

1735.

HOGGAN  
v.  
WARDLAW,  
&c.

JOHN HOGGAN, Provost of the Burgh } *Appellants;*  
of Kinghorn, *et alii*, - - - - }  
WILLIAM WARDLAW, Colonel JAMES } *Respondents.*  
ST. CLAIR, *et alii*, - - - - }

10th March 1735.

PACTUM ILLICITUM.—MEMBER OF PARLIAMENT.—A bond entered into by a portion of a body of electors, binding themselves to vote according to the opinion of the majority of their number, found to be *contra bonos mores* and illegal. The election following thereon annulled.

BOROUGH ROYAL.—The sett recorded in the books of the Convention of Royal Burghs must be adhered to, notwithstanding that previous contrary practice be alleged.\*

No. 31. By the sett of the burgh of Kinghorn, it is appointed, “ that the council shall consist of merchants, tailors, and brewers, to the number of seventeen, and of five deacons; that annually, upon Monday before Michaelmas, the said council of twenty-two shall choose six new councillors in the room of six who go off; that upon Wednesday immediately after Michaelmas yearly, the old and new councillors and deacons shall choose the provost and two baillies, and that

\* Both of these points are insisted on in the arguments; but it would rather appear that the judgment went on the former, under which head the decision of the House of Lords is founded on as an authority in the case of Patison, &c. v. Magistrates of Stirling, 1st March 1775, Fac. Col. No. 166, Mor. p. 9527.

“ out of the council and deacons the treasurer  
 “ shall be chosen at Martinmas yearly.”

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In order to secure a preponderance in the election, a bond was entered into and signed by thirteen of the councillors, by which “ they all, with  
 “ one advice and consent, bound and obliged  
 “ them, conjunctly and severally, each under the  
 “ penalty of 500 merks, and of being esteemed infamous and unfit for society, to act in concert  
 “ with one another, and give their votes plum at  
 “ the election of the magistrates of the said burgh,  
 “ to be on Wednesday next the 4th October, to such  
 “ persons as the major part of them should think  
 “ most worthy of the office of magistracy, till the  
 “ next election at Michaelmas 1733, and then to vote  
 “ with one another for such persons as they, or the  
 “ major part of them, should think proper to succeed in the magistracy, and in the council, for  
 “ the good and benefit of the burgh.”

At the meeting preceding Michaelmas 1733, for the election of new councillors, a dispute having arisen between two parties, they separated, when Hoggan (the appellant) then provost of the burgh, and his adherents, made choice of six new councillors, and the other party also made an election, but only chose three. At the election of magistrates a like separation took place; Hoggan being chosen provost by one party, and Wardlaw (the respondent) by the other.

Each party raised an action of reduction and declarator, for reducing the election of their opponents; and declaring their own right.

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In the action at the instance of the respondents, the appellants first stated in defence, that an unlawful confederacy had been entered into by the respondents, which was sufficient to annul the election.

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The Lords found that “the bonds produced are “*contra bonos mores*, unwarrantable and unlawful.” But by subsequent interlocutors they

January 4, —  
January 15, —

found, “that the bonds produced are not *per se*, “relevant to annul the election of Provost Wardlaw, and other magistrates chosen with him in “1773.”

January 26, —

It was next objected that the election of the respondents was contradictory to the sett of the burgh, inasmuch as they had changed no more than three of their councillors, whereas by the sett they ought to have changed six. The Lords “found that the objection proponed for the de- “fenders (appellants) are not sufficient to void “and annul the election of the pursuers, magistrates and councillors of the burgh of Kinghorn, “at Michaelmas last, for the year now current, *in toto*, and remitted to the Lord Ordinary to proceed accordingly.”

February 1, —

It was farther objected that the two bailies, Miller and Wilson (respondents) were incapable of acting as magistrates, by reason of their being subscribers of the foresaid association; but the Lord Ordinary ‘found, that in respect of the interlocutor of the whole Lords, the exception against ‘the bailies was not sufficient, *per se*, to annul the ‘election.’ Other objections were stated, which

were not founded on in the appeal. Upon a re-claiming petition, the Lords ‘adhered to their ‘former interlocutors.’

The appeal was brought from the interlocutors of the 4th, 15th, and 26th January, and the 1st, 6th; and 8th February 1734.

*Pleaded for the Appellants* :—1. The election of such of the respondents as pretend to have been elected councillors on the Monday before Michaelmas is null, because the electors were not a quorum of any sort, and acted without the concurrence of any magistrate, which has been adjudged to be absolutely necessary. And the election of magistrates was illegal, because made by councillors unduly chosen, and by only half the number of new councillors which the sett of the burgh requires.

2. The sett recorded in the books of the convention of Royal Burghs, and in the town books of Kinghorn, in the 1710, is the only rule whereby to judge of the constitution of the burgh, and is a law which the corporation itself can never alter, neither have they attempted to do it. The minutes of every election begin with a reference to it, viz. ‘this being the day appointed by the sett of this ‘burgh, &c.’ And though it may be true, that, as against the crown, a corporation cannot give itself a constitution, which is not strictly warranted by prescription and immemorial usage, yet they are themselves barred from claiming franchises in a different manner from that in which they have set them on record, or have in any solemn way consented to their being fixed.

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In almost all the royal burghs of Scotland the elections have, ever since the Union, proceeded on the footing, and according to the tenor of the setts recorded in the books of the convention of royal burghs; and the breaking in upon those setts, so recorded and acquiesced in, would manifestly shake loose the foundations of all elections in time coming, and make their proceedings arbitrary and dependent on the humours of the magistrates for the time. In the present case, the respondents do not oppose any other fixed constitution to this sett, but only that which, being altogether uncertain and arbitrary, suits better with the purposes of their association.

3. Even if the respondents had not gone contrary to the sett, yet their election is null and void, because it was carried on by immoral and illegal means. The voters were not free agents, but under the influence of a bond, by which they engaged in effect to submit their own consciences and the rights and interests of the burgh, to the pleasure of the majority of their own number, and thereby invested that small proportion of the corporation with the whole power of the burgh. But the judgment of the Court of Session seems quite inconsistent, they having by one interlocutor found the bond immoral, unwarrantable, and illegal; and nevertheless, by another have found that such a bond was not sufficient to void an election carried on directly in consequence thereof.

*Pleaded for the Respondents:—*1. If the election was carried on without the presence of the magistrate, it was owing solely to the fault of the

appellants, who, being a minority of the town council, thought proper, after the meeting had commenced, to withdraw from the council house. It is in vain for them to pretend that when they so withdrew they required the other councillors to go along with them to a tavern; for if they had been willing that the other councillors should concur with them, they ought to have remained in the proper place at the council board, and finished the business of the day.

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2. There is no original or legal sett, by charter or otherwise, of the borough extant. Such sett could only flow from the authority of the crown in charters of erection or confirmation, or be introduced by prescription or constant and immemorial custom; but that upon which the appellants found, is only a sett pretended to have been established and sent to the convention of royal boroughs in 1710, and has no authority from the crown, from prescription, or from immemorial usage. On the contrary, since 1710, it has not been in observance hardly in one article on which the objection is founded; for the number of new councillors has been various and ambulatory; and in the period of twenty-three years it has not happened in more than three or four instances at most, that the precise number of six new councillors has been chosen.

As this pretended sett is only entitled, 'Report of a Sett,' and indeed could be nothing else, even supposing it has justly stated the customs of the borough, because neither the council of the borough, nor the convention of royal boroughs, have autho-

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rity to make a sett; it could have no force, but in so far as it truly related the former usages of the borough. When these were examined into, and the council-books searched, it appeared that the "Report" was erroneous, and not warranted by the former precedents.

3. The respondents entered into concert without any compulsion, as well as without any reward or corrupt view; and their act amounts to no more than a resolution taken voluntarily, that they would act jointly, in making choice of such persons as they should judge most proper and fit for the service of the borough. It is usual in elections to enter into previous concerts for avoiding divisions, and procuring unanimity, and if such concert can lawfully be made *viva voce*, by which the parties are in honour no less engaged than if they gave it under their hands, it cannot much alter the case that the same is reduced to writing, to serve as a memorandum of what has been agreed upon. As to the penalty annexed to the obligation, if it was *contra bonos mores*, it could produce no action or diligence; and as to the other objection of infamy, it imports no more than that parties are bound in honour to observe that which they have agreed to,—an obligation which is implied in every verbal concert or engagement. Therefore neither the penalty nor the infamy adjected can affect the present question.

It did not appear in the Court below, that the bond had any influence upon these elections, by any previous meeting to discover the opinion of the plurality of those who signed it, all having

freely, and of their own accord, voted for the persons elected at Michaelmas 1733; and, therefore, although entering into the bond should be held in strictness illegal and unwarrantable, still it cannot affect the election to the prejudice of the burgh.

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After hearing counsel, 'it is ordered and adjudged, &c. that the said several interlocutors complained of be reversed; and it is hereby declared, that the election of the respondents to be magistrates and councillors of the said borough of Kinghorn is null and void,—and that the said respondents be at liberty to proceed before the Lords of Session, upon that part of the libel which calls in question the election of the appellants as they shall think fit.'

Judgment  
March 10,  
1735.

For the Appellants, *Ro. Dundas, W. Murray.*  
For the Respondents, *Dun. Forbes, J. Strange, J. Taylor.*