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ped, and the driver sitting in them with a single rein, and if they were in a wrong place, then this is fault and negligence for which the master is liable, and you must assess damages. The expense of the funeral is easily ascertained. But on the solatium, being myself a father and grandfather, I cannot assist you in estimating in money a claim for such an injury.

Verdict—For the defender.

Cockburn and *A. M'Neil*, for the Pursuer.
Jeffrey and *Pyper*, for the Defender.
(Agents, *N. W. Robertson*, S. S. C. *M'Millan* and *Grant*, W. S.)

PRESENT,

LORD CRINGLETIE.

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1827. Dec. 26.

Finding as to the usage of a burgh in reference to the admission of freemen.

THIS was a petition and complaint against the election of Magistrates of Selkirk in 1825, on the ground that the votes of certain masons had been improperly received in the election of the deacon of the hammermen. At the election of the deacon there were nineteen votes on one side, and twenty on the other, including eight votes now questioned.

ISSUES.

The issues contained an admission that certain individuals tendered their votes for one leet, and that the deacon gave his vote for another, but did not tender or reserve his right to a casting vote. The questions then were, 1. Whether these eight individuals, or any of them, were wrongfully admitted to vote? 2. Whether the majority of hammermen, excluding these individuals, met and shortened the other leet, and whether a deacon was duly elected from the leet so shortened? 3. Whether, by the constitution of the burgh, the deacon must be held to have given his casting vote for the second leet, provided the number of qualified votes proved equal?

Sandford, for the pursuer, stated the constitution of the burgh, and the facts out of which the question arose: That the town council shortened the leet sent by the twenty, and that to remedy this evil the deacon and incorporation met and shortened the other: That these eight had no right to vote, as they were not burgesses, and had not applied in time to be admitted.

A copy of the seal of cause entered in the books of a corporation admissible evidence.

When it was proposed to give the seal of the

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incorporation in evidence, it was objected, that it could not be proved by the deposition of a party in the cause, but it was admitted that the deacon said that this was the seal. It was then proposed to give in a copy entered in the minute-book of the incorporation, but this was rejected, and an objection was taken to the clerk of the incorporation proving the seal, as he was not the proper custodier. It was also maintained that a haver could not prove where he got a document, and that the town-clerk ought to be called.

Clark *v.* Spence, 3 Mur. Rep. 450.

Hope, Sol.-Gen.—The seal is probative, and, being dated before the statute 1681, does not require witnesses.

LORD CRINGLETIE.—The only way the clerk could prove it would be by producing the document which is here. If the want of the seal attached to it is an objection, I suspect the same might be made to most charters of a hundred years old. It is said this may not be the seal of cause, and that there may be a different one; but the clerk of the corporation proves that this was what he considered the seal of cause. An entry in the books of an early date I should think good, but the more you can authenticate it the better.

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A document bearing to be a burgess ticket, but not delivered to an individual, admitted to show that he was not a burgess.

The clerk of the burgh was called to produce a document bearing to be a burgess ticket in favour of one of the persons objected to; when it was about to be read,

Cockburn objects, This is incompetent. Being produced by a witness does not make it evidence. The record does not deny that they are qualified to be burgesses. The issue is general, but if they go out of the record, it is surprise.

Hope, Sol.-Gen.—We call the clerk to produce the document; and unless they prove that they have burgess tickets, I shall argue that they are not burgesses, as the tickets never were given to them, but remained in the hands of the clerk.

LORD CRINGLETIE.—I do not know what this document proves, but Mr Cockburn objects to it; and when I wished to know whether he asserts that these persons were burgesses, the only answer is a general one, that they were qualified to be admitted freemen. With respect to surprise, there is something like information on the subject, though it is not precise. Had these persons applied in a regular manner, perhaps they would have been entitled to admission; but it is admitted that they required to be made freemen before being

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allowed to vote; and in these circumstances perhaps the pursuers were not bound to prove the negative, but they take it upon themselves, and I admit the document.

In a question as to an election in a burgh, one pursuer admitted as a witness for the others.

An objection was taken to the examination of one of the pursuers as a witness, but Wight and Connel being referred to as authorities, Mr Cockburn, though he still took the objection, said he expected it to be decided against him.

Cockburn.—A party is bound strictly to make out this case, and it is peculiarly necessary here where the question is, whether the minority could make itself the majority? There was here a double return, and the magistrates were bound to decide, and did decide, which was the right one. The other party must prove the issue; and the objection on which they now rely is, that these persons were not burgesses; that they did not apply in proper time; and that, not having been admitted burgesses, they could not vote. There is no evidence that they are not in the books, and the dues paid. It is said they were refused admission, because they did not apply in proper time; but the corporation had power to admit them. The minutes of the meeting of the incorporation are the only evidence of what took place at the meeting, and they do not state that these votes were rejected.

Suppose you hold that they were unduly admitted to vote, you cannot find that the other person was duly elected, as he could only be elected from a leet shortened by the magistrates.

LORD CRINGLETIE.—The case has been distinctly opened on both sides, and the facts are simple.

The interlocutor of the Court of Session explains the point to be tried under this issue. It is whether these parties duly claimed, and were, according to the constitution and usage of the burgh, legally entitled to be admitted members of the incorporation. The main feature of the seal of cause is proved by the usage,—the requisites for admission are four years apprenticeship,—that the party is a burgess,—that he applies to the deacon, who calls the quarter-masters to assemble and admit the claimant. Now this requires more time than these parties allowed to the deacon before the meeting of the trade, and he accordingly refused to admit them. Were not these persons, before being admitted, bound to show their discharged indentures and burgess tickets? and was the deacon bound to admit them in this precipitate manner without their producing that necessary evidence?

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The second issue does not decide the case, as the deacon must be elected from a leet shortened by the magistrates, not the incorporation. There are, besides, no minutes of any meeting of the nineteen members, and their having met rests on the statement of a witness. There is evidence that a shortened leet was produced, but it is not proved by whom it was shortened; and in these circumstances I do not exactly know how you should deal with it, though perhaps it is better to find for the defenders on the second and third issues.

Cockburn.—They cannot try whether a deacon was elected from a leet "so shortened," unless they have evidence how it was shortened.

Hope, Sol.-Gen.—They may find that a deacon was elected from a leet not shortened; and we shall then succeed, if we can convince the Court of Session that no shortening was necessary. If there was an equality we hold it a void election.

Verdict—For the pursuers on the first issue, and for the defenders on the second and third.

Hope, Sol.-Gen., and *Sandford*, for the Pursuers.
Cockburn and *Monteith*, for the Defenders.
(Agents, *John Young*, s. s. c. and *William Lang*, w. s.)