

1796.

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 DENNY, &c.
 v.
 MARQUIS OF
 LORNE, &c.

lant assoilzied ; and it is further ordered, that the cross appeal be dismissed.

For Appellant, *Wm. Adam, Geo. Ferguson.*

For Respondent, *Thomas Erskine, John Dickson, James Montgomery.*

JOHN DENNY, Eldest Bailie of Dumbarton,
 JOHN KEAY, Dean of Guild, DAVID
 PHILIPS, JAMES ROCHHEAD, JOHN DIXON,
 WM. EWING, GEORGE, WILLIAM, and
 JOHN MACARTHUR, all Councillors of the
 Burgh of Dumbarton, - - -

} *Appellants ;*

GEORGE, MARQUIS OF LORNE, Provost of
 Dumbarton, DAVID CONNELL, Second
 Bailie, ROBERT DAVIDSON, Treasurer,
 Captain ROBERT DAVIDSON, JAMES FER-
 RIER, ROBERT COLQUHOUN, and PETER
 HUTCHISON, all Councillors, - -

} *Respondents.*

House of Lords, 6th December 1796.

BURGH ELECTION—NOTICE—CUSTOM OF BURGH.—An ordinary meeting of council of the burgh of Dumbarton, taking place the day after the death of one of their number, the majority at this meeting, without any previous notice, proceeded to elect a new councillor in the room of the one deceased, though objected to by the minority. Held that this election was void, and that fourteen days' notice must be given to every councillor previous to such election, although it appeared from the records of the burgh, that it had been the practice for nearly a century, to proceed to the election without any such previous notice.

The Michaelmas election of magistrates of Dumbarton, for the year 1795, took place on 29th September, when the magistrates and councillors chosen, were the parties in this cause, with the exception of John Dixon.

Oct. 2. 1795.

William Dixon was also one of the councillors then elected, but having died three days after the election, the present dispute regards the validity of the election of John

Dixon to fill up the vacancy in room of the deceased councillor.

1796.

Next day after the death of William Dixon, there was an ordinary meeting of council held, agreeably to the annual custom for qualifying the newly elected deacons of crafts and their masters, and also the guild, council, and other office-bearers.

DENNY, &c.
v.
MARQUIS OF
LORNE, &c.
Oct. 3, 1795.

Upon that occasion eleven members of the council attended, and before engaging in the ordinary business of the meeting, the appellant, John Denny, the eldest bailie, moved, that as there was a vacancy in the council, occasioned by the death of William Dixon, the meeting should proceed to elect a councillor in his room. This motion was carried by a vote of seven of the members present, being a majority of the meeting, though David Connell, one of the bailies, objected to it, in which he was joined by Robert Davidson, Robert Colquhoun, and Peter Hutchison, all of whom are respondents in this cause, and who withdrew from the meeting. The meeting, however, proceeded after they withdrew, and after naming proxies, both for the four members who had withdrawn, and also for the other respondents, the Marquis of Lorne, Mr. Ferrier, and Captain Robert Davidson, they proceeded to the election of John Dixon as councillor, in room of William Dixon, deceased.

After the election was over, the four councillors who withdrew, returned with a notary and witnesses, and took protest against the said election, as null and void. That it had proceeded without due intimation being given to each councillor that such election was to take place. That the meeting was called for a different purpose, and for the ordinary business of the council, and for the purposes stated in the warning given them, without any information being given that an election of a councillor was to be proceeded with, and therefore protesting that their names should be erased from the minutes, as forming no part of the meeting.

The seceding portion of the council being joined by the other three respondents, on 8th Oct., by a mandate subscribed by them, determined to fix upon a day for the election of a new councillor in room of William Dixon, and appointed the 9th day of October for a meeting of the whole councillors to proceed with said election. This meeting, and its purport and objects, were duly intimated to the whole councillors.

On the day previous to the 9th October, the appellants Oct. 8, —

1796. met, and took into their consideration the notice for the meeting of next day, and protested that such meeting was quite unnecessary, as the election of John Dixon in room of William Dixon, deceased, on the 3d October, was finally completed.
- DENNY, &c.**
v.
MARQUIS OF LORNE, &c.
- Oct. 9, 1795. Next day, the respondents met, and fixed the 10th Oct.,
— 10, — the day following, to fill up the vacancy, which they did, by electing Alexander Connell a councillor of the burgh.
- Two elections having thus taken place, a reduction and declarator was brought by the respondents against the appellants, concluding to have the election of John Dixon set aside, and declared null and void, and to sustain the election of Alexander Connell, as the only legal and valid election.
- Jan. 13, 1796. The Lord Ordinary, of this date, pronounced this interlocutor: “Sustains the reasons of reduction in so far as regards the election of John Dixon, but assoilzies from the declaratory conclusions with respect to the election of Alexander Connell; finds both elections null and void, and decerns.”
- Feb. 23, 1796. On representations by both parties, the Lord Ordinary adhered, “and further finds, that no interim election of a new councillor in room of William Dixon can take place without at least fourteen days’ previous notice thereof being made to the resident councillors, of the day on which the said election is to take place.”
- Mar. 11, — On petition to the whole Court, the Lords adhered to the interlocutors of the Lord Ordinary.
- Against these interlocutors the present appeal was brought.
- Pleaded for the Appellants.*—The election of John Dixon on the 3d day of October, being made at a regular stated meeting of the council, at which every resident councillor was present, was valid; and the subsequent secession of four of the councillors present being illegal, they cannot found upon that secession as any objection, especially as the appellants, according to the practice of the burgh, elected proxies to vote at such election for them. There is, besides, no statute requiring previous intimation of any kind to be given of the intended election, much less that there should be a previous meeting called for fixing the day of the election; and there is no order or regulation of the convention of burghs of Scotland to the above purpose, and no uniform practice on the subject; and while the respondents have adduced no evidence of such practice,

the appellants have proved from the records of the burgh, that the uniform practice for nearly a century, has been to proceed with such elections without any previous notice whatever.

Pleaded for the Respondents.—The election of John Dixon was void, as the same was proceeded with by fraud and surprise, and at a meeting not called for that purpose. That no more than seven members were present at the election, and it was unlawful in them to elect proxies for those objectors who had left the meeting in the face of a protest. That notice, from the nature of the thing, ought to be given for the election of a member of Town Council, in order that all electors who are qualified to vote, may have an opportunity of giving their voice at such election. That the interlocutors of the Lord Ordinary, unanimously confirmed by the Court, have declared that notice is necessary, and also prescribed what is reasonable notice. That where the set of the burgh, or long, constant, and uninterrupted usage, has not ascertained what notice shall be given, it is competent to the Court to determine what notice shall be given; and the Court has declared what it did by an act of Court, 21st January 1790, that sixteen days is a reasonable notice.

After hearing counsel,

LORD CHANCELLOR LOUGHBOROUGH said,

“ My LORDS,

“ The present appeal respects the election of a member of the town council of the burgh of Dumbarton.

“ By the constitution or set of that burgh, a certain number of members compose the town council, some of whom may be non-resident.

“ The councillors of the burgh are elected annually on the 29th of September. After such election had been had on the 29th of September 1795, one of the councillors who had been then elected, dies on the 2d of October following. The practice of the burgh has been from ancient custom, that on the Saturday after the annual election, the councillors qualified themselves, by taking the oaths to the government, and other offices in the burgh are distributed.

“ After the said election of councillors on the 29th of September 1795, notice was given of a meeting on Saturday the 3d of October, for the *usual* purposes. This meeting was accordingly held, and eleven members attended; some of them proposed to elect a new councillor in the room of the one who had died the day before; but four of the members present objected to this, thereupon left the

1796.

—————
DENNY, &c.
v.
MARQUIS OF
LORNE, &c.

1796.

—————
 DENNY, &c.
 v.
 MARQUIS OF
 LORNE, &c.

meeting, and afterwards protested against such election. The other seven, however, proceeded against the minority of four.

“ The set of this burgh, allowing that proxies should be chosen for absent members, to vote in their names, the majority at the said meeting, appointed proxies for the members who had left the meeting, and then chose a member to fill up the vacancy in the council.

“ On the other hand, the opposite party, who were a minority of the council of the burgh, on the 8th of October called a meeting of the councillors, to elect a new councillor in the room of the one who was dead, and for this purpose they only gave two days’ previous notice. At the meeting so called by them only four members attended, and they proceeded to the election of a new councillor accordingly.

“ Each party having complained to the Court of Session of the election made by the other, their Lordships very properly held both elections to be bad. The Court says:—“ You may proceed to fill “ up the vacancy, and you must give fourteen days’ previous notice “ of the day of election ;” and, for a general notice, these fourteen days seem a reasonable period.

“ A number of cases was cited by the appellants, in the Court to show that election of officers of the burgh had taken place at meetings of the councillors without previous notice. But the nature of the thing renders intimation absolutely necessary; and no practice, however inaccurate, or for whatever length of time, can establish a contrary rule.

“ It is true, that if the councillors assembled in general meetings are unanimous in concurring upon any measure competent to such general meetings, and if all the members acquiesce, it may be in their power to proceed to matters, of which no previous intimation was given. But if the members are not unanimous, it will be necessary for a new meeting to be called, with proper intimation of the measure intended.

“ The election which the appellants attempt to support in this case, is of a very extraordinary nature, and appears to me in every view to be surreptitious and fraudulent. It was an attempt to choose a new councillor in place of one who had been dead but a few hours before, and whose death was not known, perhaps, till the meeting in question was actually held.

“ I therefore move, that the appellants do pay to the respondents £100 for their costs in this cause.”

It was ordered and adjudged that the appeal be dismissed, and that the interlocutors complained of be affirmed. And it is further ordered, that the appellants do pay, or cause to be paid, to the said respondents, £100 for their costs in respect of the said appeal.

For Appellants, *J. Anstruther, C. Hope, W. Dundas.*
 For Respondents, *R. Dundas, J. Campbell.*