated.

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In this case many of the councillors are not parties to the appeal. If they had been made parties, and the petition had prayed that they might answer, judgment would have been given against them by default if they had not appeared upon the usual summons. We can do nothing against them in their absence, if you have not, by your proceeding in the appeal, given them the opportunity of appearing. We can only give judgment against those who are before the House individually, or against the whole body who are not before the House.

The *Lord Chancellor*:—I have looked anxiously 28 Feb. 1821. into the statute and the authorities, and considering the circumstances of this case, I can only advise the House to affirm the judgment, taking care distinctly to express in the terms of the order, the grounds on which it is made.

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The Lords find, that in the circumstances of this case an application by summary complaint to the Court of Session of Scotland could not be sustained, with respect to the Respondents, now before this House. It is therefore ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of, so far as they relate to the Respondents now before this House, be affirmed.