

1782. December 5. MICHAEL MARSHALL against JOHN CARR and OTHERS.

BOROUGH ROYAL.

A Complaint against a Borough Election, commenced in due time, may be prosecuted after two calendar months from the subsequent election have elapsed.

[*Fac. Coll. IX. 115; Dict. 1887.*]

GARDENSTON. The defence is indecent. A regular complaint is brought, and yet it is said that the Court cannot judge of it because no consequences can follow from their judgment! I am not of *that* opinion. Great consequences must follow. If the election 1781 is void, the actings of the magistrates elected in 1781 must be void. We are not called to judge of the validity of the election 1782; but we must try the complaint before us as to the election 1781. In the complaint there is a conclusion for costs, and there is also another conclusion, which no subsequent election can set aside, "for such relief" as the Court shall see cause to give. There may and ought to be a fine against the offenders: the bribe bargained for was great; and at this season the necessities of the poor are great.

BRAXFIELD. By the statute 16 Geo. II. proceedings at common law were superseded, and proceedings must be according to the statute. Hence, the judgment of the House of Peers, in the case of *Anstruther*, was right. The complainers *there* had the statutory remedy, which they did not use in a proper manner. But the question is, How that judgment can apply to the present case? A complaint is regularly brought: suppose the fact to be that all the complainers are turned out at Michaelmas 1781. By dilatory defences and appeals, the cause is hung up till after Michaelmas 1782. The complainers have no right by statute to complain of that election, and so, by the defender's argument, he who protracts the determination of a cause is sure to win it: if so, nothing but want of money can make a cause to be lost. This was not the meaning of the statute. That statute did not mean to abrogate the principles of the law of Scotland: it prescribes the form of actions, but it says nothing as to their consequences. It is an universal rule that, *resoluto jure dantis, resolvitur jus accipientis*; and there was no need for the legislature to declare this principle. Another principle is, *pendente lite nihil innovandum*. The defender cannot make the condition of the pursuer worse than it was. I should incline to think that, if the only question were as to costs, the cause could not proceed, for the costs have already been offered back,—no good sign of the goodness of the cause.

MONBODDO. If all the council had been corrupted, would it have been said that no action lay at common law?

HAILES. We must not suppose the defenders are guilty until they are proved to be guilty: so the question of inflicting penalties is premature. [This alludes to Lord Gardenston's hasty determination.] It is obvious that the defenders

have been lying in wait for defence that they now make. Under various excuses, they put off their answers from day to day ; but, just as two months had elapsed after a new election, they lodged their answers, and objected that the complaint could not now be effectually heard and determined. If this is law, it is plain that he who has money enough and art enough to keep back a cause for a year, wins it, and may sit down and enjoy the fruits of his own wrong. At any rate, the question here cannot be limited to costs ; for, supposing that the defenders should be found guilty, there may be a fine imposed as well for the cause itself as for the conduct of the cause, and there may be a notification of the judgment to the public at large. Besides, the cause must go on ; for, if it is dismissed, the defence of those men, who hardly pretend to innocence, must be defrayed out of the revenues of this unhappy burgh.

ESK GROVE. There is a doubt proposed to the competency of this complaint : as to the *relevancy* there is none. It is objected, that, by the intermediate Michaelmas election, not complained of, *res devenit in alium casum*. Nothing is said against the complainers ; but it is said that the parties complained upon have frustrated the complaint. This is singular : the maxim, *pendente lite nihil innovandum*, is applicable to every case. If the first election was brought about by bribery, so also was the *second* : can the continuation of a wrong protect its authors ? We are not to inquire at present what will be the consequences of reducing the first election. The principle, *resoluto jure dantis*, &c. is not shaken, nor was it meant that it should be shaken, by any statute. The case of *Anstruther*, determined in the House of Lords, does not apply to this : for there a complaint was exhibited, and cast on informalities ; then an action was brought at common law after the two months, but it still related to things that fell under the statute, and which might have been tried under the statute, had the complainers laid their complaint properly. Here the complainers sought their remedy in the right form, and no exception is taken against the complaint. It is only said, that the defenders have, by their *own* delays, rendered the complaint elusory, and won their cause without a hearing.

JUSTICE-CLERK. Much has been said prematurely. I am indifferent as to consequences : I must go on as the law directs.

On the 5th December 1782, "The Lords repelled the preliminary objection, and allowed a proof of the complaint."

*Act.* R. Dundas, Ilay Campbell, R. Blair. *Att.* A. Wight.

The President, who was not in Court at the judgment, took an opportunity of expressing his approbation of it.

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