

1775. March 1.

JOHN PATERSON and Others, *against* The MAGISTRATES and TOWN-COUNCIL of Stirling, elected at Michaelmas 1773.

IN November 1773, a petition and complaint was presented to this Court, under the authority of the statute of the 16th of the late King, for regulating the elections in Scotland, at the instance of John Paterson deacon of the weavers, and others, as constituent members of the town-council of Stirling, elected at Michaelmas 1773, setting forth, That James Alexander, then elected provost, Henry Jaffray, counsellor, and James Burd, bailie, have, since the year 1768, managed the elections and affairs of the burgh according to their pleasure; and that, being resolved to support their influence, they had entered into a most illegal and dangerous association in 1772, which they executed in the form of mutual bonds, whereby they became bound to one another, that no person should be brought into council that was not approved of by all the three, and without their being assured that such persons would stand by and support their interest: That each of the three should name a certain number of friends to be brought in at every election: That no office or place of trust or profit within the burgh should be bestowed on any person but with their joint consent; and that they should maintain this engagement during their lives. That, agreeably to this bond of association, the council of the town of Stirling had, by degrees, been modelled and framed to the pleasure of the three bondsmen, and the burgh entirely brought under subjection to them; and, therefore, the complaint prayed the Court to grant diligence for recovering the said bonds, and to find the same *contra bonos mores*, unwarrantable, and illegal; and to reduce and make void the pretended election of magistrates and council made at Michaelmas then last.

Answers were put in to the complaint, in which Alexander, Jaffray, and Burd, admitted, that they entered into a bond of association nearly in the terms specified in the complaint; but they *alleged*, That they never did, and never had occasion to give it any effect in election matters; and that, at the election 1773, it was disregarded, and soon after destroyed: This bond was intended to strengthen a friendship that had subsisted for some time, and they never made a bad or improper use of it in any respect whatever. The other respondents averred, that they never heard of the bond till after the last Michaelmas election; and that none of them felt any influence at the last, or any other election, which they could, after hearing of the bond, impute to it.

The bondsmen, Mr M'Killop, a writer, in Stirling, and others, were examined upon a diligence granted by the Court, and from their depositions it appeared, that the bond, in consequence of a difference that rose amongst the bondsmen at the last election, had been destroyed; but the tenor of it was substantiated by the bondsmen themselves, and sworn to by M'Killop and others.

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The effect of a bond of association entered into among three leading men in the politics of a borough, to unite and perpetuate their interests, found to annul a subsequent election of magistrates, as brought about by the undue influence of that association.

No 71.

The complainers having been ordained to give in a condescence of the facts they offered to prove, they accordingly did exhibit a condescence, to which the bondsmen and others made answers, in which they disputed the relevancy of the condescence, as it was not offered to be proved that any of the respondents, other than the bondsmen, had any knowledge of the bond; and therefore they insisted, that, though it might affect the election of the bondsmen themselves, yet it could not strike against the election of the rest of the respondents.

The complainers, in replies, *inter alia*, insisted, That, if the provost alone be disqualified, the election cannot subsist, agreeably to the opinion of the Court in the case of Inverkeithing election, 11th March 1761, (*see* APPENDIX). Further, *2do*, That this bond does not merely disqualify the parties who subscribed it, but affords a good reason for reducing the whole election, even of those who had not subscribed the bond, as being brought about by undue influence, as was found by the House of Lords in 1734, in the case of Kinghorn. But, *3tio*, Though they might rest their cause upon the proof as it stands, as the bond, though subscribed but by three, ought, for the reasons given, to annul the election even of those who did not subscribe it; yet they are in condition to prove, that both at Michaelmas election 1772, and at Michaelmas election 1773, the persons brought into the council as merchant-counsellors, and deacons, were informed, that the interest of Messrs Alexander, Burd, and Jaffray stood upon one bottom, and were taken bound, by a promise previous to their election, to support that interest. Now, if the persons brought into the council were taken bound to support the joint interest of these three men, and if these three were bound to one another by a bond, as above mentioned, the case is evidently the same as if all the counsellors had been parties to the bond. The replies were followed by duplies.

THE COURT allowed a proof, which having been led upon both sides, after advising the depositions and memorials, and hearing parties procurators, the whole of the Judges expressed the highest disapprobation of the three bondsmen for having entered into such an illegal and unwarrantable bond of association. The only difference in opinion was as to the effect it ought to have upon the election in question, which the plurality agreed should operate no less than a total avoidance thereof; but, before signing the decree, the respondents, for the first time, moved the Court upon the following plea in bar of the whole complaint:

That the complaint being founded upon the statute of the 16th of the late King, which authorises a minority to apply for redress of wrongs committed by the majority: That, in the election complained of, there was no minority, the whole having passed without a dissenting voice; and, therefore, no complaint could be made under the statute: That the complainers were barred, *personali exceptione*; and that it was without example to allow a party *allegare suam turpitudinem*, and upon such grounds to challenge his own acts and deeds.

The complainers, in answer, stated, that it was obviously the intention of the statute to give a remedy against every wrong done in matters of election, whether committed by a majority, or acquiesced in by all concerned. It cannot be supposed that any one or more of the members of a meeting who had concurred in the several steps of an election, not knowing of any latent wrong or ground of challenge at the time of such election, should be barred from bringing a complaint upon any relevant ground, when, *de recenti*, they came to be informed of such cause of complaint. Such a doctrine is adverse to every idea of law and equity; and various instances have occurred where personal objections, such as here moved, to the title of complainers, have been overruled; and it would be absurd to confine redress only to wrongs where the parties have divided into majority and minority, and to deny relief in all other circumstances.

The judgment pronounced was,

“ Repel the objections to the title of the complainers; and find it proved, That James Alexander, Henry Jaffray, and James Burd, entered into the bonds or obligations mentioned in the petition or complaint; and find, that the said bonds were illegal, unwarrantable, *et contra bonos mores*, and that the same had an undue influence on the election of the magistrates and counsellors of the burgh of Stirling made at Michaelmas 1772, and also upon the election of magistrates and counsellors made at Michaelmas 1773, the election now complained of; the LORDS therefore find the said election at Michaelmas 1773 null and void, and reduce and declare accordingly; and find the complainers entitled to full costs of suit.”

Act. *Ilay Campbell, M'Laurin.*
General Dundas.

Alt. *M'Queen, L. Advocate, Dean of Faculty, Solicitor-
Clerk, Gibson.*

THE COURT having afterward taken into consideration how far the said James Alexander, Henry Jaffray, and James Burd, the three bondsmen, were liable to censure for having entered into such an association,

Their counsel represented, That as, in the complaint the said persons were no otherwise parties than as members of the town-council of Stirling, therefore no procedure could be had against them under the said complaint, personally; and moved that, at any rate, they might be heard by counsel thereupon.

THE COURT, of the same date with the former, pronounced this other interlocutor: “ THE LORDS having heard what is above represented, they supersede the consideration of this matter till the third sederunt day of June next, when they declare they will hear counsel thereon; but, in the mean time, allow the decree now pronounced to be extracted.”

These two interlocutors were affirmed in the House of Lords, 8th November 1775.

Fol. Dic. v. 4. p. 29. Fac. Col. No 166. p. 59.