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rant from the parties. The third witness on life, was the said William Syme against whom Donaldson objected. He can never be a habile witness now, whatever he was at the time of his subscribing; for now the very right of the debt in controversy is by his falling heir to Cruikshanks his goodsire, and serving heir to him, established in his person; and the improbation to sweep it away is pursued by Scott, as his trustee, alienarily for his behoof, so in effect his deponing were *in re propria*; and the writ must stand or fall by his oath; and no law can ever allow him to declare a writ false, the benefit whereof will rebound immediately to himself; and what if an instrumentary witness were bribed to deny his subscription, will not the proving his corruption, cast him from being a witness; *ergo a pari* his becoming a party should much more reject him; and why should any man be led into so palpable a snare and temptation to stretch his conscience, where his own oath gains him the cause. Answered, The law presumes every man honest till the contrary be proved, and if this supervenient interest should cast him from being a witness, then persons might insert in their bonds their sons, brothers, and nearest heirs, who coming to succeed, shall be found inhabile witnesses, and so make the deed fall; whereas there is nothing more ordinary than to insert these near relations as witnesses in bonds and other writs, and being reputed elected by the common consent of both parties, they can never afterwards be objected against. It is true, bribery is a personal exception founded on their own crime and delinquency; but what contingency has that with the case in hand, where one innocently succeeds by his right of blood to the granter of the disposition, where he was adhibited a witness, which can never import an incapacity. See Sir George Mackenzie's Observations on the 80th act Parliament 1597. THE LORDS, in this extraordinary case, proceeded with all the wariness and circumspection imaginable, and allowed him to be received *cum nota*, but declared they would examine him in their own presence. And, by the testimonies already taken, one of the witnesses denies his subscription, the other *non meminit*, so the writ may be found null and improbative, though it will not amount to falsehood.

Fol. Dic. v. 2. p. 265. Fountainball, v. 2. p. 392. & 453.

1767. January 26. Sir JOHN ANSTRUTHER against ALEXANDERS, &c.

No 575.

Proof and effect of bribery in the Michaelmas election of a burgh.

UPON the death of Sir Harry Erskine, member of Parliament for the five burghs of Pittenweem, Wester and Easter Anstruther, Kilrenny and Crail, two candidates appeared, Sir John Anstruther, a gentleman of great estate in the neighbourhood, and Mr Robert Alexander, an Edinburgh merchant, who had no natural connection with any of these burghs. By the force of money, however, he prevailed in three of them, viz. Pittenweem, Anstruther Wester, and Kilrenny, and got his adherents into the Council and Magistracy, so as to secure their

votes in the approaching elections for a new Parliament. This obliged Sir John Anstruther to bring a process for reducing the Michaelmas elections of these three burghs, upon the head of bribery and corruption. With respect to Anstruther Wester, there was a clear proof that Alexander had brought over to his interest a plurality of the Town-Council by direct bribery; and the question was, What effect this should have upon the election? As the Town-Council consisted of fifteen members, eight were necessary for a regular election; because in general where no quorum is named, the plurality are understood to be a quorum. Upon this foundation the Court unanimously reduced the election. They held the bribed members to be as dead or absent, which left not a quorum of untainted members.

With respect to Pittenweem, it came out upon proof, that Alexander purchased the town by a private bargain with Bailie Martin, in name of the Town-Council, bearing, that they should receive L. 1000 for payment of the debts of the town, the surplus to be divided among the members of the Town-Council. Here was a bribe to the whole electors in general; and upon that ground the Michaelmas election of Pittenweem was reduced almost unanimously.

The pinching case was that of Kilrenny. As to private conviction, no mortal could hesitate to pronounce that the whole members were bribed. But as there was no proof, except against four or five individuals, there still remained a quorum untainted, as far as appeared from the proof, sufficient to make a legal election.

The only argument for the reduction, that had a show of relevancy, was what follows: Alexander was an absolute stranger to these burghs, and to every individual voter. The neighbouring gentlemen, who had the only influence in these burghs, were all zealous for Sir John Anstruther. *2do*, From the circumstances of this case, and from the proof, Alexander could have no other prospect to carry these burghs but by money. *3tio*, The Town-Councils of these burghs, and of Kilrenny in particular, were composed of low indigent persons, incapable to resist any money-temptation. And it is proved against them, that they were unanimously resolved not to neglect the opportunity of the ensuing election to sell themselves to the best bidder. Upon these and other circumstances, a presumption was founded, that the whole Council of Kilrenny had been bribed, or so many as not to leave an innocent quorum. And it was urged, that unless this presumption be sustained, an open door will be left for bribery; for supposing every individual to be bribed, yet the person who challenges the election can scarce hope to prove the crime against a plurality.

This argument had weight with me, and I voted for reducing the election. But the plurality not being touched with it, Alexander and his party were as-soilzied from the reduction. And that the judgment was right, I became afterward sensible, upon pondering deliberately the following topics. With regard to Alexander himself, there is a good foundation for the presumption; for he whose conscience will allow him to bribe five, can have no hesitation to

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2do, Supposing a foundation for this presumption in other instances, it ought never to be admitted in the case of bribery. We frequently presume a fact to have happened upon a *semiplena probatio*, because there is no offer made to prove the contrary. This last circumstance being the chief foundation of every presumption, it follows clearly that a presumption ought never to be admitted, where the contrary proposition resolves into a negative that is not capable of proof. This is the case of bribery ; for to affirm that a man has not been bribed, is a negative not capable of proof. Hence it follows, that to sustain a presumption of bribery where there is no clear evidence, is in effect to give a *semiplena probatio* the effect of a complete proof.

Alexander at the same time carried on a reduction of the Michaelmas election of Easter Anstruther, which had declared for Sir John Anstruther. It was proved that Bailie Johnston, who had long governed that town, brought the whole Town-Council to vote according to his direction, upon his engaging to pay the debts of the town. Here the whole Town-Council were bribed ; but there being no evidence that the persons who were voted into the Council had any knowledge of this corrupt bargain, a doubt occurred, whether these innocent persons could be deprived of their right by the crime of third parties. But the following answer satisfied the Court, viz. That it is against conscience for any man to use a right that he acquires by a criminal act committed by another. And accordingly this election was unanimously reduced, 7th August 1767, Alexander Young *contra* Andrew Johnston of Rennyhill. (Not reported.) (See No 54, p. 3720.)

Sel. Dec. No 152. p. 323.

SECT. IV.

Holding how proved.—What proof that a decree had been extracted.

No 576.

A blench-holding found not relevant to be proved by retours, but only by charter and sasine.

1543. June 16. KING'S ADVOCATE *against* LD. of HOUSTON.

THE LORDS retreated the Laird of Houston's retour of the lands of ———, because the assize saw no charter of blench-holding of the lands, but two or three retours eighty years old, making mention that they were holden blench ;