No. 40. JOHN TOD and Others, Appellants and Respondents.—*Solicitor-General Tindal—Robertson.*

JAMES TOD and Others, Respondents and Appellants.—*Spankie—Keay.*

Burgh Royal.—Stat. 16 *Geo. II. c.* 11.—*Expenses.*—Held,—1, (affirming the judgment of the Court of Session,) that it is not competent to raise an action of reduction of an election of Magistrates of a Royal Burgh, made in virtue of a royal warrant, after the expiration of two months from the date of election—2d, (reversing the judgment,) that as the above statute ordains costs to be given to the successful party, the defenders resisting the reduction ought to have got expenses,—and, 3, That an appeal in regard to these expenses was competent.

March 26, 1827. 1ST DIVISION. AT the election of Magistrates for Pittenweem, at Michaelmas 1822, John Tod was elected first bailie, or chief magistrate; James Tod second bailie; and two other individuals third and fourth bailies. These persons, along with a treasurer, and nineteen councillors, being twenty-four in all, formed the full council. On this occasion, Sir William Rae, his Majesty's advocate, was elected a councillor, but it was alleged he had never qualified himself by taking the oaths. In the course of the year a schism arose in the council. John Tod, and eleven others, formed the one party; while James Tod, and eleven others, constituted the other party. On the day of the annual election at Michaelmas 1823, one councillor from each of the parties was abroad, so that they were equal in numbers. James Tod and his party declined to attend, and thereupon John Tod and his friends (being altogether eleven persons,) proceeded to elect certain of their own party to be magistrates. By the constitution of the burgh, it was necessary there should have been a majority of the councillors present, and therefore as there had only been eleven, whereas the council consisted of twenty-four, a complaint was presented to the Court of Session by James Tod and his friends, on this ground, and the election was in consequence set aside. The burgh being thus disfranchised, a petition was presented by each of the parties to the Court, praying for the appointment of interim managers. In that presented by James Tod, he prayed that he himself, certain of his friends, and four of the opposite party, including John Tod, should be appointed, and this prayer was granted.

A petition was then addressed by James Tod and the other managers, to the King in Council, for restoration of the privileges of the burgh; and a similar petition was presented by John Tod and his party. After the usual forms had been gone through,

a royal order, or warrant, was issued on the 19th July, 1825, March 26, 1827.
in these terms :—

'His Majesty having taken the said report into his consider-
'ation, was pleased, by and with the advice of his Privy Coun-
'cil, to approve thereof, and to order, as it is hereby ordered,
'that for restoring the peace and good government of the said
'burgh, the persons who composed the magistrates and town-
'council of the said burgh, on the day preceding the 16th of
'September, 1823, or the majority of such of them as shall at-
'tend, do meet and assemble within the town-house of the said
'burgh of Pittenweem, upon the 13th day of September next,
'at 12 o'clock at noon; and when so assembled, do proceed to
'choose and elect the usual number of persons to be councillors
'of the said burgh; which councillors, so chosen, shall be em-
'powered forthwith to proceed to the choice of magistrates
'and office-bearers, according to the set of the burgh; and
'which councillors, magistrates, and office-bearers, shall con-
'tinue in office until the ordinary time of the annual change of
'the councillors, magistrates, and office-bearers of the said
'burgh, in the year 1826; and then, and from thenceforth, the
'procedure in the election of councillors, magistrates, and of-
'fice-bearers, shall be made according to the provisions of the
'constitution, or set, of the said burgh, whereof all persons
'concerned are to take notice, and pay due obedience hereto.'

This warrant was not addressed to any particular person, but it was delivered to the solicitor for James Tod and the other managers, by whom it was transmitted to them. On consulting counsel, they were informed, that it was their duty, by a precept, or order issued by them, to give notice of the warrant to the persons therein named, to proceed to the election at the appointed time. A precept was accordingly issued, under the signature of James Tod, as chief manager, and the seal of the burgh, requiring those who had been magistrates and councillors, prior to the 16th of September 1823, to attend in terms of the warrant. One of the councillors was dead; and it being alleged that the Lord Advocate was not qualified to act as a councillor, it was resolved that he should not be summoned, but that intimation should be made to him by a notary public and witnesses, in order that, if he conceived he had any right to vote, he might take the requisite steps for having it established. On the 13th of September, being the day of election, James Tod and his party being in possession of the keys of the Council Chamber, got access to it, and thereupon, having seated themselves round the Council-table,

March 26, 1827. James Tod took possession of the chair. When John Tod and his friends, accompanied by the Lord Advocate, got admission, they found their opponents in this situation, and they therefore sent for another table, round which they seated themselves on benches, and John Tod placed himself in a chair at the head of it. The Lord Advocate then protested that he had right to vote, which was resisted by James Tod and his party. On the assumption that he had such a right, the two parties were equal in number, and a violent dispute therefore took place, both upon this subject, and as to the person who was entitled to be preses, and who, as such, had a casting vote. A vote was then taken, when, in consequence of the rejection of the vote of the Lord Advocate, James Tod was elected preses by his friends. On the other hand, John Tod and his party contended, that the Lord Advocate had right to vote, and that as John Tod had formerly been chief magistrate, he had the casting vote, which he gave in favour of himself, and therefore they insisted that he had been duly elected preses. A list of councillors was then presented by each of these parties, and of course each voted for those contained in their own list. As James Tod and his friends were in possession of the Council-books, they recorded their list in them, and they then declared their nominees duly elected. A motion was thereupon made, that John Tod and his party should forthwith withdraw, as they were no longer members of the council; while they, on the other hand, attempted to introduce a notary public and a clerk, to record their own minutes. This gave rise to another altercation, in consequence of which the Sheriff-substitute (who was in attendance) was obliged to interfere.

Within two months thereafter, John Tod and his friends brought a summons of reduction of the election, but this process was dismissed, in consequence of a defect in the execution. A new summons of reduction was then raised, on the 21st of December 1825, against which various objections were stated, and particularly it was pleaded, under the fifth head of the defences—'The present action is clearly incompetent on two 'grounds: 1st, An annual or general election of magistrates 'and councillors for the year cannot be challenged in any other 'mode than by a petition and complaint to the Court of Ses-'sion, presented within two kalendar months of the date of the 'election complained of; and 2d, Supposing the challenge 'could be made by an action of reduction and declarator, that 'action must be raised, executed, and brought into Court, with-'in the two kalendar months following the election.'

To this it was answered, That the election, having been made in virtue of a royal warrant, did not fall within the statute; that the pretended election was made in opposition to the terms of it; and that, at all events, as a reduction was a remedy at common law, the institution of it could not be limited to two months. March 26, 1827.

The Court, on advising the summons and defences, with Cases on the 2d of June 1826, 'Sustained the fifth preliminary objection, or defence, stated upon the part of the defenders, against the competency of the present action; dismissed the same as incompetent; and assoilzied the defenders from the whole conclusions of the libel, and decerned, but found no expenses due.'

Both parties appealed,—John Tod and others against the interlocutor dismissing the action,—and James Tod and others on the point of expenses.*

Appellants. (JOHN TOD AND OTHERS.)—I. The provisions of the statute 16 Geo. II. c. 11, upon which the defence is founded, are totally inapplicable to the circumstances of the present case, and the nature of the present action; because,

1*st.* This is not a complaint against the proceedings of an annual election of magistrates, or of any meeting preparatory thereto;—whereas the statute founded on by the respondents merely introduces a summary mode of redressing wrongs done at annual elections and meetings preparatory thereto.

2*d.* The statute founded on by the respondents relates exclusively to the case of the minority of a meeting complaining of the acts of the majority;—whereas the appellants were not, physically or legally, the minority of the meeting; and the proceedings of which they complain were not done by either the physical or legal majority. In this discussion it must be assumed, that the allegations of the appellants, as to Sir William Rae's right to vote, are correct; and the question is, whether the action is competently brought, upon the assumption of the facts on which it is founded.

3*d.* The action relates, not to an act done against the set of the burgh, or the ordinary rules or laws of election, but to acts of dis-

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* It may be proper to mention, that as in this case judgment had been pronounced on the summons and defences, in regard to a preliminary defence, without closing a Record, each of the parties presented an Appeal Case, consisting of the summons and defences, with their respective Cases, in the Court of Session, and a short supplementary statement, reciting the interlocutor which had been pronounced, and containing the reasons of appeal.

March 26, 1827. obedience of the royal warrant, whereby the appellants were obstructed in the execution of that warrant, and are now interrupted in the exercise of their legal functions by persons who have illegally obtruded themselves into the management of the burgh, and against whom they applied for summary redress by suspension and interdict. These acts of disobedience of the royal warrant, and attempts to frustrate the execution of it, were not even limited to the meeting appointed by the warrant to be holden, but commenced at a prior period, and were parts of a continued and regularly digested plan to defeat the royal warrant.

II.—Even supposing this to be one of the cases to which the remedy introduced by the statute 16 Geo. II. c. 11, might have been applied, still that remedy is not exclusive of all others. The common law remedy, by ordinary action, still remains; and the limitation, in point of time, introduced by the statute, is applicable only to the summary remedy by petition and complaint, thereby introduced. And,

III.—An appeal on a question of expenses is not competent.

Respondents. (James Tod and Others.)—1. The election, although made in virtue of a royal warrant, was a proper annual election of Magistrates; and as such, fell within the provisions of the statute. But it has been decided, that by that statute, a code of laws regulating complaints against elections was established, excluding altogether the remedies at common law: And, therefore, the appellants ought to have proceeded by a summary petition and complaint, and not by a reduction; and, at all events, they could not competently get the election set aside by proceedings adopted two months from the date of election.

2. In regard to the question of expenses, it may be true that it is not competent to appeal in the ordinary case; but the Court of Session have disregarded the express injunction of the statute, which declares that the successful party shall be found entitled to his expenses; and, in such a case, it is quite competent to appeal, and the Court were not entitled to refuse giving effect to the statute.

'The House of Lords ordered and adjudged that the said interlocutor complained of in the said original appeal be, and the same is hereby affirmed, except in so far as it omits to give costs; and it is declared that the respondents ought to have had the costs of proceeding in the Court of Session, according to the true intent and meaning of the statutes, relative to pro-

'ceedings in such cases; and it is further ordered, that the cause March 26, 1827.
'be remitted back to the Court of Session in Scotland, to do
'therein as shall be just and consistent with this declaration.
'And it is further ordered and adjudged, that the said interlo-
'cutor, so far as complained of in the said cross appeal, be,
'and the same is hereby reversed.'

LORD CHANCELLOR—My Lords, there is a cause which your Lordships have been pleased to order to stand for judgment to-day, in which John Tod, flesher of Pittenweem, and others, are appellants, and James Tod, and a great number of others, are the respondents. This is an action of reduction and declarator, for setting aside the proceedings at an election, which were had in consequence of his Majesty having been pleased to restore the burgh of Pittenweem. It has been very much discussed in the papers, as well as at your Lordships' bar, whether this was to be considered as within the meaning of the words of the act of Parliament an Annual Election—whether it was to be considered as a proceeding to be distinguished by majority or minority. Strictly speaking, on looking at the numbers, John Tod and ten other persons made eleven, and James Tod and ten others made eleven also, so that you can hardly call it a majority and minority.

But the question is, whether, regard being had to the nature of the proceedings, this is not within the true intent and meaning of the act of Parliament to which reference has been made; and, on the best consideration I can give to the subject, I think that, though this was an election held in consequence of his Majesty restoring the burgh, and although there was most unseemly diversity of opinion, and very singular conduct in the proceedings when the election was had, yet that still it is to be considered as an annual election, and a complaint within the intent and meaning of the statute.

Then the question is reduced to this, namely, whether, in this species of action, which is an action of reduction and declarator, it is competent to bring that action after eight weeks or two months had expired after the election, and before the institution of that proceeding. On the one hand it has been contended, that this is not to be considered as a proceeding under the statutes which regulate the election of councillors, and other persons at these burgh meetings, but that it is to be considered as an action brought according to the common law of Scotland; and that being an action brought according to the common law of Scotland, there is no statute which ought to be considered as a bar; and I have no hesitation in stating to your Lordships, that if we were here to judge of the law of Scotland upon English principles, (which we ought never to do, and which I believe we have never intentionally done,) it might be a difficult thing to say that where, without words excluding the common law, a special proceeding is provided by act of Parliament, the general operation of the common law would be considered as taken away; and yet I cannot go the length of saying, that if there are statutes, in pari materia, you may

March 26, 1827. not infer such a shutting out of the remedy under the common law, without any expression in the act of Parliament which your Lordships have to construe.

But, my Lords, I find in this case a difficulty that I apprehend is quite insuperable, because my humble opinion is, that this point has been already determined by your Lordships, and that we cannot now alter it, whatever might have been our opinion upon the question, whether this common law jurisdiction was shut out or not by the special provisions.

My Lords, the case of Johnston *v.* Young has been alluded to, together with the authority of Mr Wight and Mr Bell. With respect to the first named of those gentlemen, I think I am old enough to have had the honour of practising along with him at your Lordships' bar; and that he was a very great authority on these subjects, nobody can deny; nor did I ever hear any dispute with respect to the correctness of his representation as to matters of law in which he had been concerned. I need not state to your Lordships who Mr Bell is, because you are all aware that he is a person whose authority is of considerable weight, though still he is a gentleman practising at the Bar. *

Upon looking at the case of Johnston *v.* Young, I have not been able to find that there is one word in the printed cases on the subject; and yet it would be extremely difficult, upon looking at the evidence in that case, to conceive how this House could have made the decision which it has, unless the decision that it made went upon a ground that formed no part of the allegations in the printed cases or the evidence; and, accordingly, Mr Wight has recorded in his work, that the reversal in this case went upon a ground neither mentioned in the Court of Session in Scotland, nor mentioned in the printed cases laid upon your Lordships' table; that it went upon this ground, that the action of reduction was competent, but still that it must be brought within two months.

It has been supposed that there is some mistake upon that subject; but when we come to look at a subsequent case that is to be found, which has been decided by your Lordships, it appears to me, that it is quite impossible to contend, with any hope of persuading the House, that Mr Wight is mistaken as to that fact. In a subsequent case, which was heard at your Lordships' bar in the year 1785, in which Robb and others were appellants, and Thomson and others, magistrates and councillors of the burgh of Anstruther Wester, were the respondents, in the printed case in that proceeding this is stated:—'Supposing it were 'competent to the appellants, though not constituent members of the 'council of Anstruther Wester, to insist in the present action, yet, as 'the act of 7th and 16th of his late Majesty have expressly limited the 'time for preferring action or complaints to two months after the elec- 'tion complained of, and the present action was not brought till near 'twelve months after the election complained of, it is therefore incompe-

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* His Lordship, it is presumed, must have supposed that the Treatise on Election Law was written by Mr Professor Bell, whereas it was written by his brother, Mr Robert Bell, who died several years ago.

'tent, and could only have been brought with an intent to create trouble March 26, 1827.
'and confusion at the Michaelmas election, which was to come on a few
'days after the summons was raised, the prevention of which was the
'principal object of the statutes.'

Then this reason, which has the signature of Mr Wight, goes on to say, (and it may be considered therefore that this representation was made to this House with respect to what it had done in the case of Johnston *v.* Young,) 'this point has been already determined by your Lordships, who 'reversed a judgment of the Court of Session upon this single ground; 'and that, in a case where a complaint of the same election had been 'brought within two months, but had been dismissed on account of a 'mistake in the name of one of the defendants, after which an action of 'reduction, similar in form to the present, was brought by several consti-'tuent members of the council. No objection was taken to the action in 'the Court below, nor even in the cases upon the appeal. The Court of Ses-'sion reduced the election; but, upon this objection being taken at your 'Lordships' bar, your Lordships reversed the decision of the Court below, 'without even going into the merits of the case, upon the single ground 'that the intention and purpose of the acts above quoted was to form a 'code for the election of magistrates and councillors in Scotland; and, 'while it gave remedies in cases where there was formerly no remedy, it 'also cured evils which arose from the old laws; and among the other 'evils the act intended to remedy, there was no greater than that it was 'in the power of persons, by bringing actions of declarator and reduction, 'to reduce elections made many years before, and long after the persons, 'whose elections were complained of, were out of office. This question 'was very fully entered into by your Lordships, and has ever since been 'understood to be finally settled; and in that case also the appeal was 'dismissed.'

My Lords, when we are looking at these statutes, which are all made in pari materia, it would be a very singular thing to say, that though the magistrates and councillors are in the form of action required under these statutes, to proceed within eight weeks, yet that there is another form of action at common law, in which they need not proceed for eight years, or any given time. I look upon it, therefore, that these cases of Johnston *v.* Young, and Robb *v.* Thomson, decide this point; and I dare not venture to give your Lordships any advice which shall militate against the decision of this House, pronounced in the case of Johnston *v.* Young, and thus represented to the House in Robb *v.* Thomson, in the year 1785, in which case also the result was the same.

My Lords, there is a cross appeal, which I feel some difficulty how to deal with. That is about the costs. That those costs should have been given, is pretty clear. This House never does entertain an appeal for costs where costs are in the discretion of the Court below; but when the legislature, by a statute, has expressly required that the Court of Session, in the case of an action that is brought under the authority of that statute, and in the case of a summary complaint which is brought under that sta-

March 26, 1827. tute, the Court shall make the party who fails pay the full costs of suit; it does appear to me that the party is in fact entitled to full costs of suit, and that being so entitled to full costs of suit, the Court below ought, by their judgment, to have given full costs of suit, unless they were prepared to say that this was a case out of the statute. If it is a case out of the statute, it would be a question of discretion, and therefore no appeal would lie; but, on the other hand, if this is a case within the intent and meaning of the statutes to which I have referred, it appears to me that the costs ought to be given. The great difficulty I have had to decide is, in what form we are to do this—how we are to give that judgment. The two gentlemen who stand at the bar, who are the agents in this matter, will probably give me the benefit of their knowledge of the practice of the Court of Session; and, desirous that we may be quite right, I would propose that we should have the opportunity of seeing the agents before I move your Lordships to proceed to judgment in the precise terms in which it should be entered. I am, however, of opinion that this judgment ought to be affirmed; and I humbly submit, that if your Lordships concur in that opinion, in some way or other this House must take care to provide that the party who has not failed, shall have full costs paid to him by the party who has failed.

Appellants' Authorities.—Wight, 340.—Bell on Elect. 489.—Glass, Feb. 28. 1754, (1857); Wight, 356.

Respondents' Authorities.—16 Geo. II. ch. 11. § 4.—Young, January 1766, (Wight, 339.)—Robb, Feb. 17, 1785, (Bell, 493.)—Henderson, July 3, 1821.—(1. Shaw and Bal. No. 125.)—Wight, 340.—Coutts and Others, Feb. 17, 1747, (Wight, 358.)—4 Ersk. 1. 18.

SPOTTISWOODE and ROBERTSON,—RICHARDSON and CONNEL, —Solicitors.

No. 41. J. NAPIER, Appellant.—*Keay.*
A. CROMBIE, (for Lady GORDON,) Appellant.—*Wetherell.*
W. G. SCOTT and Others, Respondents.—*Murray—Bligh.*

Fee and Liferent—Competition.—A party having sold his estate to his son-in-law, under burden of the price, payable at certain stipulated periods; and having declared that the interest of part of the price should be liferented by his son-in-law and his wife, and the property vested in their children, (of whom one was then alive,) and the price not having been paid,—Held (affirming the judgment of the Court of Session)—1, That the fee belonged to the children, and not to their parents;—and, 2. That they were preferable on the price to the heirs ab intestato of the seller.

May 14, 1827. 1ST DIVISION. Lord Alloway.

THE late William Glendonwyn, proprietor of the estates of Parton and Crogo, entered into a transaction with his son-in-law, Mr Scott, by which he agreed to sell the property to him,