opposing litigant; there may be other reasons, but we must, in considering whether or not we are to allow a retractation, have regard to its effect as well as to its motive.

This case is distinguished from the cases to which reference has been made, where a retractation was allowed. I am quite of opinion with your Lordship that the appeal must be dismissed.

Lord Ardmillan — This case raises a question of form of procedure. It is important and right to distinguish between cases (1) where any evidence *prout de jure* is competent, and (2) where the pursuer is limited by law to proof by writ or oath. In the first instance, surely it would be the height of injustice to allow a pursuer who, having a bad case and knowing that the defender was aged or nervous, had referred the whole to his oath to retract that reference. In the other instance, I do not think it is incompetent to retract a reference to oath. No case could be put stronger than that put by Lord Gillies when he said (*Chambers* v. *Jackson*, Feb. 18, 1813, 17 F.C. 215), "I refer, for instance, to a man's oath that he is my trustee, because I have lost a back-bond which he gave me. He appears to depone, and I produce the back-bond which I have found in the meantime. It would be most unjust not to let me retract the reference."

In the case before us the Sheriff-Substitute decided that the defender could only prove his case by the writ or oath of the pursuer. That judgment was not appealed to the Sheriff, and nothing was done in regard to it. The party who had that judgment against him presented a minute of reference, which the Sheriff sustained. That was a judicial reference, and the interlocutor sustaining it was pronounced in May. In June following the defender proposed to withdraw or retract the minute, and the Sheriff-Substitute finds "it in the circumstances incompetent to withdraw the said reference," and decerns against the defender.

I think the Sheriff-Substitute was right, and that we should not now permit the reference to be retracted.

Lord Mure —I have come to the same conclusion. I do not think that the Sheriff-Substitute meant to hold that the withdrawal of the reference was incompetent in any case, but merely that it was so in the circumstances of the present case. Indeed the Act of Sederunt which was quoted to us contemplates that effect shall be given to a minute of retractation. All the books lay down that there must be special circumstances in the case before it can be allowed, and I do not think that these exist here.

The following interlocutor was pronounced:—

"Find that the appellant (defender) is not in the circumstances of the case entitled to retract the reference to the oath of the respondent (pursuer), contained in his minute of 4th May 1875; but in respect he now offers to proceed to take the deposition of the respondent on the said reference, appoint Saturday next the 19th instant, at twelve o'clock noon, as a diet for the respondent to appear and depone on the said reference: Grant commission to Donald Crawford, Esquire, Advocate, to take the respondent's deposition, and report the same to the Court, reserving all questions of expenses."

Counsel for Pursuer (Respondent) — Asher — Young. Agents — Millar, Allardice, Robson, & Innes, W.S.

Counsel for Defender (Appellant) — Rhind — Hunter. Agent—Robert Menzies, S.S.C.

Thursday, February 17.

FIRST DIVISION.

[Lord Young.

THOMSON AND OTHERS *v.* HAMILTON AND OTHERS.

Burgh—Stat. 3 *and* 4 *Will. IV. c.* 76—*Construction —Municipal Election.*

In a question as to a municipal election upon a construction of the Statute 3 and 4 Will. IV. c. 76—*held* (*reversing* Lord Young) (1) that the words in section 16 of that Act, "one-third, or a number as nearly as may be to one-third, of the whole council shall go out of office" each year, mean one-third when the number of councillors fixed by the set or usage of the burgh is divisible by three, and as near as may be to one-third when it is not so divisible; and (2) that when any of the members of three years' standing die in the course of the year when they would otherwise have fallen to go out of office, they are to be reckoned among the retiring third, but that when any member dies before entering on his third year of office, he is not to be so reckoned, and the retiring third must be made up of councillors of two years' standing, beginning with him who had the smallest number of votes.

This was an action of reduction, declarator, and payment at the instance of William Garth Thomson, seed merchant, Glasgow, and others, all councillors of the royal burgh of Rutherglen, and registered voters there, against Robert Hamilton, calenderer, Glasgow, and others, also councillors of that burgh, and George Gray, the town-clerk. The conclusions of the summons were—(1) for reduction of a minute of the town-council dated 5th November 1875, whereby it was set forth that the defender Hamilton had, *inter alios*, been elected a bailie of the burgh, and also for reduction of the pretended election; (2) for declarator that Hamilton was not lawfully elected, but had ceased before the 5th November 1875 to be a councillor, and should now be ordained to give up office; and (3) for payment by the defenders of £300 for wilful contravention of the Act 3 and 4 Will. IV. cap. 76.

By the usage of the burgh of Rutherglen the number of members of council was eighteen, and the election of councillors fell to be regulated, in the first place, by the Statute 3 and 4 Will. IV. cap. 76. The first Tuesday of November was the day fixed under the

statute for the election, and by the 15th section of the Act it was provided that on that day in November 1834, and in every succeeding year, the electors should elect "one-third part, or as nearly as may be one-third part, of the council of such burghs, in the place of the third thereof who shall, as hereinafter directed, go annually out of office; providing always that any councillor so going out of office shall be capable of being immediately re-elected."

The 16th section of that Act enacted "that upon the first Tuesday of November 1834, and in every succeeding year, one-third, or a number as near as may be to one-third, of the whole council of each such burgh shall go out of office; and in the said year 1834 the third who shall go out shall consist of the councillors who had the smallest number of votes at the election of councillors in this present year. And in the succeeding year 1835 the third of the councillors first elected under this Act, who shall go out, shall consist of the councillors who, at such first election under this Act, had the next smallest number of votes (the majority of the council always determining, where the votes for any such person shall have been equal, who shall be the persons to retire), and thereafter the third of the councillors so annually going out of office shall always consist of the councillors who have been longest in office."

The 24th section enacted "that when any magistrate or office-bearer (other than the provost or chief magistrate and treasurer) shall be in the third of the council going out of office, the place of such magistrate or office-bearer shall be supplied by election by the council as soon as the full number thereof shall have been completed by the annual election of the third then thereby directed to take place, the said election to be made by plurality of voices, and the chief or senior attending magistrate to have a double or casting voice in case of equality; provided always that the provost or chief magistrate and the treasurer shall always remain in office for the period of three years, and that they, as well as all the other magistrates or office-bearers, shall at all times be capable of being re-elected."

The 25th section enacted "that if any vacancy shall in the course of the year occur in the council or magistracy or office-bearers of any such burgh by death, disability, or resignation, the same shall be filled up *ad interim* by the remaining members of the council by election, as hereinbefore provided, at a meeting to be called on five days' notice by the town-clerk, by intimation in writing to each of such remaining members of the council; but any councillor, magistrate, or office-bearer so elected *ad interim* shall go out of office on the first Tuesday of November next ensuing his election, and the vacancy thereby occurring shall be supplied at the next annual election of councillors and magistrates or office-bearers in such burgh," &c.

In each of the years 1871, 1872, and 1873, six members were elected to the council, and in the last of these years one of the six councillors who had been elected in November 1871 became provost. His term of office was therefore lengthened, in terms of the statute, by two years beyond November 1874, at which date he would otherwise have retired.

Before November 1874 one of the councillors elected in 1872 died, and the vacancy fell to be filled up at the annual election in November following. The provost's time as a councillor also expired at that date, and it was contended by the pursuer that the councillor who had the lowest number of votes of those then two years in office should in that case have in addition retired; that so six should have retired and seven been elected, one to fill the vacancy caused by death. The fact was that only six were elected, and it was stated in the condescendence that "the adoption of this course was the beginning of the system against which the pursuers have protested."

Before November 1875 one of the councillors elected in 1873 resigned, and the vacancy fell to be filled up in that month, at which time also the pursuers averred that the councillor who had the smallest number of votes of those two years in office (the defender Hamilton) should likewise have retired in place of the provost, who continued in the council in virtue of his office. In that way the six who fell to retire by rotation, and likewise Hamilton, should have gone out of office, and seven members, six to take the place of those retiring by rotation, and one the place of him who had resigned, should have been elected. Instead of that, only four members, the survivors of the six who had been elected in 1872, retired, and six new members were elected. Of the two predeceasing members elected in 1872, one had died (as above-mentioned) in 1874, and his place had been supplied at the annual election of that year, while the other had died in the course of the year 1875.

The pursuers averred that by the course followed no one had been elected to fill the place vacant by the resignation, and Hamilton had been allowed to retain his seat and was afterwards chosen bailie: therein the defenders had wilfully contravened the provisions of the statute.

The defenders answered that the system they had adopted had never resulted in increasing the total number of councillors beyond what usage had established; that they had acted according to the true meaning of the statute by securing an annual renewal of the council to the extent of one-third; and also enabling each councillor, so far as possible, to serve his full term of three years.

The pursuers pleaded, *inter alia*,—"(1) Irrespective altogether of vacancies occasioned by the death or resignation of its members, one third of the council must annually retire from office, under section 16 of the Act 3 and 4 William IV. cap. 76. (2) If a councillor, who would otherwise have been compelled to retire in terms of that section, has his term of office prolonged by reason of his being elected provost or treasurer, still a full third must go out; and the councillor who must retire instead of him is the councillor who had the smallest number of votes of the councillors two years in office."

The defenders pleaded, *inter alia*,—"(4) On a true construction of section 16 of the Act 3 and 4 Will. IV. cap. 76, it is not necessary that more than one-third, or a number as near as may be to one-third, of the whole council of a burgh shall go out of office in each year. (5) There is no warrant in the statutes, or any of them, for compel-

ling a councillor to retire merely because he has been elected by the smallest number of votes of his year. (6) Assuming it to be necessary that there should be a vacancy in the council in order to permit of the provost remaining in office beyond his natural term as a councillor, the magistrates and council are entitled to accept a vacancy caused by death or resignation as sufficient to meet that requirement."

The Lord Ordinary upon 12th January 1876 pronounced the following interlocutor, with note, in which, and in the opinions afterwards delivered by the Court, the arguments used are sufficiently detailed:—"The Lord Ordinary of consent holds the production satisfied and the defences given in and the record closed as the defences and record on the merits, under reservation of the preliminary pleas, and having heard counsel on the whole cause and considered the record and process, sustains the defences, assoilzies the defenders from the conclusions of the action, and decerns: Finds the pursuers liable in expenses; and remits the account when lodged to the Auditor to tax and report.

"*Note.*—The leading conclusion is for reduction of the defender Robert Hamilton's election as a bailie of the royal burgh of Rutherglen in November 1875, on the ground that he was ineligible, not being a councillor of the burgh. He was elected a councillor in November 1873, and the question whether or not he was a councillor when elected a bailie in November 1875 depends on the soundness or unsoundness of the pursuer's contention that he ought to have gone out of office prior to the election of that year, under section 16 of the Act 3 and 4 William IV. cap. 76. This again depends on the construction of the statute as applicable to the facts averred by the pursuers.

To take the facts first—these, as averred by the pursuers, and so far as material, appear to be—1st, That by the set or usage of the burgh the full number of councillors is eighteen; 2d, That Hamilton was duly elected a councillor in November 1873, as one of the six then elected to fill the places of the third of the council who then went out as having been longest in office, he having the smallest number of votes of the six elected; 3d, That Scouler, a councillor elected on November 1871, was in November 1873 elected provost; 4th, That neither in 1874 nor 1875 did a full third of the council go out under section 16 of the Act, but in 1874 only *five*, and in 1875 only *four*. The other facts will be most intelligibly stated after noticing the provisions of the Act as explanatory of how it happened that six councillors did not go out under the Act in 1874 and 1875, but only five in the one year and four in the other.

"The most important clause of the Act with reference to the present question is clause 16, quoted in condescendence V. It enacts generally that in November 1834, and in every subsequent year, 'one-third, or a number as near as may be to one-third, of the council' of each burgh shall go out of office. In 1834 the selection of councillors to go out was necessarily made from those elected in 1833, for there were no others, except it may be persons who had been appointed *ad interim* to fill vacancies under section 25, and who, if there were such, went out under the provisions of that clause. In 1835 the case was to a certain extent different, and it is to be observed that only councillors elected in 1833 are required to go out in 1835.

"The criterion in both years is 'number of votes,' the third having the smallest number being appointed to go out in 1834, and the third having the next smallest number being appointed to go out in 1835. There is no provision for the very unlikely but still possible event of the number of councillors who had been elected in 1833 being, before the election of 1834 or 1835, reduced by 'death, disability, or resignation' below one-third of the whole number of councillors, according to the set or usage of the burgh, other than the words 'one-third, or a number as near as may be to one-third.' I should myself think these words sufficient to meet the case, and had it occurred I should think that it would have been so held rather than that any deficiency of a full third should be made up of councillors elected in 1834. It is necessary to consider this point in construing the words which I have quoted, which, according to the contention of the pursuers (with which I do not agree), refer only to the case of a burgh in which the whole number of councillors, according to the set or usage, is not exactly divisible by 3.

"The part of the clause which has governed the matter since 1835 is in these words—'And thereafter the third of councillors so annually going out of office, shall 'always consist of the councillors who have been longest in office.'

"Taking the clause as a whole, I think the provision applicable to the first three years may be regarded as of the nature of a temporary expedient necessary to be resorted to prior to the complete development in operation of the scheme of the Act, which scheme is, I think, clearly that every councillor shall have three years of office and no more, the machinery by which this is secured being that in every year after 1835 'one-third, or a number as near as may be to one-third, of the whole council,' and which shall always consist of the councillors who have been longest in office,' shall go out.

"After the scheme of the Act came into full operation, on the expiry of the first three years, the comparative number of votes by which any councillor was originally elected is no criterion for going out. This criterion, which is by the Act limited to councillors elected in 1833, has no application to councillors subsequently elected, for there is no rule of the common law that I know of which would warrant the Court in resorting to it.

"The next important clause of the Act is the 24th, which enacts that a provost or treasurer 'shall always remain in office for the period of three years.' This is in truth a qualification of section 16, for the admitted effect of it is to extend the duration of the office of councillor in the case of any person who may be elected provost or treasurer in his second or third year.

"Accordingly, Mr Scouler (a councillor elected in 1871) being elected provost in November 1873, his term of office as councillor 'was lengthened by two years, in terms of the foresaid statute, beyond 2d November 1874, at which date, had he not been elected provost, he would have fallen to retire' (condescendence XII).

"But the pursuers, while thus admitting that

Mr Scouler was not required to go out in November 1874, although he was then one of the six councillors (a full third of the council) who had been longest in office, contend that the full third ought to have been made up, by putting out in his stead a councillor elected in 1872, and who was therefore not of those 'who have been longest in office,' and, in the absence of any other criterion of selection, suggest that of number of votes—which had been enacted as the criterion for the elections of 1834 and 1835. The pursuers do not indeed seek any remedy for what was done in 1874, but only refer to it as an irregularity, and as 'the beginning of the system against which the pursuers have protested' (condescendence XIV.). In my opinion there was no irregularity. I think not only that the provost properly remained in the council, but that the statute was satisfied by the going out of the five councillors who were elected at the same time with him (November 1871), and were the whole councillors who had been longest in office, although less by one than a third of the council, that one being enabled to remain by section 24, which to this extent qualifies section 16.

"The point is only unnecessarily confused by referring to the death of Mr Wallace before November 1874. If his death occurred long before 1874, the council may have erred in not making an interim appointment. But his place was filled at the election in November, just as it must have been had there been an interim appointment; and his death in no way affects the present question. The resignation of Mr Alexander before November 1875 (he having been elected in 1873) is an equally uninteresting and unimportant incident; and I pass it by accordingly.

"The pursuers' case really turns on the election of 1875—the question being whether or not the defender Robert Hamilton (who was elected in November 1873) ought then to have gone out under section 16 of the Act?

"Now, leaving out of view the case of the provost (elected councillor in 1871), the councillors who had been longest in office were these (six in number) who had been elected in November 1872, and whose names are given in condescendence X. Had these councillors all been alive and in office in November 1875, it is clear that they must all have gone out under section 16 of the Act. But two of them died before November 1875, that is, between November 1874 and November 1875. There were therefore only four in life to go out under the Act, and they went out. The other two having gone out by death, the question is, whether their turn to go out under the Act ought to have been supplied by selecting (on the criterion of number of votes) councillors who had been elected in 1873, and who were therefore not of the number of the council who had been longest in office. If my conception of the case and of the Act of Parliament is not fundamentally erroneous, the pursuers' contention here is so obviously untenable that I should waste words and consume time unprofitably by arguing the matter at large. Clause 25 was especially relied on in argument by the pursuers' counsel; but why, he failed to convey to my mind. In the case of death or disability the clause distinguishes between the case of a party who would at the next election have gone out under the Act, and one who would not,—but to this extent only that the person elected in room of the dead or disabled councillor shall in the latter case be elected as 'an additional councillor,' and in the other not. The language is inaccurate, but the meaning, which need hardly be expressed, is simply this, that where the party dying, resigning, or disabled would *not* have gone out under the Act prior to the election of his successor, the election of his successor shall be deemed the election of an additional councillor—*i.e.*, additional to those required to fill vacancies caused by councillors going out under the Act, but, if otherwise, that no councillor shall be elected 'additional' to those required by such going out; or, in other words, that the circumstance of the going out of a councillor being anticipated by his death or resignation before the election shall make no difference with respect to the rights of his constituents to elect a successor.

"I have already sufficiently indicated my opinion that the death or resignation of a councillor not of the number of those who, as having been longest in office, are required to go out in the following November, is immaterial to the question. The place of such a councillor dying or resigning must, whether or not it shall have been filled by an interim appointment, be supplied by a new election in the following November, under section 25 of the Act, without reference to section 16. But the death or resignation of a councillor who, had he not died or resigned, would have gone out, under section 16, in the following November, is another matter. In that case also an interim appointment may be made, but whether made or not, there is only one place to be filled when the November election arrives—thus, when in November 1675 it appeared that of the six councillors who, had they all lived, would have gone out, two were dead, I am very clearly of opinion that the vacancies to be filled were not raised to eight, but remained at six. Upon this view the election of 1875 proceeded. *Six* councillors were then elected in room of the six who had been elected in 1872, and who were then all removed from the council, two of them by death immediately before the election, and the remaining four by going out under section 16 of the Act. The case would not have been varied (although the pursuers seem to think otherwise) had the places vacated by death been supplied by interim appointments.

The primary conclusion thus failing, the subsidiary conclusion must fail also. I must say, however, that in my opinion the subsidiary conclusion must fail in any view—there being no ground whatever that I can see for attributing to the defenders a wilful violation of the Act. My opinion that they have acted in accordance with the Act would probably be an answer to the imputation of wilful violation, even in the judgment of those who may think that I and they are in error."

The pursuers reclaimed, but at the debate withdrew their conclusion for payment of penalties.

It was agreed that the Lord Ordinary had erred in thinking, as stated in his note, that two councillors had died immediately before the election of 1875. One only had died then, the other before the election of 1874.

At advising—

Lord President—The object of this action is to set aside as invalid certain proceedings at the election of councillors for the burgh of Rutherglen in November 1875, and the election of Robert Hamilton as bailie following upon the election of councillors; and further, for declarator that Robert Hamilton prior to the 5th November 1875 had ceased to be a councillor of the burgh, and is not at present one of the councillors of the burgh.

Now, the whole question before us, I apprehend, turns upon the regularity of the election of 1875. There has been a good deal of reference from that to proceedings which took place at the election of 1874. But for reasons which I shall explain it appears to me that we have nothing to do with what may have happened at that previous date.

By the old set or usage of the burgh of Rutherglen the town council consisted of eighteen members, and that number was not altered but confirmed by the Statute of 3 and 4 William IV. cap. 76. The general scheme of that statute, after providing for the mode of election and the way in which the councillors should go out of office, had regard to the fulfilment of the provision that one-third should go out of office every year, and a corresponding number be elected. Now, the number of the council of the burgh of Rutherglen being eighteen, of course the application of that rule would be that six councillors should go out regularly, and six be elected in their place. Accordingly, we find from statements before us that in the years 1871, 1872, and 1873, that course was followed. Each year six went out and six were elected in their place.

But when the year 1874 came round and the election took place, it turned out that in the interval between the former election and November of that year a gentleman had been elected provost, who but for that circumstance would have gone out of office in that month. The same statute provides that when a councillor is elected provost or treasurer, "he shall always remain in office for the period of three years." This has been construed by universal practice to mean that each of these officials is to have a course of three years' office after his appointment. It follows therefore that the gentleman who had been appointed provost after the election of 1873 must remain in office until November 1876; and accordingly, of the six who fell to go out of office in 1874, this gentleman, being one, did not go out.

It is contended on the part of the pursuers that as he was exempted, another councillor should have gone out in his place; on the other side, that the effect of the clause is that when the period arrives at which the provost or treasurer would have gone out but for his official position, the result is that there is one fewer than the usual number of councillors to go out. I do not think it is necessary to determine that question, because in whatever way it were decided, it could not affect the election of 1875. Only five councillors went out in place of six, and in proceeding to examine the election of 1875 I shall assume that that was the regular course to follow. In 1875 the councillors who would naturally fall to go out were those elected in 1872, and if six of these were still in the council, no difficulty could possibly arise; they would go out, and six be appointed in their stead. But the state of facts was that of the six who had been elected in 1872, one, Mr Wallace, had died before November 1874, and another before November 1875 in the course of that year. It appears to me that, according to the true construction of the statute, the gentleman who had died in 1875 falls to be counted as one of the councillors going out in 1875, as if he had survived until the date of the election. But I am of opinion that the gentleman who died before November 1874 cannot be counted as one of those outgoing at November 1875, because since he died in 1874 his place fell to be filled up in November 1874, and was filled up. His place was therefore full, and the councillor elected to fill his place remained a member of the council till 1877.

The view of the Lord Ordinary in regard to the election of 1875 is irresistible, and his reasoning and logic is unimpeachable, but he proceeds as if both deaths had occurred in 1875, and therefore, one of these having occurred before the election of 1874, in place of there being six councillors going out in November 1875 there are only five, because Wallace cannot be counted.

Now, this brings the matter to a simple issue. Is it necessary or not that six shall go out each year, or will the statute be satisfied in this instance if five go out? The decision of that question turns upon the construction of the Act of Parliament. The 16th section requires that in every year one-third shall go out, and it is said that the true construction of these words is, that if there is not one-third who have been for three years in office, then a part must be taken, as near as may be to one-third—or, otherwise those who have been in the council for three years, as near as may be to one-third.

The normal condition, as assumed in the statute, is that every man shall be three years in the Council and no longer. But it is quite impossible that that theory can receive effect. It may happen that of the gentlemen elected in 1872 not one remained when the election of 1875 arrived; and in that case, according to the defender's contention, there would be no one to go out. That cannot be the construction of the statute. It would leave the council quite unchanged. But, without going so far as to suppose a complete extinction, we may take it as not improbable that three or four councillors died. Would it be possible to bring the balance of three or two which remained within the one-third prescribed by the statute? I think not.

But it is possible that there may be a much larger number than one-third who have been three years in office, and that there may consequently be a surplus over the one-third, unless there had been a compensating number of deaths and resignations. According to the contention of the defenders in this case, these would all require to go out. The theory of this statute cannot be perfectly carried out. It is important that every councillor shall have three years of office and no more. Therefore where you have no more than two or three men who have served that term, that number must be supplemented; and, on the other hand, where you have a larger number than one-third who have been in office, then there must be a selection of those who are to go out.

One method of avoiding this would be to hold that when a councillor dies the man chosen to fill his place is only to serve out the balance of the period of office which the first would have had had he survived. If that were the true construction of the statute, the difficulties which I have been suggesting would be avoided. But the decision in the case of *Scott* v. *The Magistrates of Edinburgh*, Dec. 21, 1838, 1 D. 347, rules this point the other way, and we cannot now go back upon it. It seems therefore to follow that when the statute speaks of the number *one-third*, it means a number as near to one-third as the number of councillors fixed by the set of the burgh will permit. If the number is divisible by three, six must go out every November.

That being so, the proceedings in November 1875 were irregular. Five only went out, including those who died in the course of the year. Six were elected, one of these being to fill up a vacancy caused by a resignation, but that fact does not affect the present question, as the Lord Ordinary has properly held. The election of 1875 was therefore irregular, in as much as one other councillor should have gone out in addition to the five who did.

But the pursuer has further to make out that the gentleman who ought to have gone out was Hamilton. The conclusion of his action is that Hamilton ceased to be a member of the town council in November 1875. That raises a question of greater difficulty than the other. It turns upon the construction of the statute, upon which, if unaided by the light of subsequent legislation, I should have had doubts about sustaining the pursuers' argument. The 16th section of the Act 3 and 4 William IV. provides—[*His Lordship here read the clause of the statute quoted above.*] So far the meaning is plain enough. At the first election in 1834 the third who go out are those who had the smallest number of votes in 1832, and so in 1835 it is the third who had the fewest votes next to them, and in 1836 the remaining third go out. The statute does not in terms precisely say so, but includes them in a provision generally:—"Thereafter the third of the councillors so annually going out of office shall always consist of the councillors who had been longest in office." It might happen that in 1836 the third remaining of those elected in 1833 would no longer be all in the council owing to deaths or resignations or otherwise, which could not be held to be equivalent to "going out of office" in 1836. What is the proper course to be followed there? Suppose there were only three of the councillors originally elected in 1833 remaining, where are the other three to be found. You must of necessity go to other years and look in these for the victims, if I may so speak. There is nothing in the statute to guide us, unless it be the number of votes which each had when first elected. But that test is only specifically directed to be applied with regard to the cases of the years 1834 and 1835; it is contended that it applies thereafter.

I should have had difficulty in this matter if it were not for subsequent legislation. The Statute 33 and 34 Vict. cap. 92, throws light on this matter. Under the Reform Act of 1832, no one could come into the council without being voted for; even when the number of persons voted for did not exceed the number of vacancies, they came in upon the votes of the electors. The Act of 1868 (31 and 32 Vict. cap. 108) made this change, that it provided for notices being given beforehand of those who were to be put in nomination, and for the nomination taking place some days before the election. But the 3d section of the Act 33 and 34 Vict. cap. 92, provides "that when at any election of town councillors the number of persons whose names have been intimated to the town-clerk, under the provisions of the Act 31 and 32 Vict. cap. 108, . . . does not exceed the vacancies to be supplied, the town-clerk shall notify that in respect the number of persons proposed for election does not exceed the number of vacancies to be supplied . . . there will be no poll, and that the persons so proposed will be declared to be elected." Consequently, in such a case there is no voting, and the persons then elected will come in, not in virtue of the votes which have been given them, but in virtue of their not having been opposed. This provision having been introduced, the 5th section of the same Act proceeds to enact, that when two or more councillors have been elected on the same day, or by an equality of votes, the majority of the town council shall determine the order in which they shall retire. This is an important section in reference to the question with which we are here dealing, because it assumes (1) that persons elected on the same day may go out at different times, and (2) that where persons are returned on the same day by an equal number of votes, one of them may be required to go out and the other to remain, and the determination of the question is given to the town council. But the clause does not provide for the case where councillors have been returned on the same day by an unequal number of votes. Suppose that one councillor elected in 1873 has a larger number of votes than another elected on the same day, and that one of the whole number of councillors elected in that year is wanted to fill up a place in the number of those who fall to go out in 1875, which ought to have been occupied by a member of the council who has previously died or retired? There is no provision in the Act for such a case, and the reason is that it plainly assumes that it is already provided for. The only difficulty it recognises is where there is an equality of votes.

I come, therefore, to the conclusion that the intention of the Legislature is, that where, as here, there is not a sufficient number of councillors who have been three years in office, one of those elected in the following year must be taken, and the proper course is to take him who had the smallest number of votes; if that test is not applicable by reason of an equality of votes, the provision of the 5th section of the Act of 1873 must be followed.

Applying that conclusion to the present case, it follows necessarily that Hamilton, being the councillor of the second-year class who had the smallest number of votes, was the person who should have gone out along with the five who had served for three years. To that extent I am of opinion that the contention of the pursuer is right, and we must find that the election of Hamilton as bailie was inept.

LORD DEAS, LORD ARDMILLAN, and LORD MURE concurred.

The following interlocutor was pronounced:—

Recal the interlocutor: "Reduce, decern, and declare in terms of the reductive conclusions of the summons: Farther, find and declare that the defender Robert Hamilton had ceased to be a member of the town council of Rutherglen prior to the 5th November 1875, and was therefore on the said 5th November 1875 ineligible to the office of a bailie of the said burgh, and was not lawfully and duly elected a bailie of the said burgh, and decern: Farther, decern and ordain the said Robert Hamilton to desist and cease from exercising any of the functions of a bailie or of a councillor of the said burgh. *Quoad ultra* of consent assoilzie the defenders, and decern," &c.

Counsel for Pursuers (Reclaimers)—Dean of Faculty (Watson)—Pearson. Agents—Dewar & Deas, W.S.

Counsel for Defenders (Respondens)—Balfour—Darling. Agents—J. & R. D. Ross, W.S.

Friday, February 18.

SECOND DIVISION.

[Lord Craighill.

CHALMERS *v.* DIXON & CO.

Property—Damage—Reparation.

Ironmasters accumulated a "bing" or heap of waste material drawn from their pits, to the amount of 200,000 tons. The bing became ignited, but whether through spontaneous combustion or otherwise could not be ascertained. After the fire had been going on for three months, the ironmasters, for the first time, took steps to have it extinguished, but failed to do so.—*Held* that they were liable for the damage caused to a neighbouring farm by the vapours and fumes from the burning bing.

Property—Use—Damage.

Opinions that an owner of land who puts it to the natural and ordinary uses, and thereby injures his neighbour, is only liable in damages on proof of wilfulness or neglect, but an owner who puts his land to non-natural and extraordinary uses is liable, though there is no personal wilfulness or neglect.

This was an action at the instance of John Chalmers, farmer, against William Dixon & Co. ironmasters in Glasgow, incorporated under the Companies Acts 1862 and 1867. The summons concluded—(1) for £500 damages; (2) for interdict against the defenders "burning and calcining ironstone, or burning blaes or other mineral substances" at their pit, in the immediate neighbourhood of the pursuer's farm, "so as to cause noxious, unwholesome, and offensive vapours, smokes, and fumes," injuring and incommoding Mr Chalmers in the management and cultivation of his farm at Heads. Subsequently the pursuer departed from his conclusion for interdict, and reduced his claim for damages to £200.

The pursuer leased the farm of Heads from Sir William Baillie, at a rent of £66, for nineteen years from 1857. He averred that he had largely improved his farm, and that it yielded him good profits, but that the defenders, in the course of their operations as ironmasters, had accumulated an immense "bing of blaes" or waste material from the pits covering an area of half an acre, and that "through the carelessness and fault of the defenders. or those for whom they are responsible, it was set on fire in the course of the year 1872, and has since been burning, and will continue to burn for a long time to come." The distance between the bing and Mr Chalmers' farm was about a mile, and when the wind blew from the south-west the vapours and gases from the burning "bing" spread across the farm and injured the pastures and ryegrass.

In the statement of facts for the defenders they admitted that the bing contained "about 200,000 tons of refuse," but said that it "had been formed in the usual course of working the ironstone, and in precisely the same way as all the other bings (their being many of them) of the like material in the district." Further, the defenders averred that the ignition, which was discovered early in September 1872, had occurred spontaneously from the unusually wet season, and also that they had taken every means to put it out.

The defender pleaded, *inter alia*—"(2) The igniting of the bing of blaes and refuse foresaid, and the smoke and gase emitted therefrom, and the alleged nuisance and injury to the pursuer caused thereby, not having been caused through the fault of the defenders, they are entitled to absolvitor. (3) The defenders and others in the neighbourhood having, for many years prior to the pursuer coming to his farm, calcined the ironstone obtained from the lands near to their respective pits, and the defenders having for many years continued to calcine ironstone close to their present pits without complaint, the pursuer is not entitled to the interdict craved. (4) It being impossible to extinguish or stop the burning of the bing of blaes foresaid, any interdict granted against it would be inept."

On 2d June 1875 a proof was led before Lord Craighill, Ordinary, and thereafter his Lordship pronounced the following interlocutor:—

"*Edinburgh, 27th July* 1876.—The Lord Ordinary," &c.—"In the first place, Finds as matter of fact, (1) That the bing referred to in the record and proof was ignited in the beginning of September 1872, and that since then the fire has continued to burn, although, from the progressive exhaustion of inflammable materials, it has not recently been so strong as it was in 1872, 1873, and 1874; (2) That the smoke and sulphurous vapours discharged from the said bing since it became ignited, when the wind was from the south-west, which is the prevailing current in the district, reached the pursuer's farm of Heads, and were the cause of discomfort to all living in the farm-house, as well as the cause of serious injury to the crops of all kinds in these years upon the farm; and (3) That £200 is not more than reasonable *solatium* for the discomfort and reparation for the loss which in consequence was suffered by the pursuer: In the second place, Finds as matter of fact, (4) That the said bing covered two acres of ground, and was for a considerable portion of its area 42 feet in height, and the materials of which it was composed, being in part rubbish from the workings of the defenders' ironstone pit, No. 8, and in part, though not