

Judgment,  
22 May  
1723.

After hearing counsel, *It is ordered and adjudged, that the interlocutory sentences or decrees complained of in the said appeal be reversed.*

For Appellant,	<i>Rob. Raymond,</i>	<i>Dun. Forbes.</i>
For Respondent,	<i>C. Talbot.</i>	<i>Will. Hamilton.</i>

Case 102. Alexander Mill of Hatton, William Rofs, and David Butter, Baillies of the Town of Montrose, for themselves and other Magistrates of the said Town, - - - *Appellants;*  
Colonel Robert Reid and Others, Members of the Town Council of the said Burgh, *Respondents.*

23d May 1723.

*Member of Parliament.*—In an action to reduce the election of certain magistrates of a royal burgh, on account of the imprisonment of certain of the electors by the provost, who was a member of parliament: the provost's privilege of parliament could not be pleaded to stop the declarator against the other defenders, as not elected by a sufficient quorum:

And the provost's privilege of parliament could not stop the pursuers from insisting upon the reason of reduction, that some of the electors were unwarrantably imprisoned by the provost.

*Burgh Royal.*—It was relevant to annul the election of magistrates, that the provost had unwarrantably imprisoned some of the electors, during the time of the election, with an intention to prevent their giving their votes at that election.

**T**HE town of Montrose, by the set or constitution of the burgh, was governed by a town council, consisting of 19 members, viz., a provost, three baillies, a dean of guild, a treasurer, a master of the hospital, 10 common council-men, who are merchants, and two other common council-men, who are tradesmen. This town council was elected annually about Michaelmas by the old council; seven of them being continued for the year following, and 12 new ones being chosen.

On Wednesday preceding Michaelmas day 1722, an election was held for the said burgh, at which James Scott, Esq. of Logie, a member of parliament was chosen provost, the appellants baillies, and certain other persons, councillors of the said burgh; but the respondents, who were aggrieved by the election thus made, soon after brought an action of reduction and declarator against the same before the Court of Session. The circumstances of the case as stated by the respondents were;

That the method of election was that, upon the day of election, all the magistrates and councillors should meet in the town-house, or at least a majority of the whole, being 10, and there the old council elected the new, the provost, the 3 baillies, the dean of guild,

guild, treasurer, and master of the hospital, for that year, being *ex officio* continued members of the council for the ensuing year :

That at the Michaelmas election 1722, James Scott Esq. of Logie, the then provost, and the appellants, were anxious to continue themselves, and their friends in the management : but finding that the majority of the then town council, would be for bringing in a new set of burgessees, they resolved to prevent some of the councillors, who would not fall in with their measures from coming to the election ; and in order thereto, the then provost, on the morning of election, ordered four of the councillors to be carried to prison, upon pretence of some personal insult or disrespect to himself : and most of the councillors, thinking the liberties and privileges of the burgh infringed by this mode of proceeding, absented themselves from this pretended meeting ; but sent Mr. Murison one of their number, to protest against the illegal practices thereof :

That the appellants and their associates finding their number was but eight, reckoned Mr. Murison, (who went there only to protest against their proceedings) as the ninth ; and to make up the tenth, they made one of their friends appear as proxy, for one of the absent councillors, without any warrant or order for so doing ; and then chose a new town council :

That Mr. Murison protested against all these illegal proceedings, and demanded that the four councillors who was imprisoned should be liberated, before they proceeded to an election, and offered caution for their appearance to answer to any crime with which they should be charged, which was refused : and immediately after this irregular election was over, the four councillors were set at liberty ; and were never afterwards prosecuted for the crimes alleged against them : and as soon as these four were liberated, eleven members of the town council, being a majority of the whole, met and proceeded to a due and regular election of magistrates and councillors for the ensuing year.

The appellants made defences, that the action being brought to overturn the election of Mr. Scott, of Logie, as provost, and the other magistrates of the town, upon an alleged act of violence committed by Mr. Scott, the respondents could not proceed in their action against Mr. Scott, because of his privilege of parliament ; nor against the appellants, who were the other defenders, because they were in society together, and therefore no action could lie against them, unless Mr. Scott was made a party.

The cause being heard before the Lord Ordinary, his lordship on the 22d of December 1722, “ Sisted process against the said  
“ Mr. Scott, during his privilege of parliament ; but sustained  
“ process against the appellants ; and before answer allowed the  
“ respondents to prove their libel, that there was not a quorum  
“ at the election, and that there were four of the town council in  
“ prison at the time of the election.” And on the 27th of the  
same month his lordship “ sustained process against all the de-  
“ fenders, and allowed a proof to be led against them, and against  
“ Mr. Scott.”

The appellants having reclaimed, a hearing was had in presence of the whole Court, and on the 8th of January 1723; their lordships “found that Logie’s privilege could not be pleaded to stop the declarator against the other defenders, as not elected by a sufficient quorum.” A second reclaiming petition was presented, upon which a fresh hearing was had, and the Court on the 19th of January 1723, “found that Logie’s privilege could not stop the pursuers from insisting on that reason of reduction, of the other members, viz: that some of the members of the council were unwarrantably imprisoned by Mr. Scott of Logie.” And by another interlocutor of same date, they “found it relevant to annul the election of the other members, that Logie unwarrantably imprisoned some of the members of the council during the time of the election.”

The appeal was brought from “the interlocutory orders of the Lords of Session in Scotland of the 8th and 19th of January 1723.”

Entered  
8 Feb.  
1722-3.

#### *Heads of the Appellants’ Argument.*

It seems very unreasonable to oblige the appellants to justify an act of Mr. Scott’s, when at the same time there can be no proceedings against Mr. Scott himself. He may have very good reasons to allege in support of what he did, of which the appellants may be entirely ignorant; or supposing they should be acquainted with them, they may not be furnished with proper vouchers for justifying them; and therefore the appellants should not be obliged to plead to the action, till Mr. Scott can be regularly proceeded against. It is not so much as charged by the respondents, that the appellants were concerned with Mr. Scott, or accessory to the illegal act said to be committed by him; and it is at least a very new method of proceeding to compel the appellants to justify this act, at the hazard of losing their right, when not only the principal, but the only actor cannot be proceeded against.

Supposing the fact were proved against Mr. Scott, yet it seems highly unreasonable, that any act of his to which the appellants were not at all accessory, should be made use of to set aside the election of the appellants. Every man ought to suffer for his own faults; and therefore it is hardly to be conceived how Mr. Scott’s act can affect the appellants. The case is the same as if Mr. Scott had not been present at the election, and the other electors had proceeded to make a choice without him, that election no doubt would have been good; how, then can the presence of Mr. Scott against whom there may be an objection upon a fact committed by him only, be made use of as a handle to set aside the act of election, which of itself can subsist without the intervention or presence of Mr. Scott?

The respondents contended that it is sufficient in order to avoid the election, to insist that some of the members of the council, and the electors were unwarrantably detained, nor was it of any moment by whom, or by whose directions they were so detained. But were this reason sufficient, it would be in the power

power of any person though not an elector, by unwarrantably detaining any one of the electors, to set aside every election of magistracy, and introduce the greatest confusion. It would be the more unreasonable in this case, because neither by the law, nor the constitution and practice of this burgh, is any particular number of electors necessary to be present when an election is made; the day for the election is fixed for the Wednesday before Michaelmas, and the persons elected by the majority of the electors then present, are, and always have been, considered as duly and regularly elected: and the appellants were, accordingly, without any accession to any unwarrantable act upon their part, regularly elected by the majority of the electors present on the proper day, and in the proper place appointed for that purpose.

*Heads of the Respondents' Argument.*

The Lords of Session allowed of Mr. Scott of Logie's privilege of Parliament as a protection to himself, without entering into any dispute, whether that privilege could protect him against any action brought against him as a member of a corporation; and the respondents conceive that he could not by such privilege protect his fellow magistrates and councillors from the just suit of the respondents; there being nothing more common, where members of parliament are jointly or severally bound in bonds with other persons, than the bringing actions against the other persons bound, though no action be commenced against the members upon account of their privilege.

Though by the written set of the town, no quorum was expressly fixed, yet custom and reason determined, that no number of the council under ten, which is a majority of the whole could proceed to do business, more especially business of such weight as the election of a new town council, for if any lesser number should be allowed, it would be impossible to determine where to stop, or why two or three met together in the council-house may not be a *quorum*, and have a power to elect a new town council, or determine business of the greatest consequence to the town: The appellants indeed founded upon a precedent in 1719, where there were but eight present at the election of a new town council, and where they chose proxies for two more to make up the number ten; but no argument could be brought from this precedent, since they could not shew that it was ever practised before or since.

It appears from the very facts themselves, that the four members were imprisoned, in order to influence the election, and to prevent a majority of the town council's being against the provost and his friends, which would have happened if a free election had been allowed; for the appellants themselves acknowledge, that six or seven of the council were walking in the streets, and would not come up to the place of election; which number, with the four that were imprisoned, would have made a majority of the town council; but by this act of Mr. Scott's he procured himself to be elected as provost, and his other friends to be brought in as magistrates or councillors for the year following. And, there-

fore, though the appellants had been entirely ignorant of the imprisonment of the four councillors, yet their own election being the effect of this act of violence, ought to be declared void; for in such cases *non queritur an is cui convenitur, an alius, vim facit.*

The appellants were all accessory to this illegal act, in so far as they openly and knowingly took advantage of it to get themselves elected as magistrates and councillors. And particularly the appellant Mr. Mill; as a magistrate, was accessory thereto, he being one of the magistrates of the town at that time. Though the council, as such, have no jurisdiction, yet Mr. Mill, as a magistrate, might have joined with Mr. Murison, who was another magistrate, then present, and they two as such might have liberated the imprisoned members upon giving good bail, which privilege ought not to be refused to any subject, who is not imprisoned for some heinous crime.

Judgment,  
23 May  
1723.

After hearing counsel, *It is ordered and adjudged, that the interlocutory order of the 8th of January be affirmed; and it further ordered and adjudged, that the interlocutory order of the 19th of the same January, whereby the Lords of Session found, "that Logie's privilege could not stop the pursuers from insisting in the reason of reduction of the election of the other members, that Logie unwarrantably imprisoned some of the members of the council during the election," be affirmed; and as to the second interlocutory order, of the same date, it is further ordered and adjudged, that it is relevant to annul the election of the other members, that Logie unwarrantably imprisoned some of the members of the council during the time of the election, "with an intention to prevent their giving their votes at that election;" and with this variation and addition the same last mentioned interlocutor is hereby affirmed.*

For Appellants,	Dun. Forbes.	Will. Hamilton.
For Respondents,	Rob. Raymond.	Will. Fraser.