

1782. December 4.

MICHAEL MARSHALL and RICHARD DICK, *against* JOHN CARRE of Cavers, Esq;  
and Others.

IN November 1781, Marshall and Dick, as late counsellors of Jedburgh, preferred to the Court, in terms of the statutes respecting the redress of wrongs committed at elections in burghs, especially the statute of the 16th of Geo. II. a petition and complaint against the annual election of magistrates for that burgh, which took place at the preceding term of Michaelmas, as having been made under the influence of bribery and corruption. The mode of summary complaint, it is to be remarked, authorised by that statute, is limited to the two kalendar months immediately following the election complained of.

No proceedings however ensued in consequence of this complaint; nor even were answers given in to it until November 1782, a full year after it had been presented, and more than two kalendar months subsequent to a new election of the council of the burgh.

Mr Carre therefore, and other persons interested, *objected*, That it was now too late to prosecute the complaint; and in support of this objection, on the merits of which the Court ordered a hearing in presence,

*Pleaded*: It is an unquestionable rule of law, that no action ought to be admitted, in which either of the parties has not an interest; and therefore, to show that none of its objects can ever be gained by the present complaint, is all that is necessary for precluding its farther progress. The purpose of now prosecuting this complaint is, by setting aside the election of 1781, to overturn that which took place in 1782; for as to any claim of costs, if insisted on, it shall not be disputed. But more than two kalendar months having elapsed since the time of the late election, that is, by the statutes, now put absolutely beyond challenge; for those enactments, whilst they themselves form a complete code of rules for governing burgh-elections, supersede of course the operation of the common law. This principle was the ground of the judgment of the House of Lords in the case of the controverted election of the burgh of Anstruther Easter, determined about fifteen years ago; as it was likewise of the more recent decision of the Court of Session with respect to the burgh of Wigton, 23d June 1782, Cowan and M'Guffog *contra* Magistrates of Wigton\*. The statutes then limiting to two kalendar months the period for bringing such a challenge as the present, and at the same time putting an end to the competency of any suit in this matter at common-law, it follows, that the prosecution of the complaint in question is entirely nugatory, and ought to be disallowed.

*Answered*: The prosecution of this complaint is certainly not nugatory, or otherwise every similar one might be rendered equally so at the pleasure of the defenders; nothing more being wanting for that end than just to protract the suit for a year, or until the time of a new election. As the persons who seek such redress may not be constituent members of the succeeding meeting for election,

No 28.

A complaint against a burgh-election, commenced in due time, may be prosecuted after two kalendar months have elapsed, from the subsequent election.

\* Fac. Col. No 46. p. 73. voce TITLE TO PURSUE.

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it will in that event be impossible that they can renew, either within two kalendar months, or at any other period, their complaint against the then nomination; for the statutes confer not that power; and thus, according to the doctrine of the respondents, whilst the former complaint could no longer be prosecuted, the new election would become unchallengeable. But surely a plea so fraught with inconsistency, and which represents those statutes as calculated only to defeat their own purpose, must at once be rejected; while, on the other hand, it is equally clear, that a suit conformable to the statutable requisites, ought not to be stopped in its progress to a legal determination. If it shall then appear that the election complained of was void, does it not unavoidably follow, that persons invested, by that ineffectual nomination, with the insignia of office merely, cannot of themselves become the legal electors on the ensuing occasion; and by consequence, that in a proper or legal sense there could not then be any election at all? Nor is it to be imagined, that the formal mode of complaint authorised by the statutes would be needful for overturning proceedings of so little significancy.

THE COURT were clearly of opinion, that the prosecution of the complaint might be attended with full effect, and ought to be allowed. For, it was observed, that if the grounds of challenge were established, and by consequence the prior election set aside, the subsequent nomination, without the necessity of a new complaint, must, agreeably to the maxim, *resoluto jure dantis, jus accipientis resolvitur*, of course fall to the ground; and that besides, *pendente lite nihil innovandum*; so that any change of circumstances produced by the respondents, posterior to the complaint, ought not to bar that legal method of redress: Rules of law, these, it was added, which, to preserve their efficacy, require not the aid of any saving clause of a statute.

THE LORDS, therefore, 'repelled the objection, and allowed to the parties a conjunct probation.'

Act. Blair, R. Dundas. Alt. Wight, Ilay Campbell. Clerk, Colquhoun.  
Stewart. Fol. Dic. v. 3. p. 100. Fac. Col. No 75. p. 115.

1785. February 23.

ALEXANDER TENANT and WILLIAM GRAY, against ALEXANDER JOHNSTON, and Others.

No 29.

Non-residence was considered to be an essential objection to the election of a person to serve in any office within burgh, unless where a contrary

In the burgh of Anstruther Easter, the three bailies, who are the chief magistrates, present to the burgesses annually a list of nine persons, out of which number are chosen the bailies for the ensuing year; and these, in their turn, elect the other office-bearers of the burgh.

In a complaint exhibited in the Court of Session, Alexander Tenant and William Gray contended, That one of the persons put in this list, in the year 1784, being resident in England, the whole election was void and ineffectual.