[13*th June* 1839.]

(Appeal from the Court of Session, Scotland.)

JOHN FLEMING, Appellant.[1] (No. 17.)

[*Lord Advocate* (*Rutherfurd*)—*Hill*]

HENRY DUNLOP, Respondent.

[*Knight Bruce*—*Pemberton*—*James Anderson.*]

Burgh—*Stat.* 3 & 4 *W.* 4. *c.* 76. (*Scotch Municipal Act*)—*Process.*—An application for suspension and interdict having been made by a party alleging that he had been duly elected provost of a burgh, and founding upon the minutes of election as his title to the possession of the office, and stating that he was molested by a party also claiming to have been elected provost, and who alone was called as a respondent, or was sought to be interdicted; and the bill of suspension having been passed by the Inner House on report of the Lord Ordinary on the bills,—Held (reversing the interlocutor of the Inner House deciding in the Bill Chamber), That, as the validity of the election of the provost could not, under the statute 3 & 4 W. 4. c. 76., be tried by summary application in which the two claimants were alone made parties, the suspension and interdict was incompetent.

Question raised, but not determined, as to the party who (under certain circumstances) was entitled to preside at the election of a provost, and, in case of an equality of votes, to exercise the right of giving a casting vote.

Appeal—*Stat.* 48 *G.* 3. *c.* 151.—Held, that an interlocutor, passing a bill for letters of suspension pronounced by the Inner House upon report of the Lord Ordinary on the bills, is not an interim order, and may be competently appealed against, even although the suspender has expede the letters of suspension before intimation of such appeal.

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[1] Fac. Coll. 16th Dec. 1837; 16 D., B., & M., 254.

2D DIVISION.

Lord Cuninghame, Ordinary on Bills.

BY the statute 3 & 4 W. 4. c. 76., intituled "An act "to alter and amend the laws for the election of the "magistrates and councils of the royal burghs in Scot-"land," it is enacted, by section 1. that thenceforth the right of electing the town council in such burghs shall be vested in a certain class of the inhabitants possessing a particular qualification, being the same which entitles inhabitants in burghs to vote for a member of parliament under the statute 2 & 3 W. 4. c. 65.

By section 15. it is enacted, "that upon the first "Tuesday of November in every year the electors in "such burghs shall in like manner, viz. the burghs "contained in the said schedule C." (which includes Glasgow), "in their several wards or districts, and the "other burghs, at their general meetings, assemble "and elect, in manner herein-before prescribed, in "relation to the first election under this act, one third "part, or nearly as may be one third part, of the "council of such burghs, in the place of the third "thereof who shall, as herein-after directed, go an-"nually out of office."

By section 16. it is enacted, "that upon the first "Tuesday in November in the year 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 deter-
" mining, where the votes for any such persons shall
" have been equal, who shall be the persons to retire);
" and thereafter the third of the councillors so an-
" nually going out of office shall always consist of the
" councillors who have been longest in office; provided
" always, that any councillors so going out of office
" shall be capable of being immediately re-elected."

By section 17., which relates to the election of magistrates upon the first election of councillors under the statute, viz. in November 1833, it is enacted, " that the " councillors of all such burghs not contained in sche-" dule F. to this act annexed," (which schedule contains only some small burghs, and not the city of Glasgow,) " respectively so elected, and accepting, " shall, upon the third lawful day after the election of " the whole number of such councillors in the present " year, assemble in the town hall, or other usual public " place of meeting within such burgh, and shall there, " by a plurality of voices, (the councillor who had the " greatest number of votes at the election of coun-" cillors having a casting or double vote in case of " equality,) elect from among their own number a pro-" vost or chief magistrate, the number of bailies fixed " by the set or usage of such burgh, a treasurer or " other usual and ordinary office-bearers now existing " in the council, by the set or usage of each such " burgh; and shall also elect the managers of any " charitable or public institution existing in or con-" nected with such burghs," &c.

By section 18. it is enacted, " that (with and under " the exception herein-after enacted, viz. of certain

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" small burghs,) upon the completion of the first elec-
" tions of councillors, magistrates, and office-bearers to
" be made in all the royal burghs of Scotland under
" the provisions of this act, and not sooner, the provost,
" magistrates, and office-bearers, and other councillors
" now in office, shall go out, and their whole powers,
" duties, and functions shall cease and determine,
" except only where any of the said persons shall
" have been again elected under the provisions of this
" act."

By section 24. it is enacted, " that when any magis-
" trate 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 magis-
" trate 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 hereby 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 voting vote 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."

By section 25. it is provided, " 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 herein-before 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 council." But this interim election is only to last till the end of the current year in which it is made.

By section 31. it is enacted, " that the magistrates " and council and office-bearers to be elected under " the provisions of this act shall in all respects stand " in relation to the administration of the affairs and " property of such burghs, or of property under the " care and management of such burghs, in the same " situation in which the magistrates and council and " office-bearers of such burghs did stand previous to " the passing of this act; and the magistrates and " council and office-bearers to be elected under the " provisions of this act shall have such and the like " jurisdiction, and the same rights and powers of ad- " ministration of the property and affairs of the burgh, " and of making all usual and necessary appointments, " as heretofore lawfully belonged to and was exercised " by their predecessors in office, any thing in the set, " usage, or custom of any burgh to the contrary not- " withstanding."

By section 36. it was declared, " that all laws, sta- " tutes, and usages now in force respecting the royal " burghs in that part of Great Britain called Scotland " shall be and the same are hereby repealed, in so far " as they are inconsistent or at variance with the pro- " visions of this act, but in all other respects the same " shall remain in full force and effect." Under its former constitution the town council of Glasgow consisted of thirty-two members, and now consists of that number,

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including the dean of guild and deacon convener ex officio, the two last being elected by the merchants house and trades house.

At the first municipal election under the statute, in November 1833, Mr. Robert Graham was elected provost by the council then chosen. In consequence of his resignation in the following year, Mr. William Mills was chosen provost on 7th of November 1834, an office which by virtue of the statute, sec. 24., he continued to hold for the period of three years. Upon the first Tuesday of November 1837, that is to say, on the 7th of November of that year, the election of councillors for the different wards to supply the places of the ten members or third of the council going out of office as councillors, of whom Mr. Mills was one, took place; and Mr. Mills having been put in nomination, though for a different ward from what he had formerly sat in council for, was again elected.

On the 8th of November a meeting of the town council was held, at which the poll books were opened, and the result of the elections of new councillors declared. At this meeting Mr. Mills attended, and claimed right to preside and act in the declaration of the election of the new councillors, in virtue of his continuing to hold the office of provost till his successor in that office should be appointed. The right to preside at the same meeting was also claimed by Mr. Henry Paul, who held the office of first bailie (being the office next in seniority in the magistracy to that of provost), and who was not of the third of the council who had that year gone out of office. The parties acted, however, by the following opinion of Mr. Reddie, legal assessor for Glasgow :—

"OPINION as to the person who is to cast up the "votes, and declare upon whom the election "has fallen, on Wednesday the 8th November "1837.

"I am of opinion that, by the 16th section of the "burgh reform act, Mr. Mills goes out of office as "councillor this year, as being one of the third of the "councillors who have been longest in office. But I "am of opinion that the election of councillors is not "completed till the declaration on Wednesday; and "that by the 24th section Mr. Mills is authorized on "Wednesday to cast up the votes, and declare upon "whom the election has fallen. As Mr. Mills, how-"ever, is a candidate this year for the office of coun-"cillor, I am of opinion he is not legally entitled to "ascertain and declare the election where he himself "is a party, namely for the third ward, and, in these "circumstances, I would recommend that Mr. Mills "and Mr. Paul should both be present at the casting up "of the votes and the declaration of the councillors "elected. This is the course which I originally "advised, and I still think it the best calculated to "prevent all ground of objection to the validity of the "proceeding.

(Signed) "JA. REDDIE."

"7th November 1837."

Accordingly Mills and Paul mutually presided, a protest being taken against the former acting.

On the 9th of November 1837 another meeting of council took place for the induction of the new councillors, at which Bailie Paul presided and administered the oaths to the new members, of whom Mr. Mills was one.

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On the 10th of November 1837 the council met for the purpose of electing from among their own number a provost and other office-bearers. The minutes of this meeting of council, as authenticated and recorded in the books of council, bear that Mr. Mills stated, that being advised that he was entitled to take the chair, he would occupy it at the present meeting.

Mr. Paul stated that it was his right to preside at the present meeting, and that as Mr. Reddie's opinion was taken on the subject, he moved that it should now be read and engrossed in the minutes, which was accordingly done, and is in these terms:

"OPINION with regard to the proceedings at the "election of the lord provost and magistrates on "Friday, 10th November 1837.

"I am of opinion that, although the 24th section of the "burgh reform act may authorize the individual elected "provost to remain a third year in office without any "new election as councillor, and after he must other-"wise have retired from the council, this clause does not "authorize such individual to preside at and vote in the "election of his successor at the meeting of council di-"rected to be held for that purpose. For such a construc-"tion of this clause would increase, by one, the number "of electors of the provost and magistrates, namely, the "number of the members of council entitled to vote at "this meeting, from thirty-two to thirty-three, and "would thus be inconsistent with and contrary to the "fundamental law of the constitution of the burgh, "which limits the number of councillors to thirty-two.

"By the 17th section the election of the provost and "magistrates is vested solely in the members of council; "and by the 4th section provision is made for the

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" retirement of the provost who has been three years
" in office and ceased to be a member of council, by
" the direction that the election is to be made by plu-
" rality of voices, and the chief or senior attending
" magistrate to have a double or casting vote in case of
" equality.

" A certain curriculum in office is fixed by the enact-
" ment that a third of the council shall retire every
" year; and the clause providing that the provost and
" treasurer shall always continue three years in office
" must have reference, for the due extrication of the
" other provisions of the act, to this statutory curri-
" culum, which, according to the opinion I have already
" given, I conceive terminates at latest with the act of
" declaration of the election of the new councillors.

" Nor does the circumstance of the individual who
" has been provost for three years being again elected
" a member of council make any difference; for such
" a re-election is merely an accidental event, which
" may or may not happen, and cannot, consistently
" with sound legal principle, be held to affect the gene-
" ral and permanent construction of the statute.

" Upon these grounds I am of opinion that Bailie
" Paul, as senior magistrate, is legally entitled to pre-
" side at the meeting on Friday first for the election of
" provost and magistrates.

(Signed) " JAMES REDDIE."

" 8th November 1837."

The foregoing opinion having been read, Mr. Mills stated that he would, notwithstanding, occupy the chair, and protested that he had a right to do so. Mr. Paul likewise insisted upon his right to occupy the chair, and protested that he had the only legal right to do so.

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Both parties continued in the chairs originally occupied by them.

Bailie Paul moved that Bailie Dunlop should be elected provost; Mr. Johnston moved that Bailie Fleming should be elected lord provost; and the vote being put upon the two candidates, who had been duly seconded, fifteen members of council voted for Bailie Dunlop, and fifteen voted for Bailie Fleming, and Bailie Dunlop and Bailie Fleming both declined to vote. There being thus an equality of votes, Mr. Mills declared that he gave his casting vote for Bailie Fleming, and Bailie Paul declared he gave his casting vote for Bailie Dunlop. Thereupon Mr. Mills declared that Bailie Fleming was duly elected lord provost, and Bailie Paul declared that Bailie Dunlop was duly elected lord provost. Whereupon (after protests by the supporters of both candidates) Mr. Mills administered to Bailie Fleming the oaths of allegiance and abjuration, and Bailie Fleming subscribed the same, with the assurance. Mr. Mills also administered to Bailie Fleming the oath de fideli administratione officii. Bailie Paul administered to Bailie Dunlop the oaths of allegiance and abjuration, and Bailie Dunlop subscribed the same, with the assurance. Bailie Paul also administered to Bailie Dunlop the oath de fideli administratione officii; and the minutes of the meeting for election were respectively signed by Wm. Mills and Henry Paul. The other magistrates and office-bearers were thereupon appointed. The minutes also bear that Mills hung the chain and badge of office round Fleming's shoulders, and presented him with the seal usually worn by the provost. A meeting of council was held on the 16th November, at which both Dunlop and Fleming claimed

the office of provost, and both signed the minutes of the meeting.

On the 17th November 1837 Dunlop presented a bill of suspension and interdict to the Lord Ordinary on the bills, wherein, after stating that he had in virtue of the statute been duly elected provost, and was in the actual exercise of the duties of the office, he set forth, that "notwithstanding of the election having thus fallen "upon the complainer, he is nevertheless molested, "and threatened to be molested, by the interference of "Mr. Fleming claiming the office of lord provost for "himself in respect of the pretended casting vote "attempted to be given by Mr. Mills at the meeting "in question, and this, it will be observed, in the face "of a clear opinion to the contrary, delivered by the "legal assessor for the city, and read at the meeting "of council. It is manifest that this state of things "may be productive of the greatest inconvenience and "prejudice to the affairs of the city of Glasgow, as "well as to the administration of justice in that burgh: "and the complainer now applies to your Lordships in "the present summary form, as one which is undoubt-"edly competent, for protecting him in his rights;" and concluding, "Herefore, and for other reasons to be "proponed at discussing hereof, the said attempted or "threatened molestation of the complainer in his office "of lord provost aforesaid, on the part of the said "John Fleming, and the said attempted or threatened "usurpation of the said office of lord provost by the "said John Fleming, ought and should be simpliciter "suspended; and the said John Fleming ought and "should be prohibited, interdicted, and discharged "from molesting the complainer in the dignity and

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" functions of the said office, and from usurping or " claiming and pretending to the same on his own " behalf.

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" Herefore I beseech your Lordships for letters of " suspension and interdict in the premises, with or " without caution, in common form; and your Lord- " ships are craved to grant interim interdict until the " case be finally disposed of. According to justice," &c.

The Lord Ordinary granted a sist, and appointed answers to be lodged with a view to reporting the case for the opinion of the Inner House, reserving consideration of the interdict till the bill and answers should be advised. The sist was held as intimated on the same day to the agent of Fleming, the only party complained against.

Fleming lodged answers to the bill of suspension, in which he pleaded, (1st,) that the summary application was incompetent, and that the proceedings complained of which affected the validity of the election of magistracy for that year could only be challenged by declarator and reduction, in which the other members of council ought to be made parties defenders; and (2dly,) that even on the minutes of election, as they stood, he, Fleming, had been duly elected provost by means of the casting vote of Mills, who was then provost, and therefore senior magistrate until his successor was appointed.

The Lords of the Second Division sitting in the Bill Chamber having considered the pleadings, and heard argument vivâ voce, pronounced the following interlocutor (16th December 1837): " The Lords having " advised this bill, with the answers and productions, " and heard parties procurators, on report of Lord

Judgment in Bill Chamber, 16th Dec. 1837.

" Cuninghame, Ordinary, pass the bill, and grant the " interdict as craved."

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On the 20th of December 1837 Dunlop expede his letters of suspension and interdict; and on the 21st of December 1837 he caused the same to be served on Fleming.

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Fleming, immediately after the interlocutor of the 16th of December was pronounced, presented a petition of appeal. That petition was presented on the 20th December 1837, when an order was made by the House of Lords on the respondent to lodge an answer to the petition. Notice of that order was, on the 23d December 1837, served on the respondent Dunlop.

In the appeal committee Dunlop objected to the competency of this appeal against an interlocutor in the Bill Chamber passing the bill, which objection was reserved till the hearing.

Appellant's Argument.

Appellant.—1. (In answer to respondent's objection to the competency of appeal.) Before the stat. 48 Geo. 3. c. 151. every interlocutor might be appealed, which was productive of inconvenience, and was remedied by that act; and although interim interlocutors cannot now be appealed, is this interlocutor to be held as an interim or interlocutory judgment? It certainly cannot. If the interlocutor had been a refusal of the bill of suspension it would have been final, and ex concessis appealable; and why not equally so where the right of the adverse party was as conclusively determined by that judgment? In this process of suspension in the Bill Chamber the suspender asks for letters of suspension, and the passing of the bill is a judicial authority to the granting of letters of suspension, which form the

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commencement of a new process in the Court of Session distinct from the process which depended in the Bill Chamber in regard to the passing of the bill. The judgment pronounced by the Court assisting the Lord Ordinary in the Bill Chamber cannot, in the process upon the bill praying for letters, be reviewed by the Court; so in that respect it is final. The suspender may then commence a new process upon expeding the letters. This appeal does not bring up the process ensuing upon the letters, but only the process on the bill upon which every step has been taken that could competently have been taken. See Young v. Dewar, 17th Nov. 1814[1], Lord Meadowbank's opinion in that case, referring to Scott v. Brodie, 2d March 1803[1]; so that the House of Lords is in a sufficient condition to decide upon the merits.

2. (As to the incompetency of suspension and interdict.) The incompetency of suspension in trying the validity of the election of a town councillor since the late statute took effect had been all but decided by the House of Lords in the case of Monteith v. M'Gavin[2], where the Lord Chancellor had expressed (p. 313) doubts which the appellant now adopted as satisfactory grounds for a reversal.

In the election of a provost the whole merits and validity of the election of the magistracy for the year was involved. Previous to the statute 3 & 4 Will. 4. c. 76. a summary mode of trying all such questions affecting the election of magistrates and councillors individually or collectively had existed under authority of the statute 7 Geo. 2. c. 16., which, in the absence of

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[1] Fac. Coll. [2] 3 Shaw and Maclean, 290.

any common law remedy introduced the form of petition and complaint, which accordingly had been acted on where an action of reduction or declarator had not been necessary. It had been determined by the Court of Session (Thomson v. Magistrates of Wick [1], 8th July 1836), that since the late act the summary process of petition and complaint was incompetent; hence there being no other summary mode of application at common law, parties were necessarily driven to the mode of determining such questions by an ordinary action of declarator or reduction in the Court of Session. The cases quoted establish this distinction, that where a question of right to an office is in dispute a declarator is necessary, and that suspension and interdict is the proper form for complaining of any interference or molestation in the exercise of an office, the right to which does not require to be declared.[2] There is no case on which the respondent can found. He cannot now found on that of M'Gavin. He cannot maintain that there has been induction into office, to the effect of holding that the merits of the election of a provost are not in dispute. There being two candidates in the field, both eligible, both on the face of the minutes appearing to have been, and both claiming to have been, elected, while the point of law on which the election turns remains to be determined, clearly there is a controverted election, or at least no such election

[1] 14 D., B., & M., 1118.

[2] Buckney and others v. Ferrier, 10th March 1753, Mor. 1854; Donaldson v. Magistrates of Kinghorn, 29th July 1789, Mor. 1892; Orr v. Vallance, 2d Dec. 1831, 10 S. & D. 93; Watson v. Commissioners of Police of Glasgow, 10th March 1832, Fac. Coll.; Drysdale v. Magistrates of Kirkaldy, 10th June 1825, 4 S. & D. 658; Abbey, 3d Dec. 1825, 4 S. & D. 266.

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as to warrant the respondent in claiming summary protection against molestation in an office of which he is indisputably the legal holder. But the question of right cannot now be tried summarily; and certainly not without the other councillors as proper parties to defend their own acts, and see the validity of the election determined on.

3. (Assuming that suspension and interdict is competent, the appellant was duly elected). Each of the two candidates had fifteen votes, including Mills, who voted for Fleming, and Paul who voted for Dunlop. Either Mills or Paul was entitled to preside, and in that character to have a double or casting vote. Mills was clearly the party so entitled under the 18th and other sections of the act as holding the office of provost till his successor in that office was appointed. His councillorship ended on the 7th; but that was not decisive of the question, as a provost once elected continued so for three years, even though the period of his councillorship might have terminated a year before (as was Mills's own case). The sound view of the terminus ad quem was the official year, terminating with the appointment of the provost's successor, and thus perpetuity of succession instead of discontinuance would be in that office upheld, but which would not be the case upon either of the two more uncertain theories of the respondent; viz., that the year consisting of twelve calendar months, and concluding in this instance upon the 7th of November, or the year terminating always upon the first Tuesday of November, was to be the rule in demitting office. The principle of perpetuity is recognized in England in corporations, and so churchwardens continue in office till their successors are

appointed. At all rates Bailie Paul could not have the casting vote, because, the bailies being elected yearly, his career of office had closed.

Respondent's Argument.

Respondent.—1. (As to incompetency of appeal.) A mere question of interim possession had been decided. The proceedings in the suspension take place in the bill chamber; and all that was then obtained by the judgment appealed from was a warrant for letters which enabled the respondent to bring the other party into court to try the question at issue. A mere interim order like this ought not to be the subject of appeal; the proceedings might in the meantime have been going on in court where a different order from that now appealed from might have been pronounced, but till parties be duly heard upon a closed record in the suspension when brought into court, this order remains an interim one, which it was the object of the sections 17 and 18 of 48 Geo. 3. c. 151. to prevent being disturbed.[1] It is not a judgment that could be pleaded as res judicata; Wood v. M'Caul, (12 D., B., & M., 50.); Binny v. Smith, 26th Jan. 1836, (14 D., B., & M., 355). The advantage of the statute in putting an end to appeals against interim orders is apparent from the circumstance that by this time the question upon the merits might have been finally decided upon the expede letters.

2. (Suspension and interdict competent). The minutes show that Dunlop was appointed to that office, and he was in the full exercise of it except in so far as

[1] Ersk. b. iv. tit. 3. s. 18.; Jurid. Styles, "Bill of Suspension," A. S., 14th June 1799; 6 G. 4. c. 120.; A. S., 19th Dec. 1778; Agnew v. Grierson, 2 Shaw, 377; Macaulay v. Brown, 16th Feb. 1833; 11 S., D., & B., 411.

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molested by the appellant. Suspension and interdict is the proceeding recognized in Scotland as the protective remedy against all wrongful encroachment upon the possession or rights of a party having primâ facie a good title to the property or office held by him.[1] Independently of all remedies from the election statutes, this was the subsisting remedy at common law, to which a party, whether complaining of official or any other molestation, could always have recourse, yet it was seriously maintained that because petition and complaint was no longer competent, the remedial process of suspension was to be excluded. No doubt this remedy is incompetent where applied for at too late a stage of the proceedings, 1 Darling, Prac. 283, and cases there cited. Although the statutes 7 Geo. 2. c. 16. and 16 Geo. 2. c. 11. authorized a process of summary reduction and of petition and complaint against proceedings at elections, no argument is thence deducible either that suspension was superseded or that it had not previously been competent. The introduction of a new legal remedy for specific wrongs does not, unless the statute so provides, extinguish the ancient common law remedies; and so subsequent practice in this particular showed; see Buckney v. Ferrier, 10th March 1753, Mor. 1854; Chalmers v. Magistrates of Edinburgh, 24th July 1782, Mor. 1863; Gray v. Magistrates of Anstruther, 29th June 1819.—Orr v. Vallance, 10 S., D., B., 93, is not adverse, for (1.) the object there was to set aside, at the instance of a minority, a formal election as informal and challengeable, an attempt not

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[1] Ersk. b. iv. tit. 3. s. 20.; M'Kenzie, 4 Sh. 1002; Manners and Miller v. King's Printer, 2 Sh. 275, 4 Sh. & D. 559, 3 Wilson & Sh. 268; Siddons v. Ryder, 3 S. & D. 576.

merely to stop, but to rescind; (2.) it was admitted in that case that the party whose place was improperly filled up would have been entitled to this mode of application, and the observations of the judges there ought to be read in reference to the actual circumstances only, and even in Drysdale v. Magistrates of Kircaldy suspension was held to be a proper form of complaining of molestation in the exercise of an office the right to which does not require to be declared; and the same remedy was again acted on, as betwixt two councillors, in Scott v. Magistrates of Edinburgh, 21st Dec. 1838 (1 D., B., & M., N. S., 347). The appellant was the only necessary party, as he alone claimed the office, and against him alone was any interim order required. The other members of council might if they had chosen have sisted themselves in the course of the after proceedings, which could however have been had between the two contending parties for the office in dispute.

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3. (The respondent was duly elected to the office in which he is now molested). The difference betwixt the respective claimants for the casting vote consisted in this, that Paul was the senior magistrate present, whereas Mills was not a magistrate, but was then in council as a new councillor, into which office he had de recenti been inducted, Paul also there officiating as senior magistrate. Mills could not have applied to a different ward for re-election except on the footing of his no longer having a seat in the council, and his election for that ward and subsequent induction was the only character in which he could now sit in the council. The argument drawn from the fact that in some burghs parties had been advised to hold fast to

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the office of provost, even after they had ceased to be councillors through the lapse of the elective period or of disqualification, did not solve the difficulty upon the act of parliament, because in the instances last referred to there had been no actual demission of office by such councillor being provost, and no new election for the ward for which such councillor had sat. Here, however, the continuity of office had ceased; and a new election, and qualification, by taking oaths, enabled Mills to exercise the duties of the office into which he had been so inducted, but could not operate a restoration of an office of which he was functus. After the 7th of November, therefore, Mills was a candidate for election, but no longer a member of the council-board in any capacity. The notion of the official year was adopted as a remedy to the supposed inconvenience of a vacancy in the provostship, which in any view was for a short period at least inevitable. But there was no inconvenience in the respondent's view of the case, inasmuch as Bailie Paul (who is admitted on the minutes to be the senior magistrate) is by law vested with the powers of provost or chief magistrate.

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LORD CHANCELLOR.—My Lords, this case, which was argued before your Lordships not long since, raises a question of the utmost possible importance, not so much as affecting the interests of the parties in contest in this litigation, but as respecting the general rule, which, if not properly laid down, may be extremely prejudicial in the present state of the corporation law in Scotland.

It has been considered that the statutory provisions by the two statutes, the 7th and 16th of George the Second, giving a summary remedy by application to the

Court of Session in questions arising out of municipal elections, does not apply to the system of corporations as now established under the municipal corporation reform act. I think your Lordships will find, that from that circumstance a course is likely to be adopted, which, if not properly regulated, may lead to very serious consequences as affecting these corporations.

The facts of the case which gave rise to the present litigation were simply these:—Upon the election in November 1837, in the corporation of Glasgow, two persons were candidates for the office of Lord Provost; the votes of the council being equal for each, it came to be decided by the casting vote of the presiding officer. It was made a matter of question, whether the Lord Provost who had been in office the three preceding years was the presiding officer; that is, whether he continued Lord Provost up to the 10th November, when the election took place, or whether he had ceased to be Lord Provost upon the 7th of November. If he had ceased to be Lord Provost on the 7th of November, a certain other person would be the senior magistrate. The question therefore was, whether the one or the other had the casting vote; the one voted for the one side, and the other voted for the other; so that the question, who had been elected Lord Provost, turned upon the question, who was the presiding officer at that election. My Lords, there was no possession of the office by either party; each claimed the right of having been properly elected, and there was nothing done upon either side which could be said to put either party in possession of the office. Under these circumstances, one of the parties applied in the bill chamber for an interdict. The Lord Ordinary reported it to the Inner

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House, and the Inner House, upon an application for a suspension and interdict, granted an interdict against one party; and that is the subject of the appeal to your Lordships House. The first question, therefore, raised, independently of the merits of the election, is, whether this be a proper course of proceeding to decide upon the merits of the election under the circumstances which occurred in this case.

Now, in looking back to the authorities upon this subject, it seems to be a statement common to both sides, that there is a very great paucity of authority to be found in the records of proceedings in the Court of Session; and that may be accounted for, no doubt, during the period anterior to the 3 & 4 W. 4. c. 76. when the statutes of George the Second were in force. I find, however, that although there may be but few cases to be found, there seems to be no question as to certain propositions that may be laid down; namely, that a proceeding by suspension and interdict cannot apply against a party in possession of an office; it is equally clear that it is not applicable to proceedings prior to the election, so that, in point of fact, if it be competent at all, it is not necessary to discuss that question. In the present case it can hardly be supposed to apply to any case, except where, from the proceedings at the election, it is a matter of doubt who has been elected, neither party being in possession of the office which is the subject of the election.

But there is ample authority that this mode of proceeding is not the mode of proceeding to decide the question of election in a burgh election at all.

There is another class of cases, indeed, with regard to which the authorities seem consistent, namely, that where there is an undisputed right to an office, and the

party is in possession of the office, it is not incompetent to apply this mode of proceeding for the purpose of protecting the person in possession of the office against an unauthorized intrusion by a mere stranger; but your Lordships, I think, will find that it is confined to cases where the title to the office is so clear and so free from doubt that there is no question to be adjudicated upon as to the title to the office.

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I find almost all these propositions laid down, and by all the judges, who all seem to concur in that opinion, in the case of Orr v. Vallance [1], decided in the year 1831. The Lord Justice Clerk in that case says: "I "have a clear opinion that this application is incom- "petent" (viz., an application for suspension and interdict). "I apprehend that there is no point more "thoroughly fixed, than that there is no process for "reviewing proceedings of town councils, filling up a "vacancy, real or supposed, other than by petition and "complaint or reduction;" petition and complaint not applying now to the corporations in Scotland. "Then "what is the nature of this? It is in form, no doubt, a "complaint against the actings of this person, Vallance, "as chief magistrate; but what is put in issue is the "merits of the election by the town council, and we "have the regular minutes of the election as an "appendix to the bill. If we could sustain such appli- "cations under the miserable cover that they are only "against the actings of the man, there would be no "case in which the same sort of argument might not "be used to sanction a bill of this kind instead of a "complaint or reduction, in which it is a fundamental

[1] 10 S., D., & B., 93.

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" principle that the council, one and all, must be called. " I can listen to no such flimsy pretext, and it is not " necessary to enter into the question whether all the " parties are called, for on the incompetency alone I " think the bill must be refused."

Lord Glenlee [1] says: " I am of the same opinion; if " Dods had applied,"—Dods was the party who was unquestionably in possession of the office. Lord Glenlee says, " if Dods had applied, it would have been a " different case; but the complainers have no title in " them, and we must first of all enter into the con- " sideration of the merits of the election, which is " incompetent in the present shape."

Lord Cringletie says: " A bill of suspension would " do against a party having no title or election at all; " but here there is a formal election, which must be " complained of by complaint or reduction."

Lord Meadowbank says: " In the case of Dods " applying there would be no need to inquire into the " merits of the election, and so a bill by him would " have been competent."

Now, it is impossible that any doctrine can be laid down more distinct, or more directly applicable to the present case. They say that that court cannot try the merits of an election in a proceeding by suspension and interdict.

Now, that is supposed to have been interfered with by the case of Watson against the commissioners of police of Glasgow [2], which took place in the following year; but the circumstances of the case are by no means similar. It was not a burgh election, to begin

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[1] 10 S., D., & B., 95. [2] Rep. in Fac. Coll. 10th March 1832.

with. The learned judges took a distinction between the two, recognizing to the full extent the doctrine laid down in the case of Orr v. Vallance: The Lord Justice Clerk says, "The case of Vallance is in no "respect parallel to the present, the former referring "to a burgh election, as to which there must be either "a petition and complaint, or a reduction."

At an earlier date than those cases, namely, the year 1825, was the case of Drysdale against the magistrates of Kirkaldy.[1] The facts of that case are not similar to the present; it is only valuable for the doctrine laid down. The report there states, "That where a ques- "tion of right to an office is in dispute, a declarator is "necessary, and that a suspension and interdict is the "proper form for complaining of any interference or "molestation in the exercise of an office, the right to "which does not require to be declared." Up to the time at which it was declared that the summary proceedings under the statutes of George the Second[2] were not applicable to the present state of Scotch burghs, there does not appear to have been any difference of opinion amongst the learned judges that the question of an election in burghs could not be tried by suspension and interdict.

After it was found that that mode of proceeding was not applicable, it does appear to me that an attempt has been made, or rather a disposition has been manifested, to introduce a mode of proceeding, which was not considered as competent before that time. Now, upon all the cases to which I have referred, nothing can

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[1] 4 S. & D. 128. (new ed.)
[2] 7 Geo. 2. c. 16.; 16 Geo. 2. c. 11.

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be more clear than this proposition at least, that where a party was in possession of an office, his title to that office could not be questioned by proceedings of suspension and interdict; that it was necessary to proceed by process of reduction or declarator. There are obvious reasons, to which I shall presently advert, which shew how utterly incompetent a proceeding of suspension and interdict would be to effect the object in view. But I am now referring to it only for the purpose of shewing that, up to the year 1831, no doubt was entertained that suspension and interdict was not applicable to that state of things.

Now, previous to this very election, one of the circumstances which gave rise to the election of Lord Provost was the election of one of the councillors of the name of M'Gavin; and your Lordships will find, by referring to the report of that case, which was argued during the last session, in the third volume of Shaw and Maclean's Reports[1], that M'Gavin was actually elected. He was actually then in possession of his office. Those who questioned his right to be a councilman, depending upon a supposed defect in the list of electors, applied for a process of suspension and interdict. The judges did not act upon that: they thought, under the circumstances, it was not a case in which they ought to grant an interdict, but they sustained the competency of the proceedings; so that in M'Gavin's case they sustained the competency, although the proceeding by suspension and interdict applied to a party actually in possession of his office, which in the three cases I have mentioned were considered by all the judges as a totally

[1] p. 290.

incompetent proceeding for the purpose of questioning the title of a person in possession of an office.

Such is the state of the authorities; now for one moment I call your Lordships attention to the effect of proceeding by the process of suspension and interdict. The result and the only result of it can be to prohibit one party, the party against whom it is directed, from exercising the functions of an office which he either is in possession of, or which he claims the right to exercise; it decides nothing as to the right of election. It may prevent one man from exercising the duties of the office, but it does nothing towards putting any other person in his place: an observation which occurred to me when your Lordships were considering the case of Monteith v. M'Gavin, in July last, and was strongly exemplified by what had then taken place, but had not then been brought under your Lordships consideration.

Now, the only means of trying the right of parties to any office in a corporation must be first of all to try the right of the party in possession, and then by some process to try the right of the party who claims to stand in his place. The proceeding by suspension and interdict may do the one,—it may undoubtedly displace the party in possession, not by depriving him of the office, but by prohibiting him from exercising the functions of the office. It does not declare that any other person ought to be elected in his place, but prohibits the individual from exercising the functions of the office. One, therefore, is not surprized that the learned judges, up to the time when the difficulty arose with respect to the statute [1] of George the Second,

[1] 7 Geo. 2. c. 16.

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considered that the proceeding of suspension and interdict was wholly inapplicable for the purpose of trying the right to an office.

In the present case it is true that the party against whom the process was addressed cannot be considered as in possession of the office; because, a question having arisen as to the mode of election, both parties having claimed to be in possession of the office, in point of law it may be considered that neither of them is actually so. Now, if the learned judges adopted this course of proceeding with the intention of deciding which of the two was really the Lord Provost of Glasgow, then they did that which in the case of Orr v. Vallance, and in the case of Drysdale v. the Magistrates of Kirkaldy, and in the other case of Watson v. the Police Commissioners of Glasgow, to which I have referred, the judges themselves stated distinctly that it was not competent for them to do, upon that proceeding, because it would then be a proceeding to adjudicate upon the merits of an election in a case of suspension and interdict.

But if they proceed upon the ground that this is a mere intrusion by a stranger upon the office of a party properly elected, they could never come to that conclusion without adjudicating that the other party had been first properly elected, and then to treat the other as a stranger intruding. They could not so treat him without considering the merits of the election. It is perfectly clear that they would have first to adjudicate on the merits of the election, and then to treat the other party as a mere intruder. But that applies only where the party is actually in possession; and if one party is not in possession, no more is the other party in possession. I apprehend it is extremely difficult to explain the course that has been adopted

upon the supposition that they were acting upon that which is recognized as a competent mode of proceeding for protecting a party actually in possession of an office against the unauthorized intrusion of a stranger. But if, on the other hand, they exercised a discretion as to the merits of an election, it must have been, in their opinion, a matter free from all doubt that the party upon whose account they allowed the suspension and interdict was the party duly elected.

Now, it is not my intention in the view I take of this case to give any opinion as to the merits of the election; but to this extent I think your Lordships are bound to attend to what took place. It cannot be considered a matter free from doubt and difficulty, which of the parties should be held to have been duly elected, the point turning upon the construction of the act; the construction of the act, as it is contended for by the present appellant, being that the Lord Provost for the time being, who by the act is to remain in possession of his office three years, is, according to his construction, to go out of his office at the anniversary of the day of his election; whereas the argument on the other side is, that he is to remain three municipal years in the office, and that he shall retain his office till his succesor is appointed. There appear difficulties enough on either side upon considering the different clauses of the act, — difficulties, certainly, which the Court of Session can hardly have considered before they came to the conclusion that there was no question at all to discuss between the parties; but if there was any question to be discussed between the parties, then they were adjudicating upon the right of election, and were in a cause of suspension and interdict deciding

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which of these two parties had been properly elected Lord Provost, contrary to all preceding authorities, and contrary to the doctrine which has been acted upon in all the cases to which I have referred.

That is the state of the contest between these parties. The Court of Session have, by an interlocutor upon a bill of suspension and interdict, prohibited the one party from exercising the duties of the office, and put no other party in possession of the office, leaving the town of Glasgow just as much without a Lord Provost by any adjudication of right as it was before.

It was urged at your Lordships bar that great inconvenience would arise from interfering with the interlocutor that has been pronounced, inasmuch as it would leave the parties, and all those interested in the affairs of the corporation, in a state of uncertainty as to who was the Lord Provost. My Lords, it is perfectly true that great inconvenience must arise from this state of things. But in a question which affects all the corporations of Scotland, — in a question, therefore, which it is of the utmost importance to have rightly understood at an early period after the question has arisen,— no inconvenience that may arise to any particular corporation ought to induce your Lordships to take a course that might be productive of mischief to the general administration of the affairs of corporations. My Lords, would no inconvenience arise from sustaining the interdict that has been pronounced? It is admitted that it is no adjudication upon the right to the office; but it is said that if the party had not appealed, and therefore if the process had gone on in the usual course, it was essentially necessary, according to the rules laid down for that purpose, that within

a certain number of days a suit should be instituted. But that suit would only have been a more formal way of calling for the same species of interference by interdict which had been already made by the Lord Ordinary in the Bill Chamber; that would leave the matter just where it was. It is said that the judges might have called upon the parties to adopt proper proceedings, by which a proper adjudication might have been obtained. If your Lordships think that this interdict ought not to stand, it will be competent to either party to adopt those proceedings which may lead to an adjudication upon the question of right; nor am I aware that any time will be saved in coming to a final conclusion as to who is Lord Provost of Glasgow by your Lordships adopting either the one course or the other. I have referred to the principal authorities which have been referred to as impeaching the competency of the proceedings by suspension and interdict. But if this had been a recognized course of proceeding, that is, if the Court had, by means of this summary process of suspension and interdict, the means of deciding questions upon controverted elections without the delay of a regular suit for that purpose, one would be inclined to ask, why was that summary proceeding given by the statute of George the Second? If any summary process already existed, why give that summary process in addition by petition of complaint? Nothing can be more rapid than the proceeding by suspension and interdict; and if it is competent for the judges by that proceeding to adjudicate upon the merits of an election, it could not, in point of rapidity, be improved upon by any other mode of proceeding. It is evident, therefore, that it was not known at that time that there were

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already existing in the Court of Session means of deciding by summary process, and therefore the statute gave a mode of proceeding by petition of complaint.

My Lords, two cases, and two only, have been referred to as interfering with the doctrine laid down by the learned judges in the cases I have referred to, one in the case of Chalmers v. the Magistrates of Edinburgh[1]; but upon examining the case, it does not appear to be a case which can have any influence upon your Lordships judgment in the present case. In the first place, it was not a burgh election at all which, according to the doctrine to which I have adverted of the learned judges, makes a distinction between that and the other cases; nor was it an original application to the Court of Session to interfere with the existing right by suspension and interdict. It was a process of suspension and interdict, it is true; but it was an appeal to the Court of Session from the adjudication of the magistrates of Edinburgh, who had decided upon an election matter subject to their jurisdiction. Therefore, although the proceeding was undoubtedly by suspension and interdict, it is a proceeding of such a nature as prevents it from being an authority in favour of the present proceeding. One cannot but observe even in that case, it was contrary to what is laid down generally as applicable to all cases of proceeding by suspension and interdict, namely, that it was a proceeding against the party actually possessed of the office. It may, therefore, well be a question, if the case was material to the

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[1] Mor. 1863.

present purpose, whether that decision would not be liable to be impeached upon the ground of its being a proceeding by interdict against the party actually in possession of the office.

The other case referred to is the case of Gray v. the Magistrates of Anstruther Wester.[1] Now, that is a case which, so far from being applicable to the present, was a case where the proceedings was by petition and complaint; it was not a case of suspension and interdict at all, but by petition and complaint under the statute of George the Second.

My Lords, it may perhaps be found necessary, if the Court of Session has lost the jurisdiction given to it by the statute of George the Second[2], and is incapable of administering justice in the case of controverted elections in burghs in Scotland by summary proceeding,—it may be necessary that the legislature should interfere; it may be necessary that they should have the summary power given to them which they had under the statute of George the Second, and which it appears they have lost, with reference to the existing corporations of Scotland. Whether that ought or ought not to be done is not now the matter for consideration; but the circumstance of their having lost the power under that statute can be no reason why the power should be exercised under a jurisdiction which it appears at the time when the municipal corporation reform act was passed was found incompetent, and over and over again declared to be incompetent, for the purpose of trying elections in burghs in Scotland. My Lords, it would obviously be productive of

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[1] Fac. Coll. 29th June 1819. [2] 7 Geo. 2. c. 16.

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the greatest possible inconvenience. It is impossible that justice can be done by this course. It is wholly incompetent to carry into effect that which must be the object of every court in interfering with questions as to the validity of these elections. But then another strong reason against your Lordships sanctioning a proceeding of that character is this:—that there are already modes of proceeding which, although not summary modes of proceeding, are calculated to meet every possible case that can arise. If the party is improperly in possession of an office it is not a matter of dispute that the Court of Session has jurisdiction, by process of reduction, to displace him from that office. If the party be not actually in possession of that office, then there is nothing to reduce. If a question arises, which of two parties is properly elected, then the proceeding by process of declarator is beyond all question competent and suited to the purpose of enabling the Court of Session to adjudicate between the parties, and to say which of the two is to be considered as properly exercising the duties and functions of the office. It is very true that these are not summary proceedings; but it is equally true, as I apprehend, and not disputed on either side at the bar, that, coupled with these proceedings, the proceeding by suspension and interdict might very well be applied; so that, pending the proceeding in which ultimate adjudication was to take place, the court might in the meantime, by virtue of this process of suspension and interdict, regulate as to the party who should happen to be in possession of the office. Whether that be or be not a course of proceeding consistent with the practice of the Court of Session, it is not necessary at present to

consider; it was so represented at the bar, and I find it referred to as the recognized practice in some of the cases to which I have adverted. The present question is, whether it is a wholesome practice that in the present case the Court of Session should proceed by suspension and interdict only.

My Lords, there is another point to which I shall have to call your Lordships attention; but upon the merits of the case, considering that this is a question at least difficult to be decided which of these two parties is properly elected, and therefore a question in which the proceeding by interdict cannot be supported, upon the ground of its being a mere intrusion upon an office, of which some other person is clearly and legally in possession, I should advise your Lordships not to sanction a proceeding which, if acted upon by the Court of Session in Scotland, must obviously lead to very serious consequences.

It has been objected that this appeal is incompetent, because this is not a final adjudication between the parties; and under the statute no appeal lies from the interlocutory order. My Lords, the very general terms used in the statute prohibiting appeals against interlocutory orders no doubt have created considerable difficulty in several cases which have occurred, and it is often matter of difficulty to ascertain whether within the meaning of that act a particular proceeding is to be considered as interlocutory or not. From the best information I have been able to obtain as to the nature of this proceeding, it cannot be considered an interlocutory proceeding. It is a preliminary proceeding, it is true, but it is final as far as that proceeding itself is concerned, the proceeding being by an application

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made ex parte in the first instance to the Lord Ordinary in the Bill Chamber, stating the case and praying for an interdict; it prays that the Lord Ordinary may pass the bill and grant the interdict. If he passes the bill and grants the interdict, as far as the passing the bill is concerned it is merely an authority for a more regular proceeding being commenced; but it is final. He may refuse the bill; and if he refuses the bill nothing further can be done in that proceeding; but the party may apply again to the same or to another Lord Ordinary for letters of suspension and interdict.

In considering whether this is final or not, and whether it is a subject of appeal or not, you must suppose the Lord Ordinary either to decide the one way or the other. Now, suppose he refuses the bill, that may be productive of the greatest possible evil to the parties. But the opinion of the Lord Ordinary is final; that is, he refuses the interdict, because that is the effect of his refusing the bill; and he denies to the party the opportunity of pursuing that remedy at least, though he may adopt some other, or may again apply to the Court for a similar remedy.

It seems hardly necessary to consider this any further, because I find by reference to a case which I believe was referred to in the argument that your Lordships have entertained appeals upon proceedings of this kind. I find in the case of Scott v. Brodie in the year 1803, reported in the Faculty Collection of Decisions, that the Lord Ordinary had passed the bill and granted the interdict. That was the subject of an application to the Court of Session, who sustained the bill, but varied the terms of the interdict; so that there was

the order of the Lord Ordinary confirmed, as to the principal part, by the judges of the Court of Session. The interdict was in some degree altered; that was made the subject of appeal to your Lordships house. Now, that was in precisely the same terms as the present, for all material purposes; for, though here the Lord Ordinary did not himself originally exercise a jurisdiction, but reported the case to the Inner House, and the bill was in the first instance passed and the interdict granted by them, yet, it was in that case the order of the Court of Session passing the bill and granting an interdict that was made the subject of an appeal to your Lordships house. I do not apprehend, therefore, that your Lordships will feel any difficulty in exercising your jurisdiction in this case, and that you will not consider that it is taken away by the act of parliament, inasmuch as the proceeding, though preliminary, is a proceeding complete in itself, and therefore it is to all intents and purposes within the meaning of the act a final adjudication, upon which an appeal will lie to this House upon the provisions of the act.

I by no means wish to be understood as giving any opinion as to whether a jurisdiction exists by suspension and interdict in other cases; it is a question of practice which is much better left to those who are familiar with the practice of the Court of Session. But looking at the authorities which are to be found in the books, and finding this to be a question in which an interdict could not be granted without an adjudication upon the merits of the election, and finding that all the judges have laid down, in the cases to which I have referred, that it is not competent in proceeding by

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suspension and interdict to adjudicate upon the merits of the election, I think your Lordships will adopt the safest course by not sanctioning a proceeding which may lead to dangerous consequences, and which is contrary to all the authorities to be found in the books; but that your Lordships will adopt a much safer course, by remitting it to the Court of Session to consider what is the best course to be taken in these cases, but not permitting them to interfere with the merits of an election upon a proceeding by suspension and interdict. The best way to effect that object, I submit to your Lordships, will be to reverse the interlocutor passing the bill and granting the interdict which has been pronounced in the Court below.

The House of Lords ordered and adjudged, That the said interlocutors complained of in the said appeal be and the same are hereby reversed: And it is further ordered, That the said cause be remitted back to the Court of Session in Scotland, with instructions to refuse the bill of suspension, and to do otherwise therein as may be just, and consistent with this judgment.

ARCHIBALD GRAHAME—DEANS and DUNLOP, Solicitors.