

necessary in order to vest him in that office, yet, as he had it in his power to accept when the summons was executed, he ought to have been made a party to the process; in the same way as a creditor of a defunct in a process against heirs portioners must call all of them, though some of them have not acknowledged the succession at the time the summons is raised.

To the *second* answer *replied*: That persons are by the act 6, *Annæ* only obliged to qualify within three months after they begin to act in consequence of the office; and that at any rate, John and Andrew Buckneys had not forfeited the offices in November, when the summons was raised.

To the *third* answer *replied*: *1mo*, That the summons contains a conclusion that John and Andrew Buckneys ought to be found and declared members of the Council: *2do*, That although it had contained no conclusion with respect to them, yet they behoved to be called, because otherwise the representation of the burgh was not full; and for this reason, when a process is only for reducing or declaring the election of a single counsellor, the whole members of the council must be made parties, either as pursuers or defenders, as the Lords found, 28th January 1741, George Heriot and others against Charles Cockburn, provost, and others, counsellors of the burgh of Haddington, where the Lords sustained the objection of no process, because one of the council-deacons was not called, though it was pleaded, that he needed not be made a party, because the pursuers were not disputing his right to sit in council. *See* PROCESS.

To the *fourth* answer *replied*: That a principal party cannot be brought into process by an incident diligence, but must be called by a principal summons, and have the ordinary *induciæ* given him; as has been often decided, particularly 18th February 1747, Lord Forbes against the Earl of Kintore and others, observed by D. Falconer, v. 1. p. 222. *voce* PROCESS; and lately, in the case of a sale pursued by Dalgleish against Hamilton, where the Lords found, that Hamilton's curators could not be called by an incident diligence.

'THE LORDS sustained the objection, and found no process.' *See* PROCESS.

Act. *And. Pringle, Miller, & Johnston.* Alt. *Fergusson, Brown, & Bruce.* Clerk, *Home.*
Bruce. *Fac. Col. No 140, p. 210.*

1759. August 7.

M'KENZIE of Brae, M'KENZIE of Fairburn, &c. *against* Colonel JOHN SCOT.

M'KENZIE of Brae, &c. brought a complaint before the Court of Session against Colonel Scot and others, for giving or receiving bribes in the Michaelmas election 1758, of magistrates and counsellors for the burgh of Dingwall. They set forth, That Colonel Scot, with a view to a new Parliament, offering himself a candidate for the district of burghs, whereof Dingwall is one, began his operations with a present to the town of Dingwall of L. 100 Sterling for

No 23.

In a complaint for bribery and corruption at the election of a burgh, the following points were

No 23.
considered,
What acts
amount to
bribery?
How bribery
is to be prov-
ed? What
effect it ought
to have?

building a steeple, upon which he got himself named a counsellor at the Michaelmas election 1757; that in the period betwixt 1757 and 1758, in order to secure that town to himself, he began with bribing Provost Bain, by subscribing a letter for an annuity of L. 20 Sterling to him for life, which letter being put into the hands of M'Kenzie of Kilcoy, the Colonel's trustee, was in effect reserving to himself a power to pay that annuity or not, as Bain should behave. *Next*, he obtained for Robertson the town-clerk, a commission to be clerk to the justices of peace, having himself paid the expence of expediting the commission. *Thirdly*, with respect to two of the counsellors, he had acted more undisguisedly, by bribing each of them with L. 30, and five guineas to each of their wives. And with respect to one of these, Donald Bain, the person employed to deliver him the money, took from him a bill for the same, promising, at the same time, that the money would not be exacted, if he should act for the Colonel's interest.

The defenders endeavoured to colour these facts, which came clearly out upon proof, by urging that bribery is a crime, and that no act is to be presumed criminal if it can be ascribed to an honest motive; that there is no crime in building a steeple for a burgh; far less in settling a pension upon a gentleman in decayed circumstances, such as Bain of Tulloch, who is really reduced to want of bread; and that as to the money given to the two counsellors, this was not done by the Colonel, but by M'Kenzie of Kilcoy, who having a sum impressed in his hands by the Colonel, for defraying what extraordinary expence might attend the Michaelmas election 1758, thought proper at his own hand to bestow some part in the way mentioned. And, upon the whole, it was *pleaded*, though but faintly, that there being no statute against giving money for procuring votes at a Michaelmas election in a burgh, the Court of Session have no power to prohibit such a commerce, especially as it was not proved that any positive promise was procured by money from any magistrate or counsellor to vote for the Colonel's list, but only money given to procure their good will.

Upon advising this cause, the Judges were unanimous, that bribery is an immoral act, both in him who bribes, and in him who is bribed, and that the Court of Session may justly interpose against an act so vicious. But, in the reasoning, it was necessary to clear the following points: *1st*, What acts amount to a bribe: *2dly*, How bribery is to be proved: And, *3dly*, What effect, when proved, it ought to have upon the election of a new set of magistrates and counsellors in a burgh.

With respect to the *first* point, it is of the utmost consequence in society that governors, judges, magistrates, &c. be chosen from the opinion of their worth and sufficiency, without partiality or corrupt views. Hence bribery, in such elections, has the most pernicious tendency. It is a gangrene which must corrupt the whole body politic, tend to universal depravity of manners, and end in the dissolution of government. This gangrene is not to be cured by declaring it unlawful to procure explicit promises by money. If its progress be stayed in one part, it will break out in many others. The man who receives the bribe

knows what is expected from him, and will reckon himself as much bound as if he had granted an explicit promise. Nor is there really any difference. For when parties are barred from the opportunity of making an agreement, whether in fact or by a statute, the nature of the transaction, and the avowed intention of the party who gives the sum, will infer an obligation equally strong with that which is founded on an explicit agreement. Hence, it becomes necessary to prohibit, in general, every gratuity from a candidate to any of his electors, that is intended to influence him in voting, and consequently to abridge that freedom and independency which every elector ought to carry with him to an election. It is upon this footing that, at the election of members to serve in Parliament for the burghs in Scotland, every person who has a vote is bound to take the following oath, if required : ‘ That he hath not, directly or indirectly, by way of loan, or other device whatsoever, received any sum or sums of money, office, place, employment, gratuity, or reward ; or any bond, bill, or note ; or any promise of any sum or sums of money, office, place, employment, or gratuity whatsoever, either by himself or any other, to his use, or benefit, or advantage ; or to the use, benefit, or advantage, of the burgh of which he is a magistrate, counsellor, or burghess, *in order* to give his vote at this election.’ This oath, it is true, is not required in the present case. But it is a good authority with respect to the present case : Because what is considered as bribery with respect to the election of a member of Parliament, cannot be considered as innocent with respect to the election of a magistrate or counsellor in a burgh.

With respect to the proof of bribery, which is the *second* point, there is a general rule with regard to crimes, that the person accused must be presumed innocent till guilt be proved against him ; and from this rule bribery is not an exception. But then the question is, What proof is requisite ? A gratuity may be proved, or a promise of a gratuity ; but the intention of the gratuity or promise is beyond the reach of witnesses, and yet in this consists the essence of the crime. What then is to be done in this case ? It is in vain to depend on the oaths of the persons bribing or bribed. A man of loose morals who will commit such a crime, will not be influenced by an oath to reveal it. The same rule must be followed here that is followed in all other cases civil and criminal, *viz.* that circumstances incapable of oral evidence must rest upon presumption derived from the facts proved ; and it must depend upon the judge to say what is the most probable supposition. There cannot be a better illustration than the present case. Colonel Scot, a candidate for being a member of the approaching Parliament, tries what he can make of the northern burghs, whereof Dingwall is one. Though an entire stranger to every inhabitant of that town, he makes a donative to the town, settles an annuity upon the provost, obtains a post for the clerk, and gives money to every counsellor who will accept of it. No man can hesitate about the Colonel’s intention, nor about the intention of every person connected ; and Judges are forced to adopt the probability, and

No 23. convert it to a legal presumption, because there are no better means of coming at the truth, One thing is certain, that if a candidate were allowed to ascribe to charity, benevolence, or even gratitude, every gratuity he bestows on his electors, bribery would pass current without a check. It becomes necessary, on the contrary, to construct every such gratuity a bribe, unless the contrary be proved.

If this doctrine require to be supported by authority, there is a strong authority at hand. The act 2d, Geo. 2. *cap.* 24. 'For the more effectually preventing bribery and corruption in electing members to serve in Parliament,' enacts a penalty of L. 500, first upon those who take money or other reward by way of gift, loan, or other device, to give or refuse their vote in any election; and next upon those who, by any gift or reward, or promise of gift or reward, corrupt or procure any man to give his vote at an election, or to forbear voting. The question arises upon this statute, How are the facts to be proved in order to inflict the penalty? The plaintiff has no access to the defendant's oath, which is not competent in England in any case, civil or criminal. It is certainly not supposed in the statute, that an actual promise must be qualified to vote as directed by the person who gives the bribe. It is sufficient to qualify, in terms of the statute, that the defendant was influenced by a bribe to give his vote. But such influence is *animi*, and incapable of being ascertained by oral evidence; and therefore must be ascertained from weighing all circumstances, and building a legal presumption upon them. This is an argument *a fortiori* to the present case; for if the law countenances a presumption in this case, even to inflict a penalty; much more where the consequence is only to disappoint the effect of the bribe.

And this leads to the *third* point proposed to be considered, *viz.* What is the legal effect of bribery in this case? It is clear, in the *first* place, that it is not in the power of the Court of Session to inflict a penalty independent of the authority of a statute. It is clear, in the *next* place, that this matter must be governed by equity; for the common law, with respect to any vote given, considers only whether the person was entitled to vote, not by what influence his vote was obtained. Now, as utility requires a freedom and independency in voting, a court of equity, for that reason, will disregard and set aside every vote that is obtained by bribery. For the candidate who is guilty of bribery, will not be permitted to benefit himself by his crime. And the candidate's own vote is set aside, though not obtained by bribery, as a punishment justly inflicted upon him for corrupting others.

THE COURT unanimously found the bribery and corruption relevant and proved; rejected the votes of the candidate and of those corrupted by him; and gave full costs to the plaintiffs.