husband is due either to the husband's desertion or to his consent, which I really think comes to no more than a *non renitentia* on the part of the husband to the state of affairs. It has been urged by Mr Fraser, and I take his statement as we are bound to do, that the husband on many occasions objected to this state of affairs; but I think the fallacy of the argument based thereupon rests in this, that a person may often consent to a thing to which he greatly objects and against which he protests. You may consent in fact to something which you do not at all like, and which you would much sooner have otherwise. Upon the circumstances as disclosed by the husband himself I think it is perfectly clear in this case that there was consent in fact by the husband to the wife living apart from him as she did.

In granting this petition your Lordships are really just exercising the curatorial power from the same point of view as the husband, and the only proper point of view of the husband in exercising his curatorial power is not how it will affect himself, but how it will affect his wife's interests. It is shown to us that this lady has had a successful business in the city, and not being in very good health she wishes to turn her business into money. That seems perfectly right from the point of view of the wife, and I cannot doubt that any prudent husband would give his consent. Accordingly I think we ought to recal the Lord Ordinary's interlocutor and grant the prayer of the petition.

LORD M'LAREN—I am of the same opinion.

LORD KINNEAR—I also agree with your Lordship.

LORD PEARSON—I concur.

The Court recalled the interlocutor reclaimed against and granted the prayer of the petition.

Counsel for Petitioner (Reclaimer)—Dean of Faculty (Campbell, K.C.)—Macmillan. Agents—Campbell & Smith, S.S.C.

Counsel for Respondent — Solicitor-General (Ure, K.C.)—M. P. Fraser. Agents—Patrick & James, S.S.C.

Thursday, November 21.

FIRST DIVISION.

(EXCHEQUER CAUSE).

[Lord Johnston, Ordinary.

EADIE AND OTHERS *v.* GLASGOW TOWN COUNCIL.

Burgh—Common Good—Accounts—Objections—Timeous Lodging of Objections—Royal Burghs (Scotland) Act 1822 (3 *Geo. IV, c.* 91), *secs.* 3, 10—*Royal Burghs (Scotland) Act* 1833 (3 *and* 4 *Will. IV, c.* 76), *sec.* 32—*Glasgow Municipal Act* 1879 (42 *and* 43 *Vict. c. cxxiii*), *sec.* 10.

The Royal Burghs (Scotland) Act 1822 provides that the accounts relating to the common good and revenues of royal burghs shall be made up annually on the day preceding the annual election of magistrates, and in sections 3 and 10 that any objections thereto must be lodged within a specified period thereafter. The Royal Burghs (Scotland) Act 1833, by section 32, provides for an account being made up on the 15th October. The Glasgow Municipal Act 1879 alters the date from 15th October to 31st May, and provides that no other annual accounts shall be required to be made up, but nothing is said as to the time within which objections are to be lodged.

Held that the Act of 1879 in altering the date for making up the accounts has not thereby altered the period prescribed by the Act of 1822 for lodging objections, and that objections to the accounts for the year ending 31st May 1906, which had been lodged in accordance with the "time-table" of the Act of 1822, had been timeously lodged.

Burgh—Accounts—Vouchers—Production of Vouchers for All Sums Charged in the Accounts.

In the abstract of a burgh's accounts appeared the entry—"Taxation of land values (suspense account), including £1142, 9s. 6d. spent during the year, £2457, 2s. 1d." Certain burgesses presented a petition and complaint in the Court of Exchequer against this entry. The corporation sought to have the order to be pronounced restricted to that for a detailed account, the production of vouchers altogether, or at least for sums spent in previous years, being dispensed with.

The Court *ordered* the production of vouchers.

Process—Citation—Corporation—Citation by Individual Members—Disclaimer.

A corporation may be cited either by its corporate name or by calling the individual members thereof in their representative capacity; and where a corporation is cited in the latter mode the individual members, being cited in their representative capacity, not as individuals, cannot disclaim or avoid being present so long as a majority of the corporation desire to defend.

The Royal Burghs (Scotland) Act 1822 (3 Geo. IV. cap. 91), commonly known as Sir William Rae's Act, which provides in section 1 for accounts of the Common Good and revenues of the Royal Burghs, made up to the day preceding the annual general election of the magistrates, being stated annually, in section 3 enacts—"And be it enacted that every such annual account shall be deposited in the office of the town-clerk of the burgh to which it appertains within three months after the annual election of the magistrates thereof; and such account shall remain there for thirty days after the expiration of the said three months, open to the inspection of the

burgesses, who may state objections thereto in writing, either during that time or within two months after the expiration of the said thirty days, and be entitled to call, in writing, for the production of any particular vouchers; and if upon such objections being made the party or parties making the same shall not be satisfied with the explanations which may or shall be thereupon given, it shall and may be lawful for any three or more burgesses of such burgh, within three calendar months after the expiration of the said thirty days, to make complaint in writing to the barons of the Court of Exchequer in Scotland, who shall proceed to determine the same in a summary manner, and to make and establish such rules and regulations, as to the said barons shall seem meet, for hearing and determining all matters that may come before them upon such complaints: Provided always, that no objection shall be stated in any such complaint that had not been previously during the time above mentioned stated in writing to the accounts, unless upon a sufficient cause shown, to the satisfaction of the said barons, why such objection was not then stated."

Section 10—"And be it further enacted, that in the event of no complaint being made to any annual account within the time herein limited, it shall not be competent thereafter to complain to such Court in regard to such account."

The Royal Burghs (Scotland) Act 1833 (3 and 4 Will. IV, cap. 76), commonly known as the Burgh Reform Act, which provides for the election of town councils in Royal Burghs, in section 32 enacts—"And be it enacted, that the existing magistrates and council in all Royal Burghs shall, on or before the fifteenth day of October in the present and in all future years, make up a distinct state of their affairs subscribed by the chief or senior magistrate, town-clerk, and treasurer, containing an account of all the funds, properties, and revenues since they came into office, which amount shall be brought down as nearly as may be to the said fifteenth day of October, and shall be kept in the town-clerk's or treasurer's office, for the inspection of any of the registered electors, from the said fifteenth day of October down till the time of the election; and a full and distinct abstract of the said account, with a balance sheet containing all necessary particulars, shall be printed and published by the said magistrates on or before the twentieth day of the said month of October."

The Glasgow Municipal Act 1879 (42 and 43 Vict. cap. cxxiii.), section 10, enacts—"The Lord Provost, Magistrates, and Council may cause the state of affairs which they are required to make up annually on or before the fifteenth day of October in each year, by section 32 of the Act third and fourth William IV, chapter 76, to be made up as at the thirty-first day of May in each year, with the annual accounts or statements of the various other trusts under their administration, and the said thirty-first day of May shall be substituted for the said fifteenth day of October; and no other annual state of affairs or account than that hereby authorised shall be required to be made up by them."

The Town Councils (Scotland) Act 1900 (63 and 64 Vict. cap. 49), in sections 91 to 99, makes new provisions for the burgh's accounts and their auditing; but by section 109 it allows the town council of any of the burghs mentioned in Schedule II of the Burgh Police (Scotland) Act 1892 (of which Glasgow is one, which has exercised the power), by a resolution, passed at any time within twelve months of the passing of the Act, to declare that the sections dealing with certain matters, *inter alia*, the accounts, shall not be applicable, in which case the previously applicable Acts thereby repealed shall remain in force or revive in that burgh.

On June 7th 1907 George Eadie and others, burgesses of the City and Royal Burgh of Glasgow, presented a petition and complaint to the Court of Exchequer under the Acts 3 and 4 Geo. IV, c. 91, and 19 and 20 Vict. c. 56, and relative Acts of Sederunt, against "the Right Hon. William Bilsland, Lord Provost; Peter Gordon Stewart, brush manufacturer . . . . [*here followed a list of names and designations*] . . . . all members of the Town Council of Glasgow, being the Lord Provost, Magistrates, and members of the Town Council of the City and Royal Burgh of Glasgow." In it they objected to the following entry in the abstract of the annual accounts of the burgh revenues for the year ending 31st May 1906, viz,—"Taxation of Land Values (Suspense Account), including £1142, 9s. 6d. spent during the year, £2457, 2s. 1d."—and sought to have it disallowed as a charge against the Common Good.

Answers were lodged, certain individuals presenting a minute of disclaimer, in which there was stated the preliminary plea that the complaint had not been timeously presented. The election of Magistrates in Glasgow in the year 1906 was on 9th November.

The facts are given in the opinion (*infra*) of the Lord Ordinary in Exchequer Causes (JOHNSTON), who on 19th July 1907 pronounced the following interlocutor:—"Sustains the minute of disclaimer for James Hunter and others: . . . Finds the remaining compearing respondents liable in expenses to the said James Hunter and others: Modifies the same at £3, 3s., for which sum decerns against the said remaining respondents: Having heard counsel for the petitioners and complainers, and for the said remaining respondents, on the preliminary objection for the latter that the petition and complaint has not been timeously brought, and considered the cause, Repels the said objection: Appoints the said remaining respondents to produce in process . . . a detailed account, with relative vouchers, of the item on page 16 of their abstract of accounts, which is the subject of objection and complaint: Grants leave to reclaim."

Opinion.—"George Eadie and others,

burgesses of Glasgow, in this petition, presented to the Court of Exchequer in Scotland, challenge the application by the Corporation of Glasgow of any part of the Common Good of the burgh towards payment of expenses incurred by the Corporation in promoting legislation for the taxation of land values. The particular entry in the abstract statement of the revenue and expenditure of the Common Good of the Corporation of the City of Glasgow for the year ending 31st May 1906, to which objection is taken, is to be found on page 16 of the abstract, and is this—' . . . [*quotes, supra*] . . . This entry appears under a heading of open accounts on the credit side of the abstract.

"The Corporation, or rather those members who appear to defend, for a large number have disclaimed the defence, state the preliminary plea that the objection was not timeously taken, and that it is now, by virtue of section 10 of Sir William Rae's Act of 1822, incompetent to complain to the Court in regard to any entry in the account for the year ending 31st May 1906.

"I have heard an exhaustive argument on this preliminary point, but am prepared without further delay to dispose of it against the contention of the Corporation. I think that the objection was timeously stated, and that there is nothing to prevent my entertaining the complaint on the merits.

"As the contention was seriously maintained, and as the Corporation intimated that they desired an authoritative construction of the statutes bearing upon this point, which is doubtless of importance to the Finance Department of the City, it is right that I should explain at some length my reasons for coming to the above conclusion.

"There was passed in 1900 the Act 63 and 64 Vict. cap. 49, for consolidating and amending the law relating to the election and proceedings of town councils in Scotland. That Act, which was intended to be of general application, repealed a great number of previous statutes connected with these matters with a view to the codification as well as the supplementing of their provisions, and, in particular, it repealed the following Acts bearing upon the particular point here in question, viz., the Act of 1822 (3 Geo. IV, cap. 91), for regulating the mode of accounting for the common good and revenues of the Royal Burghs of Scotland, commonly known as Sir William Rae's Act; and the Act of 1833 (3 and 4 Will. IV, cap. 76), for altering and amending the laws for the elections of magistrates and councils of the Royal Burghs in Scotland, commonly called the Burgh Reform Act. Having repealed these statutes, the Act of 1900, in sections 91–99, enacted a code for regulating the accounting for the corporate property of burghs, including not only property, heritable and moveable, vested in the council, but also all rates or assessments levied, and all money received and expended by or on account of the Council. One of its most important provisions (sections 94 and 95) related to the audit of the burgh accounts and the securing the appointment of independent auditors by placing the appointment in the hands of the Secretary for Scotland. Another (section 96) related to the council's approval and publication of their annual accounts with a view to their inspection by ratepayers or electors interested, and an appeal to the sheriff of the county by any such ratepayer or elector, dissatisfied with the account or any item therein, was provided. But unfortunately the influence of the five larger burghs in Scotland interfered with the generality of its application, and enabled them to obtain, in section 109, a virtual exemption from this general Act. That section provided that, notwithstanding anything in the Act contained, it should be in the power of the town council of any of these five larger burghs, including Glasgow, by resolution passed within twelve-months of the date of the Act, to declare that any sections or sub-sections of the Act relating, *inter alia*, to 'accounts and corporate property specified in such resolution shall not be applicable to such burgh, and that in lieu thereof the corresponding sections or sub-sections, if any, of an Act or Acts applying to such burgh, repealed by this Act, which sections or sub-sections shall be specified in the resolution, shall, notwithstanding such repeal, remain in force or revive within the burgh.'

"Now, two of the statutes applying to the burgh of Glasgow (as they were general statutes) repealed by the Act were the above-mentioned Sir William Rae's Act of 1822 and the Burgh Reform Act of 1833, and they contained corresponding sections relating to accounts and corporate property. Accordingly within the statutory period the Corporation of Glasgow resolved that, *inter alia*, sections 91 to 97 of the Act of 1900 should not be applicable to Glasgow, and that in lieu thereof the following corresponding sections should remain in force or revive, viz., sections 1 to 4, and 9 and 10 of Sir William Rae's Act of 1822, and section 32 of the Burgh Reform Act of 1833.

"Accordingly the statutory provisions with regard to the accounts of the city of Glasgow are to be found in these sections, subject to certain qualifications by the city's local Acts.

"It must be borne in mind that when Sir William Rae's Act passed in 1822 the councils of Scottish Royal Burghs were close corporations, perpetuated by the system of co-option, and that, disregarding charitable mortifications vested in the corporation, the burgh revenue was substantially derived from the Common Good; and further, that although the Burgh Reform Act of 1833 restored or created the system of free election, the revenue of burghs still continued at that date to be similarly derived. But Sir William Rae's Act contemplated that there might be revenue derived from other sources, as from cess or any local tax or imposition, and provided accordingly. So also did the Burgh Reform Act of 1833, for it calls for an account not merely of property but of revenue generally. And this the Act of 1900 amplified to 'rates or assessments levied and money received or

expended by or on account of the council.' All these statutes therefore contemplated that the accounts they respectively required should be comprehensive. But in Glasgow separate accounts for separate funds are required by local statutes—see the Glasgow Police Act 1866, sections 23, *et seq.*, and the Glasgow Corporation Act 1884, section 44. Hence it has come to pass that the accounts of the Common Good of Glasgow are in use to be kept separate. And it will be found that the accounts with which we are here concerned are confined to the Common Good of the burgh.

"That being premised, I would now draw attention to the enactments of Sir William Rae's Act of 1822. It proceeded on the preamble that it was expedient that regular accounts should be annually stated and exhibited of the Common Good of the Royal Burghs of Scotland, showing the property and funds as well as the encumbrances affecting the same and the receipts and disbursements in every year, and that provision should be made for preventing and redressing any error or wrong that may be committed in the administration of the Common Good, and therefore enacted (sec. 1) that 'a particular account of the common good and revenues of every royal burgh in Scotland made up to the day preceding the general annual election of magistrates in each burgh shall be annually stated and deposited in the manner directed by this Act.' This account was to be certified by the Provost in terms of a statutory certificate.

"It was then enacted (sec. 3) that '. . . (*quotes, supra*). . . .'

"I must here note that the annual election of the magistrates is not a loose expression intending to refer to the election of the council. The Act in several passages carefully distinguishes between the council as a whole and the magistrates, and when it refers to the annual election of the magistrates it means, in my opinion, the election of magistrates properly so-called by the council. Under this statute, therefore, the maximum period for the lodging objections to the burgh accounts was three calendar months plus thirty days plus two calendar months, and for complaining to the Court of Exchequer one calendar month more. And it is admitted that the petitioners' letter of objections of 7th May 1907 and their subsequent complaint to this Court were timeous if the limitation of time imposed is to be found in this statute. I should have said that the Act (sec. 10) further enacted '. . . (*quotes, supra*). . . .'

"But, then, matters do not rest on this statute alone. The Burgh Reform Act of 1833 provided, by section 32, which, as above mentioned, notwithstanding its repeal, remains in force or is revived *quoad* Glasgow, '. . . (*quotes, supra*). . . .'

"This is the whole provision contained in the Act of 1833 regarding corporate property and accounts, and it is quite clear that its provisions had a totally different purpose from, and did not supersede those of, Sir William Rae's Act of eleven years previous. The object of that Act was to secure honest and accurate accounting, the exposure of the burgh accounts to the inspection of the burgesses, and their correction, if necessary, by the Court of Exchequer. But the object of the Burgh Reform Act of 1833 was electoral merely. In contemplation of the annual election in the month of November, it provided for the inspection of the burgh accounts, not by burgesses with a view to correction, but by registered electors, clearly because the disclosures of the burgh accounts for the past year had or might have a material bearing on the question of the election and re-election of candidates. And consequently the Act of 1833 contained no provision for objection or complaint to the Court of Exchequer or any other authority. Hence I am clearly of opinion that, though there may have been an awkward overlapping of dates, involving the statutory deposit of the same accounts on two different dates, for two different purposes, and with entirely different consequences, that is no possible reason why the important and salutary provisions of the former statute of 1822 should be held as virtually abrogated by those of the later statute of 1833.

"Nor do I think that this virtual repeal is effected by the qualification introduced into the Act of 1833 by the local Glasgow Municipal Act of 1879 (42 and 43 Vict. cap. cxxiii). This Act (section 10) provides that the Council may cause the state of affairs which they are required to make up annually on or before 15th October by section 32 of the Act of 1833, 'to be made up as at the thirty-first day of May in each year, with the annual accounts or statements of the various other trusts under their administration, and the said thirty-first day of May shall be substituted for the said fifteenth day of October.' Pausing there and reading section 10 of the local Act of 1879 into section 32 of the General Act of 1833, it only amounts to this, that the Council shall on or before 31st May in each year make up a state of their affairs brought down as near as possible to that date, which account shall be kept in the town-clerk's or treasurer's office from the said 31st of May down to the time of the election, and an abstract shall be printed and published on or before 20th October. The result is merely to anticipate the date of closing the burgh's accounts for the year, and to subject them to the inspection of the registered electors for a very much longer period. But as, in my opinion, the provisions of section 32 of the Act of 1833, in their original form, in no way abrogated the provisions of Sir William Rae's Act of 1822, neither do they do so when qualified by section 10 of the local Act of 1879.

"But then the last-mentioned section concludes—'and no other annual state of affairs or account than that hereby authorised shall be required to be made up by them.' The only result, so far as I can see, of this latter provision is to remove any doubts as to whether two different accounts, one under the Act of 1822, and the other under the Act of 1833, as modified by that

of 1879, were required. If before there was any doubt on the subject, for the future one account only was required to satisfy the provisions of both sets of enactments. But this does not result in the provisions for its exhibition to the registered electors for the purposes of the Burgh Reform Act of 1833 superseding the necessity of its exhibition to the burgesses for the purposes and under the conditions of Sir William Rae's Act of 1822. I am here concerned with the purposes of the last-mentioned Act only, and for these purposes the calendar or series of dates specified in that Act still regulates procedure. And as on that hypothesis it is admitted that the objections and complaint now before me are timeous, I must repel the preliminary objections stated for the Corporation, and I think that the best step which I could take at this period of the session to advance the process is to ordain the Corporation at or prior to the first box-day in vacation to produce in process a detailed account, with relative vouchers of the item in their abstract of accounts, which is the subject of objection and complaint."

The respondents reclaimed.

Before the reclaiming note was heard, certain of the respondents lodged a minute of disclaimer in the following terms—"Gordon, for the minuters, stated to the Court that they gave no instructions or authority for appearance being entered or answers being lodged in their names or on their behalf in this petition and complaint, or for their being represented in the procedure therein before the Lord Ordinary in Exchequer causes; that they were not members of the Corporation when the expenditure objected to was incurred, and strongly object to it, and only recently was it brought under their notice that appearances had been made or answers lodged in their names or on their behalf. And he further stated that the minuters gave no instructions or authority for the presentation of the reclaiming note against the Lord Ordinary's interlocutor of 19th July 1907 in their names or on their behalf, and accordingly the minuters disclaim all said proceedings unwarrantably taken in their names or on their behalf."

Counsel for the minuters, in moving the Court to sustain the minute with expenses against the compearing respondents, stated that in the Outer House the Lord Ordinary had sustained a similar minute for certain other disclaimers, and had found them entitled to expenses (*vide* interlocutor, *supra*).

Counsel for the Corporation opposed the motion, on the ground that the minute was unnecessary, seeing that the minuters were called as members of the Town Council and not as individuals, and even if they disclaimed as individuals they could not do so as members of the Corporation, so long as a majority of that body resolved to appear and defend.

LORD PRESIDENT—The point which is before us arises out of a petition and complaint presented by certain burgesses of Glasgow in order to have certain expenditure of the Common Good Fund of the City of Glasgow which they allege to be illegal, checked. The Common Good of Glasgow is administered by the Corporation of Glasgow, the Lord Provost, Magistrates, and Town Council, and accordingly in the petition, which is based, *inter alia*, upon an Act 2 and 3 Geo. IV, c. 91, in the prayer of the petition, warrant is asked for service upon "the Right Hon. William Bilsland, Lord Provost." Then follows a string of names and addresses, and at the end of these names and addresses come these words—"All members of the Town Council of Glasgow, being the Lord Provost, Magistrates, and members of the Town Council of the City and Royal Burgh of Glasgow, and to ordain them to lodge answers hereto if so advised within eight days after such service; and thereafter upon resuming consideration hereof, with or without answers, and after such inquiry as to your Lordships shall seem proper, to disallow the said item of £2457, 2s. 1d. as a charge against the Common Good or revenues of the City and Royal Burgh of Glasgow, . . . and to ordain the said account to be rectified accordingly." Now to this petition answers have been put in, and these answers have been put in in precisely the same form as was set forth in the prayer of the petition, viz., "For the Right Hon. William Bilsland, Lord Provost," &c., followed by the list of names and by the concluding words I have just read—"All members of the Town Council of Glasgow, being the Lord Provost, Magistrates, and members of the Town Council of the City and Royal Burgh of Glasgow."

Mr Gordon appears for six of these gentlemen, and in a minute he says that they gave no instructions or authority for appearance being entered in their names, and upon that he moves that his disclaimer should be sustained; that the names of these parties be taken out of the case; and that they be found entitled to their expenses against the others who have lodged defences. It seems that something of the same character was done in the Outer House upon the motion of certain other of the defenders, but that is a matter which is not before us.

I have come to the conclusion that there is no ground for this motion. If answers were put in for those individuals as individuals, and if these individuals say that they never gave any authority, it is clear that they are entitled to have their names taken out of the unauthorised paper, and entitled to their expenses against the persons who put in the unauthorised paper. But it seems clear that the simple answer here is that there was no appearance for these individuals as individuals.

The common way of citing a corporation is to cite it by its corporate name. This seems to be the appropriate manner of citing all common law corporations, and I think the Corporation of Glasgow is a common law corporation. But further, the Corporation of Glasgow has the right of citing and of being cited by its corporate

name assured to it by several Acts. But though that is so I have never heard that a pursuer might not cite members of a corporation, provided he goes on to explain that he cites them not as individuals but as members of the corporation. That this has been done here is clear from the print. So I think that when these answers were put in, echoing the prayer of the petition, they were put in for the corporation and not for the individuals cited. Mr Gordon's clients may say that they do not wish to defend the action, but they cannot avoid being there in their representative capacity only, as long as the majority of the corporation desires to defend.

LORD M'LAREN, LORD KINNEAR, and LORD PEARSON concurred.

The Court refused the minute.

At the subsequent hearing—Argued for the reclaimers—(1) *Esto* that if the accounts for 1906 had still to be made up in November—as provided for in the Act of 1822—the complaint was in time, the alteration of the date for making up the accounts to 31st May, prescribed by the Glasgow Municipal Act of 1879, had antedated the whole "time-table" contained in the Act of 1822 for lodging objections and taking appeals. That being so, the "time-table" started from 31st May, and not from November, and the complaint therefore was too late. Were it otherwise, the result would be very inconvenient in practice, for the accounts would then have to remain in suspense from May to November annually, as before that no objections could be lodged. (2) The Lord Ordinary was in error in ordering vouchers to be produced. Many of the items had reference to previous years though entered in the accounts for 1905-6, and the vouchers for these had been lost. In any event, the vouchers should be limited to £1142, 9s. 6d., the amount spent during the year in question.

Counsel for respondents were not called on.

LORD PRESIDENT—The only point raised in the petition and complaint at this stage was whether certain objections that had been stated to the petition and complaint at the instance of the burgesses against the Town Council are in time or not, and that depends upon the regulations laid down for making objections to the accounts in the Act of Parliament dealing with the accounts. The Act of Parliament that deals generally with the accounts of municipal bodies in Scotland is the Act of 1900. But there is a provision in that Act by which what are known as the larger burghs are enabled by resolution to prevent the Act applying to their accounts, and really to maintain the *status quo ante*. That provision was taken advantage of by Glasgow. The Act which deals with the Common Good, the expenditure of which is here called in question, is the Act of 1822. That Act, by the first section, requires that the accounts of the common good and revenues of every Royal Burgh in Scotland, made up to the day preceding the general annual election of magistrates in each burgh, shall be annually stated and deposited in the manner directed by the Act. Then in section 3 there is what I may call a time-table, which I really need not go through, but which provides for the time within which objections may be taken and explanations called for, and then, if the explanations are unsatisfactory, there is allowed an appeal to the Court of Exchequer. Assuming that that time-table applies, it is admitted that these objections are in time. But the respondents, the Town Council of Glasgow, say that they are not in time, and for this reason. They say that although under the Act the accounts are to be made up to the day preceding the annual election of magistrates, which is sometime in November, this has been changed by subsequent Act of Parliament, and that the time has been changed with it, and if the time-table is reckoned from the 31st May, which is what I may call the modern date, then it is equally admitted by both parties that these objections are not in time.

Now the first change that took place was in the municipal Reform Act of 1833, which changed the time of making up and bringing down the account from the date of the election to the 15th day of October. One can easily see for what reason that was done. It was done at the time of the great reform of municipal corporations, and it was done, not I think for the purpose of making any difference in the objections that might be made to the accounts, but for the purpose of allowing the electors—who were now brought into existence, in the proper sense of the word, for the first time—to consider whether there had been undue expenditure or not in view of their choice of their future representatives. But that again was altered so far as Glasgow was concerned by the private Act of 1879, called the Glasgow Municipal Act. That Act in section 10 provides that the state of affairs which was required to be made up annually—that is, the then existing one, the one on or before 15th October—shall be made up as at the 31st day of May, and then it goes on to say that "no other annual state of affairs or account than that hereby authorised shall be required to be made up by them." That, of course, is perfectly plain; the date provided by that Act of 1879 for the Glasgow annual state of affairs is the 31st May, and no other date in the year. But the Act does not deal with the question of objections to the accounts; that is allowed to remain upon the old statute.

It has been urged to us by Mr Macmillan, the learned counsel for the appellants, who said everything that could be said, that it is very awkward and very ungainly to have a time-table for objections starting from a different date from the time at which the account is to be made up. I think that may be conceded. But nevertheless what the learned counsel is asking us to do here is to take away these burgesses's right of objection—for that is what it comes to—simply because these burgesses

have not been able to put together two Acts of Parliament and spell out a different result from what the Act of Parliament really says. I do not think that argument can be given effect to, for this very plain and simple reason, that if in the Act of 1879 the Glasgow Town Council wanted to change the calendar during which objections could be made, nothing in the world was easier than to say so. If, on the contrary, they left the matter alone, then I think the Act of Parliament must be read according to its plain letter as it stands, and we are not by inference to read into the Act of Parliament different dates from what are there set forth. Therefore I am of opinion that the Lord Ordinary has come to a right decision.

LORD M'LAREN—I should have thought that a great Corporation like the municipality of Glasgow, when any part of their administration is challenged, would be anxious that the fullest light should be thrown upon their management of funds entrusted to them. Agreeing with your Lordship as to the proper construction of these statutes, I do not participate in the scruples which the Magistrates and Council seem to have as to the regularity of the present proceedings, but think they are perfectly within the scope of the statutes. Indeed it is as much in the interest of the Corporation as of the ratepayers that the legality of this expenditure should be determined by the Court, in order that in future cases there may be a guide to Town Councils as to how far they are entitled to burden the Common Good. I rather think I have seen some indications that municipal bodies are inclined to take too much out of the Common Good, and it is just as well that they should be reminded that such charges are subject to statutory audit or inquiry when necessary. The question will always be, whether the subject of the expenditure is fairly within the scope and duties of municipal bodies, and is for municipal purposes. I agree in all the observations your Lordship has made upon the Acts of Parliament.

LORD KINNEAR—I agree upon the simple ground which your Lordship has stated, that we cannot disregard the plain words of the Act of Parliament in order to make a series of Acts more coherent than Parliament itself has found necessary.

LORD PEARSON—I am of the same opinion.

LORD PRESIDENT—There was one point that was urged upon us in pronouncing an order as to what accounts the respondents are to produce. Mr Macmillan first of all suggested that we need not order the production of vouchers, and second he suggested that in any case the order should be limited to the sum of £1142 instead of to the sum of £2457. As far as regards the vouchers I think the objectors here are entitled to the vouchers, because they are entitled to know precisely how this money was spent, and I think Mr Dickson's remark was quite right, that if the respondents choose to put in an admission that this expenditure was illegal, then, of course, he would not want anything more. But to put in simply a so-called admission that this was spent on Taxation of Land Values Suspense Account really does not put the matter much further, because Taxation of Land Values Suspense Account may, in one sense, mean anything. Of course, I am not meaning that one has not got a general notion, drawn from what is in the pleadings in the case,—because in this class of matter one is not entitled to take cognisance of anything except what is brought before one in the case,—I do not mean that one has not a general notion in a certain way of how the money has been spent; but then it is perfectly evident that the money may not have been even spent on that—there may be, so to speak, expenditure within expenditure which would be perfectly illegal, and which, even supposing it was held that what I may call the dominating head of expenditure was correct, might yet fall to be disallowed; and accordingly without the vouchers to show how the sum was split up, it is impossible to know where we are. Therefore I think, first of all, that the vouchers must be produced, and secondly, that the sum to which the order shall apply is the sum stated by the Lord Ordinary—£2457—because that is the sum which is put into the accounts. If there has been—I find it difficult to use a word, because I do not want to use a word which suggests that anything in the slightest degree wrong has been done in the account—if there has been an arrangement by means of a suspense account by which items so to speak have escaped detection for the moment, well it is because of the way in which the accounts are arranged and the respondents have only themselves to thank for that state of affairs. I am not suggesting that there is anything wrong in the way in which the accounts are stated; what I am saying is that until one sees the full account it is impossible to form a judgment upon that matter.

Mr Macmillan says quite frankly that there might actually be some vouchers in that £2457, which, being in past years, might be very difficult to find. Well, we must deal with that when it comes before us. It is quite clear that the order must be pronounced, and if it is impossible to obtemper that order and good reason is given I suppose the matter will end there. But at any rate we cannot do all that in the dark. At the present moment I have not even a notion of what this suspense account is. A Suspense Account, as one knows in bookkeeping, may mean anything. What this means I cannot tell until I see it. I think, therefore, the scope of the Lord Ordinary's order was correct, That is the judgment of the Court.

The Court pronounced this interlocutor—

"Recal the said interlocutor, except in so far as it decerns for the sum of £3, 3s: Of new repel the objection that the petition and complaint has not

been timeously brought: Of new appoint the respondents to produce in process . . . a detailed account with relative vouchers of the item of their abstract of accounts, . . . which is the subject of complaint: Find the reclaimers liable in expenses," &c.

Counsel for Petitioners (Respondents)—Scott Dickson, K.C. — Hon. W. Watson. Agents—Macrae, Flett, & Rennie, W.S.

Counsel for the Respondents (Reclaimers) — Hunter, K.C. — Macmillan. Agents—Campbell & Smith, S.S.C.

Counsel for Minuters—Hon. Huntly Gordon. Agents—Calder, Marshall, & Walker, W.S.

Thursday, November 21.

FIRST DIVISION.

[Lord Johnston, Ordinary.

MACKAY *v.* ROSIE.

Reparation—Master and Servant—Workmen's Compensation Act 1897 (60 *and* 61 *Vict. cap.* 37), *sec.* 1 (2) (*b*) — *Election to Take Compensation—Bar.*

A workman at the end of the week in which he was injured was paid an allowance of wages, and was told—"That is to cover anything that is due to you at present, you will get nothing for the next two weeks, and after that you will get half wages." He subsequently received from his employer, for a period of about six months, weekly payments, which amounted to slightly more than half his average weekly wages. These payments were at first made to him at his house, but afterwards he called for them at the employer's office. No receipts were given.

Held that the pursuer's actings inferred an election to accept compensation under the Workmen's Compensation Act 1897, and that he was barred under section 2 (*b*) thereof from now claiming damages at common law.

The Workmen's Compensation Act 1897 (60 and 61 Vict. cap. 37), section 1, which imposed a liability on certain employers to workmen for injuries, contains (2) the following proviso:—"Provided that (*a*) the employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed; (*b*) when the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer; but in that case the workman may, at his option, either claim compensation under this Act, or take the same proceedings as were open to him before the commencement of this Act; but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act. . . . . ."

On 18th May 1907 Alexander Mackay, mason, 64 Dumbiedykes Road, Edinburgh, raised an action against George Rosie, builder, 52 East Crosscauseway, Edinburgh, in which he sued for £500 damages at common law in respect of personal injuries sustained by him on 20th November 1906 when working in the defender's employment.

The defender pleaded, *inter alia*—"(2) The pursuer having elected to accept, and having accepted, compensation under the Workmen's Compensation Act, is barred from raising the present action."

The *facts* of the case are given in the opinion (*infra*) of the Lord Ordinary (JOHNSTON), who on 18th October 1907, after a proof, pronounced the following interlocutor — "Finds that the actings of parties between the date of the accident and 4th May 1907 infer an agreement between them whereby the pursuer elected to take compensation under the Workmen's Compensation Act on the footing of his average wage being taken at 36s. a-week: Therefore sustains the second plea-in-law for the defender, dismisses the action, finds neither party entitled to expenses, and decerns."

Opinion.—"I do not think that it is necessary to delay giving judgment in this case. The pursuer is not a foreigner; he is not even what I may call an illiterate workman. He is a Scotsman, he is a member of one of the skilled trades of this country, and from his appearance I am justified in saying that he is one of the best representatives of that trade. On the other hand the defender is a man of really much the same station as the pursuer. He is now an employer, but he began as a workman—so much so that the present pursuer actually worked under him when he was merely a foreman in the employment of others. I regard them in point of education and in point of intelligence—and I say so not merely as matter of inference but from their appearance in the witness-box—I must regard them, though one is workman and the other employer, very much as equals.

"Now the pursuer's counsel's contention practically comes to this—that there is a duty imposed upon the employer to take charge of the interests of his workmen. I cannot conceive a case in which such a rule would operate greater injustice than the present, where I find that the employer and the workman are men of similar origin, similar upbringing, similar education, and, as far as I can judge, of similar capacity, only that the one, being about eighteen years older than the other, has developed into a small employer, which there is no reason the other should not also do in his turn. But there is no such rule. The employer must not take advantage of the position of his workman, must not take advantage of his ignorance and want of education, must not take advantage of the physical condition to which a serious