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the statute 33d Geo. III. c. 74. could be held equivalent to such rejection.

2. The sederunt book, when it lay open for the inspection of the creditors prior to the payment of the first and second dividends, not only contained no entries which, either in express terms, or according to the understanding of professional men, indicated a rejection of the claim in question; but it contained nothing which, in fair reasoning, could lead the respondents to conclude, or even to suspect, that the appellant meant to reject their claim, and not to set apart funds to answer its ultimate amount. But even supposing that the entries in the sederunt book left it doubtful whether or not a rejection of the claim was intended, it was incumbent on the appellant to have expressed his intentions clearly, and he, rather than the respondents, ought to bear the loss or inconvenience which has arisen from his misconduct, in violating or neglecting the plain and positive enactment of the statute.

The House of Lords ordered and adjudged, 'that the interlocutors complained of be reversed, and that the defender be 'assoilzied.'

Appellant's Authorities.—33. Geo. III. c. 74. § 35. 39.; Act of Sed. Dec. 14. 1805; Connel, Jan. 16. 1813, (F. C.); 2. Bell, p. 430.

J. RICHARDSON—J. CAMPBELL,—Solicitors.

MAGISTRATES of MONTROSE, Appellants.

No. 48. JOHN MILL, Burgess and Guild-Brother there, Respondent.

Personal Objection—Burgh Royal.—Circumstances under which it was held, (reversing the judgment of the Court of Session), That a party making use of a right which he only had under documents challenged by him, to the effect of having them reduced, was barred from insisting that they should be set aside.

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2D DIVISION. Lord Cringletie.

IN July 1816, on an application in the name of all parties interested, the Convention of Royal Burghs modified and altered the old set of the burgh of Montrose. The Michaelmas election of that year was, on account of certain irregularities of procedure, declared null and void; and an application, also in the name of all parties interested, was made to the King in Council, for the restoration of the burgh franchise. A royal warrant followed in

1817 for restoring the burgh by poll election, and granting a new set, inter alia giving to the trades and guildry the right of electing councillors, which by the old set had been vested in the council itself. Under this warrant the elections took place in 1817, 1818, 1819, and 1820. John Mill was a burgess and guildbrother. In that capacity he had no right to vote under the old set, but had under the royal warrant. He accordingly voted at the poll election 1817, and at the elections 1819 and 1820. In 1821 he brought an action of reduction of the order of Convention of the 10th July 1816, and the royal warrant of 1817,* and concluded that the Court of Session should declare, 'that all 'and each of the annual or Michaelmas elections of magistrates 'and councillors made in the said burgh of Montrose, posterior 'to the poll election of 1817, are and have been null and void, 'because not made in terms and in the form prescribed by the 'ancient and legal set of the burgh before recited, as recorded in 'the books of the Convention of Burghs in 1708; and, in parti-'cular, it ought to be found and declared, that the election made 'or pretended to be made at Michaelmas 1820 was and is illegal 'and void, and any election made or to be made by the persons 'then chosen is void and ineffectual; and all warrants granted by 'the present or future magistrates of Montrose, in civil or crimi-'nal cases, are illegal, void, and ineffectual; and all intromissions 'with the funds or revenue of the burgh by them or their pre-'tended succcessors are illegal and ineffectual, and that they are 'liable as individuals, conjunctly and severally, to account for the 'funds with which they so intromit: and it ought to be declared 'by decree foresaid, that the said burgh is without a legal magis-'tracy and council, and that no new election can be made with-'out a royal warrant; and these things being so found and de-'clared, our said Lords ought to appoint interim managers to 'administer the affairs of the said burgh till our royal warrant be 'granted authorizing a new election.' The defenders called were the individuals elected at Michaelmas 1820 as magistrates and councillors of the burgh. They maintained in defence, that the pursuer had 'no title to insist;' that there was no competent process, all parties not having been called into the field; and that the pursuer was barred personali exceptione in respect of his own

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* He afterwards brought a supplemental action reductive of the poll election 1817, which summons was remitted to the Lord Ordinary; no further proceedings in it occurred, and it was not appealed.

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acts and proceedings. The Lord Ordinary observed in a note,—'The pursuer challenges the alteration of the set of the burgh 'made by the Convention in July 1816; 2d, The royal warrant 'in September 1817; and the elections made in each year at 'Michaelmas since the poll election,—all as null and void. The 'poll election itself is therefore not complained of, but, on the 'contrary, seems to have been admitted to have been good. The 'Lord Ordinary could have understood this admission, if the 'number of the council had been limited to seventeen, which is 'the number by the old set of the burgh; but, if he be not mis-'taken, the number of the council, by the royal warrant, is made 'to be nineteen, which it states to be as formerly the number. 'Now, this was the number introduced by the act of the Conven-'tion which is complained of, and is not the number of the old 'set; and, consequently, the pursuer will judge whether he can 'hold the poll election of nineteen persons to be good, and yet 'complain of that innovation. Secondly, It is stated by the 'defenders, that the proceedings in 1817 were reported to his 'Majesty by the Sheriffs authorized to preside in and regulate 'them, and that they were ratified by the King. This ratifica-'tion is not called for, nor sought to be reduced. The Lord 'Ordinary only mentions these particulars to prevent future 'trouble and expense; for if this action shall proceed, and it 'shall be found that the pursuer has a title to insist in it, the 'summons ought to be formal and correct before avizandum 'be made with the cause. Of this, however, the pursuer must 'judge for himself.'

There was thereafter subjoined another note in these terms:—'In so far as the Lord Ordinary's own idea of the merits 'of the points now at issue goes, he thinks that there is a dis-'tinction between a person consenting to acts or deeds which 'are lawful, but from which he is at liberty to withhold his con-'sent, and deeds which are illegal, to which he gives his con-'sent. In the former case, his consent, either directly or indi-'rectly given, by ratification express, or presumed by acts of ap-'probation, will bar him from challenging the deed so ratified; 'but in the other case, consent to an illegal deed, or even grant-'ing it, will not prevent a challenge. Of this nature are pacta 'turpia, bonds granted for an unlawful consideration, which may 'be called in question by the granter of them; and of the same 'sort the Lord Ordinary would consider an unlawful application 'to the Sovereign, either for the alteration of the set of a burgh, 'or any other purpose. The Lord Ordinary desires it to be

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'understood, that he does not mean even to insinuate at present 'that an alteration of the set of Montrose was illegal. That 'would be entering into the merits of the question, which at pre-'sent is not competent. He only gives, as an instance, that if the 'application was illegal, the pursuer would not be excluded by 'personal exception, arising from his having been one of the 'applicants, from pursuing a reduction to have it set aside; and, 'of course, no after proceeding following out the illegal grant 'could take away the right of challenge.

'The Lord Ordinary also thinks, that as the present magis-'tracy represent the burgesses, there is no necessity for calling the 'latter; and if such form were necessary, the matter would be 'inextricable, as burgesses would be daily admitted, whom it 'would be necessary to call, and to sist process till they were 'made parties, whereby the case would never be decided.

'As to the right of a burgess to set aside an election, there 'certainly is a wide distinction between complaining of the election 'itself, and the right or warrant in virtue of which the election 'was made; and if it be not competent to a burgess to complain 'of the latter, the greatest iniquity may be practised. But of all 'these points the Court will judge, and it is better that the cause 'shall go directly before them.'

Informations having been ordered to the Court, their Lordships (28th January 1824) repelled the 'objections to the pursuers' 'title to insist in this action.'*

The magistrates appealed.

Appellants.—This is a mere preliminary inquiry, and altogether exclusive of any discussion of the merits. 1. The respondent, as an individual burgess, has no legal title to pursue, neither has he any interest. It is only under the set he is desirous of reducing that he has a vote; under the old set he had none. 2. All the parties have not been called into the field. The guildry and seven incorporated trades, who yearly elect the majority of the council, ought to have been cited. 3. The respondent was a party to the application to the Convention of Royal Burghs, and to the King in Council, and acted under the warrant from the Crown, and had no right to interfere or act under the old set; he is, therefore, barred personali exceptione from bringing the present action.

* 2. Shaw and Dunlop, No. 618.

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Respondent.—1. Every individual burgess has an interest and title to insist that the burgh shall be legally governed, and its jurisdiction and revenues put into the hands of proper administrators. 2. Other parties being interested in the question in dispute, affords no legal exception to the respondent's title to pursue. The proper parties have been called. 3. The circumstance that the respondent did not dissent from the application to the Convention of Royal Burghs, or to the Crown, or that he voted at elections posterior to the act of convention and royal warrant, affords no legal objection against his title to challenge this act and warrant as illegal. He submitted at the time to high authority, but in political questions such submission does not make illegal acts valid, or prevent members of the community from afterwards vindicating their rights in a constitutional form.

The House of Lords ordered and adjudged, 'that the interlo-'cutors complained of be reversed, and that the action be dis-'missed.

LORD GIFFORD.—My Lords, In a case in which the Provost and Magistrates and Town-Council of the Burgh of Montrose are the appellants, and John Mill, flax-dresser in Montrose, is the respondent, there was an appeal against certain interlocutors of the Court of Session, by which they had decided against a preliminary objection, that the right of Mr Mill to bring the action in question was not well founded, in respect that he had no title to pursue in the action,—that he was barred personali exceptione from bringing the action by his own acts done in the burgh, and proceedings in obtaining the documents sought to be reduced, and that the proper defenders were not before the Court.

My Lords,—This was an action brought by Mr Mill, a burgess in Montrose, to set aside certain elections which had taken place in that burgh since the year 1817, in the years 1818, 1819, and 1820, and also to set aside the royal warrant by which a new set was granted to the burgh. My Lords, it appears that, before the year 1816, this burgh of Montrose consisted of a town-council, which was composed of seventeen merchants and two tradesmen, including in the number the provost, three bailies, the dean of guild, the treasurer, and the master of the hospital. The annual election was upon Wednesday immediately before Michaelmas, unless Michaelmas fell upon Wednesday, and then the election was upon Michaelmas day. The old council elected the new, with this restriction, that the provost, the three bailies, the dean of guild, the treasurer, and the master of the hospital for the immediate preceding year, were continued *ex officiis* members of the council for the year immediately following. The old and new council leet two of the new council, out of which they choose the provost; and then they leet six of the new council, out of which

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they choose the three bailies; and then the new council chooses the dean of guild and his assessors; and then also, or at any time betwixt that and Martinmas thereafter, they choose the treasurer, and between that and the first of January they elect the hospital master. The provost cannot be continued longer than two years together, and the bailies cannot be continued longer than three years together in their respective offices. The dean of guild may be continued as long as the council think fit. The treasurer and hospital master can only be continued for two years together. This set was considered too limited, and there was an alteration made in the set in the month of July 1816; but notwithstanding that alteration, at Michaelmas 1817 certain irregularities were committed in the course of the election; and on a petition and complaint the Court of Session declared that election to be null and void. In this situation it became necessary to apply to the King in Council for a restoration of the burgh franchise. That application was made, and a crown warrant was granted in 1817, and by that crown warrant a new constitution is given to the burgh. That warrant directed the election of the officers of the burgh to take place on the 13th of October 1817, with continuation of days, of which the Sheriff-depute of the county should give public notice, and that they should then proceed to fill up the vacancies. There were various alterations made in the set. This crown warrant was acted upon in 1817 by a poll election taking place; and from that time to the commencement of this action, the affairs of the burgh have been conducted under this new constitution. It appears that Mr Mill, the pursuer in this action, is a burgess and flax-dresser, who, previously to the grant of this new set in 1817, had no privilege or right to interfere in the election of its officers, but in consequence of this new set he became entitled to vote; and it appeared, that from that time to the commencement of the action, he had regularly concurred in the various elections that had taken place. I should state to your Lordships, that in the action which your Lordships have now to consider, the respondent did not seek to reduce the poll election of 1817. In the first summons he said nothing as to that, but only as to the other elections. It is, however, introduced into the supplemental summons, which we have nothing to do with. Upon that action being brought to reduce all those elections, it was objected that Mr Mill was not a party entitled to complain of those elections,—that he had taken a benefit under the warrant that he did not possess before,—that he had availed himself of the privilege then first conferred upon him, and could not now seek to set aside the warrant. It was also objected, that this action of reduction was brought against the officers only, without calling before the Court the several incorporated trades and guildry, upon whom considerable privileges were conferred, and that they ought to have been made parties. To this it was answered, that though they might be interested in the general question, yet that they were not interested in discussing this preliminary objection; and fur-

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ther, that it was competent for this gentleman, under the circumstances, though he had acted under them, to reduce and set aside these elections. After the case had been heard, the Court of Session disallowed the objections to the pursuer's title.

My Lords,—Against this interlocutor this appeal has been brought. Your Lordships will perceive that in this appeal the merits of the case are not before your Lordships, whether it is competent to reduce this warrant granted by the Crown, and grant a new set or not; but the real question before your Lordships is upon the preliminary objection, whether, supposing the appellant has a right to pursue as a burgess, upon which there has been considerable discussion at your Lordships' Bar, he was or not barred personali exceptione in respect of his own acts. My Lords, upon considering this case, it does appear to me that this gentleman was barred personali exceptione. He had no right to interfere with this election previous to the new set; and when this new set confers upon him an advantage, shall it be competent to this gentleman, who has been availing himself of this privilege, to turn round and say, It is very true I have so done, but it is all wrong? In this part of the island, there would be no difficulty upon it; but perhaps the House ought not to allude to the analogies that may prevail here. I should state, that this was not the unanimous decision of the Court below. One of the learned Judges, Lord Pitmilly, differed from the others. He says, 'that this party, making use of a right which he 'had not before, and which he never had but under the documents 'now sought to be reduced, is barred from challenging those docu-'ments.' My Lords, I think, although it is not necessary to determine the point, it is a point very well worthy of consideration, whether the proper parties were before the Court. The only persons called before the Court were the officers elected in 1820, who represented the burgh for that year. The question is, Whether the incorporated trades and guildry have not a material interest in the question to be discussed, whether this was not to be considered a valid set or not? Lord Pitmilly is of opinion they had. Upon that point he says, 'I am of 'opinion that the proper parties have not been called. The guildry and 'seven trades must be called. The magistrates are not proper parties. 'They have no interest, or very little; not enough in a declarator to 'call them only; and I would say the same in a reduction, if this was 'the proper time.' Therefore, under the whole of these circumstances, I should propose to your Lordships to reverse the interlocutor pronounced, being of opinion, that as he was barred by personali exceptione, it is incompetent for him to pursue this action. This decision only goes to the competency of this action by this party: the question may still be discussed, if the parties are so inclined, whether this warrant can be reduced by the Court of Session; or whether the Crown has exceeded its powers in granting this warrant? But it does appear to me, that, in this case, the present respondent cannot sustain this action, and that the interlocutor must be reversed.

Appellants' Authorities.—Livingstone, July 13. 1666, (10,433.); Charters, Feb. 15. 1687, (5650.); Mason, Nov. 15. 1821, (1. Shaw and Bal. No. 173.); Burgesses of Inverury, Dec. 14. 1820, (F. C.); 1. Ersk. 4. 23.; Cowan, June 23. 1782, (16,133.) June 28. 1825.

Respondent's Authorities.—3. Ersk. 3. 47.; Archbishop of St Andrews, March 12. 1784, (5699.); Chalmers, Feb. 27. 1668, (5698.); Bell on Election Law, p. 491.; Guild, Dec. 21. 1809, (F. C.); Anderson against Magistrates of Wick, Feb. 17. 1749, (1842); Anderson against Magistrates of Renfrew, June 30. 1752, (16,123.)

J. CAMPBELL—A. MUNDELL,—Solicitors.

PATRICK PEARSON, Writer in Edinburgh, Appellant. No. 49.

WILLIAM JACK, with concourse of his Majesty's Advocate, Respondent.

Delict.—The Court of Session having in general found a party guilty of various charges made against him in a petition and complaint; a remit made ex parte to review the judgment, and state in what respects he had been guilty.

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1ST DIVISION.

THE appellant, Patrick Pearson, writer in Edinburgh, was originally an agent in the Sheriff Court of Fifeshire, and in that capacity he was employed by Thomas Malcolm to recover from one Meldrum a debt of L. 121. He obtained decree against Meldrum for that sum and expenses, which, with those of diligence, enlarged the debt to L. 169. 17s. 3d. For payment of this sum Meldrum, along with other parties, accepted a bill, drawn and indorsed by the respondent William Jack, merchant in Cupar Fife, and which was thereupon delivered to Pearson as Malcolm's agent. The bill was discounted by Pearson, and it having been dishonoured, diligence was raised upon it against all parties, and a partial payment was made, which reduced the debt to L. 103. 17s. For this sum a second bill was drawn and indorsed by Jack, accepted by the other parties, and delivered to Pearson. This bill was also dishonoured, duly protested, and notice given to all concerned. Letters of horning were then raised, in the recital of which Jack's name was mentioned, but it was omitted in the will. The letters were thereafter transmitted to a messenger of the name of Millie, whom Pearson was in the practice of employing, and for whom he was cautioner, to execute them against all the parties. At this time Pearson was abroad, and the matter was attended to by his partner. No execution was returned by the messenger; but he had begun one on the back of the diligence, which he had left unfinished. He