

if he assigns his right and interest under this trust to the liquidators that will enable them to take such steps as may be necessary to put an end to the trust and compel Mr Gibson to convey one-half *pro indiviso* of this subject to them. To this proposal the liquidators answer that that is not what they bargained for. Mr Clark represented that he was joint proprietor of this estate with Mr Gibson, and that he was therefore in a condition to convey his half *pro indiviso* of this subject to them.

Now, such being the nature of the contention, I agree with the Lord Ordinary in the opinion he has formed upon the subject. I think the bargain between the parties plainly was, that there was to be complete delivery of this heritable subject, as there was to be of the moveables and money which were also given to the liquidators under the compromise, and that Mr Clark is just as much bound to give a disposition upon which the liquidators can be infert in the heritable subjects as he is bound to make delivery of the moveables and to grant the bill which he entered into, and to pay over the money in cash which it was stipulated he should pay. In short, there must be complete delivery of all that Mr Clark undertook to give them, in such a way as to put them in undoubted possession of the whole subjects transferred.

What the result of the complainers' contention would be is very obvious. It would not give the liquidators a title to this subject; it would merely give them a claim against Mr Gibson, and that claim might be resisted and they might be involved in a litigation with Mr Gibson in prosecuting this claim. Now, that is plainly not what was stipulated in the compromise referred to, and therefore I am for adhering to the interlocutor.

LORD DEAS—I have no doubt that, unless the conditions of this compromise are fulfilled, the liquidators are entitled to give the charge they have given for the payment of the whole sum, and therefore the only question is whether the conditions are fulfilled or not. This property is undoubtedly represented to be, and in point of fact is, I understand, a heritable property, heritable or feudal as it may be according as there is an infertment or not—at all events, a heritable property which can only be validly conveyed by a disposition and conveyance. Now, there is no doubt it is made a condition of the compromise that it shall be conveyed, and the fact that the liquidators were to pay the expense of the conveyance only goes to show that what was in contemplation of the parties was not an assignation in the ordinary and proper sense of the term—an assignation of a personal right—but it was to be a conveyance of a heritable estate. A *pro indiviso* title to a subject does not make a subject less heritable, and I am clearly of opinion that it cannot be conveyed in any proper sense and vested in the liquidators unless this conveyance is granted, and I cannot doubt that the party who obtained the compromise undertook to grant that conveyance. Without any doubt I agree with the view stated by your Lordship.

LORD SHAND—I concur in the judgment to be pronounced, and in the reasons given by your Lordships and by the Lord Ordinary.

LORD MURE was absent.

The Lords adhered, and remitted the case to the Lord Ordinary.

Counsel for Complainer—Guthrie. Agents—J. & J. Ross, W.S.

Counsel for Respondent—Lorimer. Agents—Davidson & Syme, W.S.

Friday, July 7.

FIRST DIVISION.

(Before Lord President Inglis and Lords Deas and Sband).

[Lord M'Laren, Ordinary.

DEANS AND OTHERS *v.* STEVENSON AND OTHERS.

Municipal Election—Ballot Act 1872 (35 and 36 Vict. c. 33), sec. 13, schedule 1—Rules for Conduct of Elections.

Circumstances in which a municipal election was *sustained* although serious irregularities had taken place in the conduct of the election, on the grounds—that the irregularities complained of, after being pointed out, were not continued; that the rules annexed to the Act are not imperative enactments, but regulations for the guidance of those who are to administer the statute; that the election had not been conducted in a manner inconsistent with the principles of the Ballot Act; and that in point of fact the irregularities complained of had not affected the result of the election.

Opinion (per Lord Deas) that there might be a violation of the rules annexed to the statute of so gross a kind as to void the election.

Municipal Election—Order of Retiring from Council.

In determining the validity of a municipal election the Court will not consider whether the result of the irregularities complained against might be to alter the order in which the elected members have to retire from the council.

In 1881 there were seven councillors of the royal burgh of Haddington who retired or fell to go out of office, and various parties offered themselves as candidates for the vacancies. As the number of persons proposed for election as councillors exceeded the number of vacancies, a poll was fixed to take place within the Town Hall of Haddington on Tuesday, November 1, 1881, between the hours of eight in the morning and four in the afternoon. An election accordingly took place on the above date, at which William M'Kay, one of the bailies of the burgh, acted both as presiding and returning officer, under and in terms of sections 20 and 21 of the Ballot Act of 1872.

By section 2 of this Act it is provided that in case of a poll the vote shall be given by ballot, the ballot-papers being to be marked on both sides at the time of voting with an official mark, and then used as prescribed—“Each ballot-paper shall have a number printed on the back, and shall have attached a counterfoil, with the same

number printed on the face. At the time of voting the ballot-paper shall be marked on both sides with an official mark, and shall be delivered to the voter within the polling station, . . . and any ballot-paper which has not on its back the official mark, or on which votes are given to more candidates than the voter is entitled to vote for, or on which anything except the said number on the back is written or marked by which the voter can be identified, shall be void, and not counted."

By rule 24 of the appendix annexed to the Ballot Act 1872 it is provided that "Immediately before a ballot-paper is delivered to an elector it shall be marked on both sides with the official mark, either stamped or perforated, and the number, name, and description of the elector, as stated in the copy of the register, shall be called out, and the number of such elector shall be marked on the counterfoil, and a mark shall be placed in the register against the number of the elector to denote that he has received a ballot-paper, but without showing the particular ballot-paper which he has received."

By rule 26 of the said appendix it is provided that "The presiding officer, on the application of any voter who is incapacitated by blindness or other physical cause from voting in manner prescribed by this Act, or (if the poll be taken on Saturday) of any voter who declares that he is of the Jewish persuasion, and objects on religious grounds to vote in manner prescribed by this Act, or of any voter who makes such a declaration, as hereinafter mentioned, that he is unable to read, shall, in the presence of the agents of the candidates, cause the vote of such voter to be marked on a ballot-paper in manner directed by such voter, and the ballot-paper to be placed in the ballot-box, and the name and number on the register of voters of every voter whose vote is marked in pursuance of this rule, and the reason why it is so marked shall be entered on a list in this Act called 'the list of votes marked by the presiding officer.' The said declaration in this Act referred to as 'the declaration of inability to read' shall be made by the voter at the time of polling before the presiding officer, who shall attest it in the form hereinafter mentioned, and no fee stamp or other payment shall be charged in respect of such declaration, and the said declaration shall be given to the presiding officer at the time of voting."

By rule 29 of the said appendix it is provided that "The presiding officer of each station, as soon as practicable after the close of the poll, shall, in the presence of the agents of the candidates, make up into separate packets, sealed with his own seal and the seals of such agents of the candidates as desire to affix their seals (1) each ballot-box in use at his station unopened, but with the key attached; and (2) the unused and spoiled ballot-papers placed together; and (3) the tendered ballot-papers; and (4) the marked copies of the register of voters and the counterfoils of the ballot-papers; and (5) the tendered votes list and the list of votes marked by the presiding officer, and a statement of the number of the voters whose votes are so marked by the presiding officer, under the heads 'physical incapacity,' 'Jews,' and 'unable to read,' and the declarations of inability to read."

By rule 30 of the said appendix it is provided

that "The packets shall be accompanied by a statement made by such presiding officer, showing the number of ballot-papers entrusted to him, and accounting for them under the heads of ballot-papers in the ballot-box unused, spoiled, and tendered ballot-papers, which statement is in this Act referred to as the ballot-paper account;" and by rule 31 of the said appendix it is provided that "the candidates may respectively appoint agents to attend the counting of the votes."

By rule 34 of the said appendix it is provided that—"Before the returning-officer proceeds to count the votes he shall, in the presence of the agents of the candidates, open each ballot-box, and, taking out the papers therein, shall count and reckon the number thereof, and then mix together the whole of the ballot-papers contained in the ballot-boxes. The returning-officer, while counting and recording the number of ballot-papers, and counting the votes, shall keep the ballot-papers with their faces upwards, and take all proper precautions for preventing any person from seeing the numbers printed on the backs of such papers." And by rule 37 it is provided that "Upon the completion of the counting, the returning-officer shall seal up in separate packets the counted and rejected ballot-papers. He shall not open the sealed packet of tendered ballot-papers or marked copy of the register of voters and counterfoils, but shall proceed, in the presence of the agents of the candidates, to verify the ballot-paper account given by each presiding officer, by comparing it with the number of ballot-papers recorded by him as aforesaid, and the unused and spoiled ballot-papers in his possession and the tendered votes list, and shall reseal each sealed packet after examination. The returning-officer shall report to the Clerk of the Crown in Chancery the result of such verification, and shall, on request, allow any agents of the candidates, before such report is sent, to copy it."

During the polling on 1st November 1881 various irregularities were alleged to have been committed by the presiding and returning-officer, Bailie M'Kay, while the precautions required by the Act to prevent voters from being identified were said to have been neglected. Upon proof it turned out that as regarded 153 voting-papers the number of the voter in the register was marked by him or his assistants upon the face of the ballot-paper. This went on from eight o'clock until four, when a voter coming in objected to take a paper so marked; thereupon the irregularity ceased, and the remainder of the votes were given without any marking of an objectionable kind upon the voting-paper. After the closing of the poll there appeared to have been a very plain violation of the rules laid down for the conduct of elections, which irregularities are fully detailed, and the objections urged against them dealt with, in the opinion of the Lord Ordinary.

The pursuers were duly qualified electors of the burgh of Haddington, who were at the date of the election eligible for the office of councillors, and the purpose of the present action of reduction was to set aside the election *in toto* on the ground that the whole procedure on the occasion in question was in violation of the principles of the Ballot Act.

Against this it was maintained by the defenders that although certain irregularities had occurred,

yet the election had been substantially conducted according to the principles of the Ballot Act.

On the 4th of March 1882 the Lord Ordinary pronounced an interlocutor assolving the defenders (who were the elected Provost, Magistrates, and Councillors of the burgh of Haddington) from the whole conclusions of the action. His Lordship added this note:— "I think, in reference to the common law, that the rule laid down by the Judges in the case of *Woodward v. Sarsons* very well expresses the principle of the common law of Scotland, which in these matters is in no way different from that of England. An election is liable to be set aside by reduction, either where there has been no election in the eye of the law by the constituency, or where, though there has been an election, it has not been an election conducted in accordance with the requirements of the existing law. As an illustration of the first case, one might suppose an election by the town-council itself, or if that is too improbable an occurrence to be useful as an illustration, then what occurred in the *Hackney* case may be taken as a fair illustration, where a whole ward, owing to some want of arrangement, had been disabled from giving its votes, and thus the election is made by a constituency of a narrower area than the area appointed by the law of the land, where, instead of the whole burgh making the election, it is only so many wards, something less than the whole area of the burgh. That would be an election by a different constituency than the one entrusted by the law with the duty of making it. As regards election in a manner different from what the subsisting law authorises, this objection would apply if the election were conducted by open voting, but obviously a much smaller deviation from the principles of the existing law would be sufficient to render the proceedings invalid. Take, for example, the case suggested by the Lord President in one of the authorities quoted—that all the ballot-papers were found to be deficient in the official mark, or if every ballot-paper had the registered number endorsed upon it, as was done with a certain number of the papers in this case, so that not as matter of occasional inattention, but as part of the system on which the whole election was conducted, there was a material and substantial deviation from the requirements of the statute. What is said in the present case is that, having regard to the provisions of the 13th section of the Ballot Act, there have been in this election deviations from the principles laid down in the body of the statute. The clause in question distinguishes between the rules for conducting elections which are contained in the schedule appended to the statute, and the principles of the existing election law as laid down in the body of the Act. It is given as a direction to any Court before whom such a question may come that an election shall not be voided merely because there have been deviations from the rules not inferring any departure from the principles of the statute, and it is inferred from this direction that wherever there has been a departure from the principles laid down in the body of the Act—I am using the words of the 13th section—such irregularities, whether intentional or unintentional, shall infer nullity of the election. Again, if the irregularities, whatever these may be, are such as to affect the result of the election, this,

according to the 13th section, would also be a reason for declaring the election void. The present case furnishes a very good illustration of what might have been the consequence of an irregularity of that kind—I refer to the 153 votes, which it appears are invalid in consequence of the registered number of the voter having by inadvertence been put upon the ballot-paper as well as upon the counterfoil. These votes would necessarily be disallowed on a scrutiny, because they are marked in such a way as to enable the voter to be identified. But according to the statute, in a question as to the validity of the election, I am to consider whether the rejection of that number of votes would affect the result of the election. Well, upon the analysis of the votes in the rejected list it appears that even if all these votes were disallowed on a scrutiny the same gentlemen would have to be declared duly elected who were declared duly elected by Mr Mackay at the declaration of the poll. Therefore the result of the election is not affected either by the admission or the rejection of these votes, and so I think I am relieved from all difficulty with regard to the second branch or condition of the 13th section of the statute. What I am now to consider is, whether these irregularities involve a departure from the principle of secret voting as laid down in the body of the Ballot Act. Now, the Ballot Act itself nowhere contains in express terms a declaration of what these principles are. They have to be collected by reading its various clauses, and by considering their results when put into operation. Of course the first principle is that the voting is to be secret, and when you read the clause you see that it is implied not only that the vote is to be secret for the moment, but that the poll is to be taken in such a way that the votes cannot be ascertained from anything done either before or during or after the election. If it were permissible for the voter to deposit in the ballot-box any paper that he brought with him to the polling station, then his vote might be identified by some pre-arrangement, as happens, we know, in other countries, where men come in with red or green tickets denoting the party for whom they vote, and in the presence of the agents in the polling place deposit their coloured tickets in the ballot-box. Anything of that kind would be utterly opposed to the principles of British legislation. If by the connivance of the presiding officer a voter were to be allowed to expose his paper so that it could be seen while the polling was going on, that I should regard as being equally opposed to the principle of the ballot. Then if the votes as a whole are taken in such a way that they may be found out afterwards, there again you have a violation of the provisions intended for securing secrecy. Another principle of the Act, as I take it to be, is that while secrecy is ensured as regards the public, yet means are provided through the correspondence of numbers for identifying the voter in case it should be necessary to do so in a judicial inquiry, and that again is one of the two leading principles of the Act—secrecy as regards the public, but opportunity of disclosure for the purpose of the prevention and punishment of fraud. These principles are to be observed in conducting an election. I do not know any other principles fundamental to the operation of the Ballot Act,

and we wish to see now whether there has been an infringement of these principles which I have attempted to summarise.

“Now, the objections may be divided into two classes. There is the irregularity as to the numbering of the papers, and the irregularities with reference to the disposal of the papers from the time the poll was closed until they were finally sealed up and placed in the custody of the town-clerk. In regard to the numbering of the papers, if the question had come before me for the first time, I should have felt it to be one of very great difficulty, because, *prima facie*, the putting a number on a ballot-paper, and thereby—although it may be quite unintentional—enabling the agents and enumerators through whose hands that paper has to pass to identify the voter is, *prima facie*, an infringement of the principles of the Act. But the case was very fully considered by a Court of the highest authority—the Court of Common Pleas—in the *Birmingham Town Council* case, and their Lordships, while refraining from expressing an opinion as to what might be the result if these numbers had been written on the papers throughout were of opinion that as the irregularity had been unintentional, and confined to a small number of votes, this was not a violation of the principles of the Act, but an accidental deviation from the rules, which was not to cause a voidance of the election unless the rejection of these votes would have the effect of returning a different set of candidates. In a question of election law this decision of the Court of Common Pleas is one of the highest authority, and which, even if it differed from my own opinion, I should certainly have followed. But I do not say that I differ from it all. This question is one of difficulty, and it seems to me their Lordships came to a sound result because, if they had taken a different course it would have followed that if by accident a register number were placed on one single ballot-paper the election would be rendered entirely void. I cannot think it was the intention of the Legislature that in the execution of an Act of Parliament which is excessively complicated, and which contains perhaps fifty different positive requirements, the omission in the case of a small number of votes of some of these requirements should have the effect of depriving a constituency of its representative, or, in the case of a municipal burgh, of setting aside the whole election.

“On the other branch of the case—the irregularities that occurred in dealing with the papers—I shall take them separately. First, it is objected that there was no ballot-paper account made up at the end of the poll, but that the votes and counterfoils were locked up and sealed in the ballot-box, the other papers being left on the table, but with this precaution, that the presiding officer locked the door and kept the key until the room was opened again for the purpose of enumeration. Now, I think it would have been more correct if the ballot-paper account had been taken at the close of the poll, and the whole papers had been enclosed in envelopes and sealed. But it is only fair to observe, with reference to the duty of the presiding officer in a burgh like Haddington not divided into wards, that the rule applicable to that subject which is contained in the schedule annexed to the statute (rule 29) is one that refers to constituencies divided into wards.

The rule directs the presiding officers at their respective wards to seal up the different papers in separate packets, and to deliver them to the returning-officer as preparatory to an enumeration of votes. In the clause making the statute applicable to municipal elections there is no correction of rule 29, no modification of its terms so as to adapt it to the case where there is only one polling place and one presiding officer, who in such a case is generally also the returning-officer. Now, therefore, in this case the provisions of rule 29 could not have been literally complied with, because you have not two persons, or, rather, you have not one series of persons who are to make up separate packets and deliver them to another person. I think it would have been quite in accordance with the spirit of the clause if Bailie Mackay at the close of the poll had made out a ballot-paper account and sealed up the various packets. But then, although he did not do so, if he locked the room in which these papers were contained, and after the adjournment proceeded in the course of the evening to make up a ballot-paper account, making it out just in the way that he must have done if he had done it at the close of the poll—that is, by comparing the number of counterfoils, as indicated by the last running number, with the number of the used and spoiled ballot-papers (which were the complement of the counterfoils)—I say there was here a deviation from the precise requirements of the statute, but there is, I think, no deviation from the principle laid down in it, the principle of comparison of the voting-papers with the counterfoils, and comparison under circumstances which did not admit of disclosure of the vote. But it is said, further, that the counterfoils were left exposed on the table during the counting. Well, that again was an error. They ought to have been sealed up before the counting commenced. But the pursuers go on after to say that because these books of counterfoils were lying on the table they must be held to be open to inspection. The counterfoils are bound up in little books, and their contents could not be inspected unless someone had taken them in his hand and turned over the leaves. There is no evidence that that was done. The only occasion was when one of the gentlemen present looked for the last running number to enable the ballot-paper account to be taken, when he turned over the leaves for that purpose, and I am satisfied for no other purpose. Therefore, though the counterfoils were lying on the table they were not inspected, and were not placed there for being inspected, by anyone in the room, and that is not an irregularity involving a departure from secrecy or the mode in which that secrecy is to be preserved as contained in the body of the statute.

“The next objection is that the papers, other than the used ballot-papers and the used counterfoils, were in the course of the enumeration removed from the table and placed on a shelf or the window-sill until after the enumeration was over. The reason for their being removed from the table is quite obvious; the table was wanted for the purposes of enumeration, and had to be cleared. Whether the papers were on the shelf or the window-sill is immaterial, and though they lay there too long, it is not said they were disturbed that evening. There is no requirement in the body of the Act, or in the schedule, that

at the completion of the returning-officer's duty the final making up of the different papers into packets shall be done immediately after the enumeration. Substantially I think the statute was complied with when the draft ballot-paper account was made out in the evening and extended the next day. I have every reason to believe that the Parliamentary paper—the formal return—is constantly left over till the day following the election—very often because the operation of enumeration occupies the gentlemen engaged in it to such a late hour that it would not be reasonable to expect that this requirement should be instantly complied with. No one, so far as I am aware, has ever taken an objection that these formal, though important, duties of the returning-officer were occasionally left over till the following day.

“Then, lastly, there is an objection to the mode in which the papers were dealt with after the close of the election. Now, I must say, that there was very great carelessness displayed in the way in which these papers were treated. The direction of the statute is that they shall be kept by the town-clerk with the records of the burgh, and I think they ought certainly to be kept under lock and key, and not left lying open in a room to which the public were in the habit of resorting when they came on municipal business. I do not say there was anything wrong in what was done, but it is calculated to excite suspicion, and anything exciting suspicion in the minds of the public should be avoided by an official. It is the principle of the Ballot Act that once the election is over the papers are to be sealed up, and that no one has power to break these seals unless under the authority of Parliament or of the Court. Worse still, it is said these packets were opened up and resealed after an interval, for a reason we do not know. Mr Hood has not come here to give the reason for the course he took, and we are not here to inquire into his conduct, and I do not say anything upon it except that I do not think that anything done by the custodian of these public documents after the election was declared can have the effect of depriving the defenders of their position as town councillors of Haddington.

“I think I have now gone over all the specific points except the one about counting the ballot-papers. Certain ballot-papers were placed with their backs upwards, when they ought to have been turned with their faces upwards. That was not an irregularity for which it is possible to make any particular person responsible. It seems to have been the idea of everyone present that that was the proper way of counting, and accordingly all the enumerators had placed their papers with the backs upwards except one. Someone called attention to the peculiarity in this case, and a gentleman present turned them round to make them like the rest. When this happened they were all arranged; but no doubt the schedule appended to the statute prescribes the precise mode in which the ballot-papers are to be placed, as it prescribes other particulars. I cannot say why it prescribes it, except in so far as regularity is important in public business—I mean it is of no importance as to secrecy or the result of the election. Many of these rules, I believe, were laid down merely because it was thought better to have a rule in case some nervous person did

not know how his paper should be turned, and which was the right side to have uppermost. Therefore he was told that which he was to do, so that he might be relieved of perplexity. The best proof of this is that at the second counting it is open for the gentlemen to look both sides, and it is constantly done, for the purpose of seeing that no identifying mark has been put on one side or the other.

“I do not think it necessary to go further into the cases that have been cited. I have referred to the *Birmingham* case, and in regard to the *Hackney* case that is an illustration of an election set aside because a section of the constituency had been accidentally disfranchised, and Mr Justice Grove's observations as to anything having a tendency to reduce the majority so far—if they bear the construction put upon them by the pursuers' counsel—appear not to be consistent with the more recent and authoritative case of *Woodward*, where the Court did what I have done—ascertained not whether the number would be diminished, but whether the result of a scrutiny would alter the persons to be elected. The cases in our own Courts appear to me to be generally in harmony with the principles here laid down. I have endeavoured to follow them and keep them in view in dealing with these different points. I have carefully considered the judgment of Lord Gifford, a Judge of great eminence and ability, and to whose opinion in all matters involving public interests I should be disposed to defer. Lord Gifford interprets the 13th section of the Ballot Act as directing and even requiring an election Judge to disregard all apparently formal deviations from the requirements of the statute, whether contained only in the schedule, or both in the schedule and in the body of the Act, if they are not matters involving principle or matters affecting the result of the election.

“My opinion, therefore, on the whole case is, that while this election is certainly not an example to be followed, but rather one which, through the medium of this case, may enable the town council to avoid similar errors in future, yet there has been no such error as would set aside the election or deprive any of the gentlemen elected of his position as a town councillor. I therefore grant decree of absolvitor, with expenses.”

The pursuers reclaimed, and argued—All the rules of the Ballot Act were systematically neglected. Many parties may have been deterred from recording their votes through fear of discovery, while others may have voted under the stress of open voting; the election ought to be set aside *in toto*.

Authorities referred to—*Hamilton v. Dunoon Police Commissioners*, January 15, 1875, 2 R. 299; *Thomson v. Magistrates of Rutherglen*, February 17, 1876, 3 R. 451; *Maefarlane v. Mochrum School Board*, November 9, 1875, 3 R. 88; *Woodward v. Sarsons*, July 9, 1875, 10 Com. Pl. 733; *Gill v. Sir C. Reed (Burgh of Hackney case)*, 2 O'Mally & Hardcastle, Elect. Rep. p. 77, also 39 L. Times, 69; 16 Vict. cap. 26, sec. 1; 35 and 36 Vict. c. 33, sec. 13, rules 24, 29, 30, 34, and 37.

The respondents argued—The election had been conducted substantially in accordance with the principles laid down in the Ballot Act of 1872. There is nothing in sec. 2 of the Act to

distinguish between faults committed by the officials and those committed by the voter. When irregularities occur the penalty is not voiding the election, but setting aside the vote. By sec. 20 of the Act the rules do not apply to municipal but only to Parliamentary elections.

Authorities referred to—*Burgh of Horsham*, 1 Fowler & Rodwell, Elect. Cases, 248; *Mortimer* case, Robertson's Appeals, 852; *Anstruther v. Alexander*, 1767, M. 12,672; Maxwell's Interpretation of Statutes, p. 327; 3 and 4 Will. IV. c. 76, sec. 7; 33 and 34 Vict. c. 92, sec. 5; 35 and 36 Vict. c. 33, rules 28, 29, and 30.

At advising—

LORD PRESIDENT—The object of this action is to set aside the election of councillors of the burgh of Haddington, and the ground generally upon which the application is made is the failure on the part of the presiding officer, who on this occasion was also the returning officer, to comply with the provisions of the Ballot Act. If any irregularities in the conduct of an election are sufficient of themselves, without considering the precise character and effect of them, to void an election, there is sufficient ground for voiding this election. The gentleman who had charge of this election seems to have had a very strange notion of the performance of his statutory duties, because it was quite impossible that before entering upon the performance of those statutory duties he could have made himself at all acquainted with the statutory requirements of the Ballot Act which he had to administer. There are many gross irregularities in the conduct of this election beyond doubt. But the question comes to be, whether any of them are sufficient to justify the Court in declaring the election void? By far the most important of the grounds of action is an objection which occurred under the second section of the Ballot Act. The way in which that objection is stated on record is this—“That during the polling, and more particularly as presiding officer, Bailie M'Kay did not take the precautions required by law to prevent the voters from being identified. On the contrary, he wilfully, and against the remonstrances of various voters, wrote or caused to be written on each and all of the ballot-papers issued during great part of the day the number on the register of voters corresponding to the voter's name on the said register, and thus made it a matter of certainty that the voter could at the counting of the votes be identified, and that it should then be known for whom the vote had been given.” Now, the substance of this objection is sustained by the evidence, but not all of it. If it had been proved that the presiding officer wilfully, and against the remonstrances of various voters, persisted in following this course, the case would have assumed a much more serious aspect. But what has been proved in point of fact is this, that as regarded 153 voting-papers the number of the voter in the register was marked by him or his assistants upon the face of the ballot-paper. The mistake was discovered in consequence of a gentleman—who apparently was better acquainted with the provisions of the Ballot Act than the person who was then administering it—having called his attention to the irregularity which he was committing, and then the irregularity was stopped, and the remainder of the

votes were all given without any objectionable marking upon the voting-paper. Now, the question comes to be, whether this way of dealing with those 153 voting-papers is to void the election. It is a very serious matter under the 2d section undoubtedly, but I do not think the 2d section, taken by itself, contemplates that a disregard of any of the provisions of that section shall have the effect of voiding the election. On the contrary, all that it provides is, that voting-papers which are marked in that irregular way shall not be counted. Therefore if we are to void the election upon this ground, it cannot be by reason of a provision to that effect contained in the second section, and we must consider whether either the Ballot Act in any of its other provisions, or the common law of elections, would hold that to be such an important irregularity in the conduct of the election as necessarily to make it void. It appears to me that in every objection of this kind there is a question of degree. It certainly cannot be supposed that if an irregularity of this kind had occurred in the case of one vote only, that was to void the election. And, on the other hand, it is just as clear that if all the voting-papers had been marked in this way the election would have been undoubtedly void; and therefore the question is, whether the thing went so far here as to make it necessary in point of law to void this election? Now, 153 votes are no doubt a very considerable proportion of the constituency of the burgh. But it is quite clear on the evidence, in the first place, that even if these 153 votes had been all counted as having been validly given, the same persons would have been returned that have in point of fact been returned notwithstanding those votes being discounted. In the second place, the averment of the pursuers that this course of marking the voting-papers was persisted in wilfully, and against the remonstrances of various voters, is certainly not proved. On the contrary, it is quite clear that the moment the mistake was discovered the irregularity was stopped. And therefore it is not possible to infer from the circumstance that this irregular course which was pursued from eight o'clock till about eleven o'clock had any effect in deterring other people from going to poll through fear of being exposed to the possibility of their vote being known, or, in short, that it had any effect upon any members of the community whatever, except merely to disfranchise the particular voters. Now, that being the nature of the case presented upon the proof, it does not appear to me to justify the Court in voiding the election upon that ground. With reference to an argument pressed upon the Court and laid upon the effect of the placing of some of the gentlemen who were returned in a different order as regarded the number of votes given for them, it was certainly very ingenious, but it is not an argument which I think we can take into consideration. That fact might make the order of their retiring from the council in certain possible circumstances different from what it would otherwise be. But dealing with this, not as a question under any particular section of the statute, but as one arising upon the common law principles of election law, I think this is not a thing which we can take into consideration, being a mere incidental and remote consequence of the way in which the return was made. This is the

only thing that occurred in the course of taking the poll which is founded upon as in violation of the Ballot Act. Afterwards there were certainly great and most blameworthy irregularities—the most perverse violation of the rules laid down for the conduct of elections that it is possible almost to imagine. But then it is to be observed that the rules there are not part of the clauses of the statute properly so called, but they are rules and regulations contained in the schedule, and which really consist, not of imperative enactments in the statute itself, but of regulations for the guidance of the officers who are to administer this statute. They are therefore to be dealt with as instructions merely. I think that—which even without the clause would have been abundantly clear—is made still clearer by section 13 of the Act, which declares that no election shall be declared invalid by reason of non-compliance with the rules contained in the first schedule of the Act, or any mistake in the use of the forms in the second schedule, if it appears to the tribunal having cognisance of the question that the election was conducted in accordance with the principles laid down in the body of the Act, and that such non-compliance or mistake does not effect the result of the election. Now, I think that the irregularities here did not make this election one conducted in a manner inconsistent with the principles of the Ballot Act. I think it was conducted with a desire to carry out the regulations of the Ballot Act, and to keep the voting secret, which is the grand principle of the Act. It was imperfectly and irregularly done, but still it cannot be said not to have been an election by ballot. Then, again, these irregularities which took place after the voting, and which were in violation of the regulations, certainly did not affect the result of the election. Therefore upon the whole matter I agree with the Lord Ordinary.

LORD DEAS—I have no doubt whatever that the objection taken under sec. 2 of the Ballot Act is a most important one, and that the writing of the voter's number in the register on the face of the ballot-paper was a very serious blunder. That the 153 votes so given cannot be counted is as strong an allegation as could well be stated not to void the election. But it is to be kept in mind that whenever the blundering was pointed out it was stopped. No doubt it might have prevented other voters from coming to the poll if the report had got abroad that it was known how each voter was giving his vote, but it so happened that as matter of fact no one was prevented from this cause from recording his vote, and though the blunder was a serious one, it cannot in my opinion void the election.

As to the effect of these irregularities in placing the elected members in a different order from that which they might otherwise have occupied, this no doubt is a serious matter also, but it cannot in any way be called "affecting the result" of the election; it is merely incidental to it, and is not an irregularity to which the statute or we can attach the result of voiding the election.

As regards those gross and persistent violations of the rules laid down for the conduct of elections, it is only to be observed that there does not seem to have been any violation of the principles laid down in the body of the statute.

Nothing, for example, seems to have been done to destroy the secrecy of the Ballot Act, and that being so the violations are not such, to my mind, as to render this election void. For it is to be observed that the more serious of these irregularities commenced after the election was concluded. It is possible that irregularities might take place during the conduct of the election of so gross a character as to void the result, as, for example, those in charge making known prematurely the result; but upon this point I reserve my opinion, and on the whole case agree with your Lordship in the conclusion at which you have arrived.

LORD SHAND—I am of the same opinion, and for the reasons so fully stated by the Lord Ordinary and by your Lordship in the chair. I think we must distinguish between the objections which are taken to what was done before the poll closed, and those which are taken to what took place after, by which time the result was decided.

There was also another objection which was pressed apparently before the Lord Ordinary, viz., that during the election the presiding officer had omitted to mark a number of the counterfoils, as he should have done, with the number of the voters consecutively as they came in, and that the number of those counterfoils were filled in some days after the voting and counting and the declaration of the poll. I think I may say that your Lordships agree with me in holding that the evidence entirely fails to make out this contention, and that is sufficient for the disposal of it.

If it had got abroad that any vote could be identified, and on this account electors had been debarred from recording their votes, then the result might have been most serious, but, on the contrary, it appears that the mistake of the presiding officer was not observed by anyone until about 11 o'clock, when a voter declined to take one of these marked papers.

Now, the statutory result of votes given upon papers so marked is that they are void, and cannot be counted; that is the only penalty prescribed.

As to the objections taken to what was done after the poll was closed in violation of the rules annexed to the Act, particularly the misplacing of the ballot-papers, and the omission to lock up the counterfoils, whereby certain votes had been identified, it does not appear to me that the violation of these rules nullifies the election, seeing that they are not in direct violation of any of the principles of the Ballot Act. I can only express the hope, as the Lord Ordinary has done, that the irregularities which have occurred here will be a warning to others on similar occasions, and that the conduct of this election will be a warning rather than an example to be followed.

LORD MURE was absent.

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