rather than a serious, tender, and nothing more was done. Nash had clearly forfeited his title by fraud, and the only one to claim was Burke, whose claim was founded merely in the indulgence of Edward Brabazon. Burke had no right, except under that indulgence, his remedy being, in my opinion, only against Nash, and not against Brabazon. I think therefore that these decrees are wrong; that Burke is entitled to no relief as against Barrett; that the issue tendered was nothing as to the merits; and that the decrees ought therefore to be reversed, and the bill dismissed.

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Decrees accordingly reversed, and bills dismissed.

Decrees of the Court below reversed.

SCOTLAND.

APPEAL FROM THE COURT OF SESSION, (2d DIV.)

BLACK—*Appellant.*
CAMPBELL—*Respondent.*

The *set* or constitution of Inverkeithing requiring that the members of council should be resident burgesses, the clerk, at the election of a delegate for that burgh, in 1812, refused to reckon the votes of two persons whose names had been entered in the minutes, as part of the magistrates and town council, assembled for the purpose of the election, and to whom the qualifying oaths had been administered by himself, in consequence of an objection on account of non-residence; the fact of non-residence being notorious and consistent with the clerk's

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own knowledge; and the rejection of these two votes governing the return. Complaint under the statute 16 Geo. 2. cap. 11. against the clerk, and judgment by the Court of Session, that he had incurred the penalties of that statute, on the ground that the officer was bound by it to reckon the votes of all those whose names appeared as members of council on the burgh records, beyond which he was not entitled to look; and that *bonâ fides* was no defence. This judgment reversed by the House of Lords for want of averment in the complaint that the complainer was duly elected delegate, the statute having given the penalties to the person so elected. And also for want of sufficient evidence of that fact; the town books, with the names inscribed, the best evidence to show that those whose votes were rejected were members of council, not being produced in proof.

The Lord Chancellor observing, that it is a wholesome principle, in a case so penal as this, that distinct averment and clear proof should be required.

Lord Redesdale observing, that he very much doubted whether the true construction of the act was that which the Court below had put upon it.

Complaint under 16 Geo. 2. cap. 11.

A PETITION and complaint under the statute 16 Geo. 2. cap. 11. was presented to the 2d division of the Court of Session, at the instance of General Campbell, of Monzie, with concourse of his Majesty's Advocate, for his Majesty's interest, against David Black, town-clerk of Inverkeithing, stating, that at the election, in 1812, of a delegate for Inverkeithing, for choosing a member to serve in Parliament for that district of burghs, David Black, the clerk, had refused to make out the commission to the complainer, who had been chosen by the majority of the magistrates and town council, assembled for the purpose of electing a delegate; and had given the commission to General

Maitland, who had not been chosen delegate by the majority, and praying the penalties of the statute against the clerk for this violation of its enactments.

The facts of the case, as averred in the petition and complaint, and as they appeared in the minutes of election, and from the admissions in the pleadings, were these.

On the 15th Oct. 1812, the magistrates and town council of Inverkeithing, assembled for the purpose of choosing a delegate or commissioner, for the election of a member to serve in Parliament for the district of burghs, to which Inverkeithing belongs. The Appellant, the common clerk of the burgh, entered or marked in the minutes the names of the magistrates and council assembled on that occasion, and administered the oaths required to be taken by the electors of the delegate; and among those whose names were so marked, and to whom the oaths were so administered, were Captain John Montgomerie and Mr. John Gulland.

In the course of the proceedings Sir John Henderson, one of the council, objected to the votes of Captain John Montgomerie and Mr. John Gulland, and of Duncan and Alexander Montgomery, for non-residence, referring likewise, with respect to the three Montgomeries, to a decision of the Court of Session, in Feb., 1807, finding that they had no right to be councillors: and he called on the clerk, not only not to receive their votes, but also not to call their names in the course of any vote which might that day take place in the council. General Campbell, who was then Provost of the burgh, objected to the votes of Sir John Henderson and three

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Facts and circumstances. Election, 1812, of delegate for Inverkeithing.

Objections to votes for non-residence.

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others, and protested that their names should be erased from the list, and that their votes should not be received, and, if received, that they should be null and void. The objection to one was, that he lay under sentence of fugitation and outlawry; to another, that he had not for a long series of years acted as a member of the council; to a third and fourth (Sir John and Mr. Bruce Henderson), generally, that they were not duly qualified to vote. The answers, as they appeared on the minutes, were, as to the first individual, the production of an extract of an act and warrant of the Court of Justiciary, reponing him against the sentence; as to the second, that the objection was frivolous; and, as to the third and fourth, that the objection was too general.

The summoning officers, on being examined in the usual manner as to their having warned the members of council to attend, stated, that they had served the summons on Mr. Gulland, at his house at Bellknows, and on Captain John Montgomerie, at the distillery. It was asserted in the pleadings, and not denied, that Bellknows and the Distillery were without the burgh, that Bellknows was the usual place of residence of Mr. Gulland, and Chatham of Captain Montgomerie.

The clerk did not give any deliverance as to the objections by General Campbell. His judgment on the objections by Sir John Henderson, as it appeared on the minutes, was as follows, "Which "protests, answer, reply, and duply, having been "considered by the clerk, he finds, that no evi-"dence of the alleged decree of the Court of Session

Judgment of the returning officer.

" has been produced sufficient to authorize him to
" strike off the names of Mr. Duncan Montgomerie,
" and Mr. Alexander Montgomerie, from the Coun-
" cil roll.

" He is, however, decidedly of opinion, that the
" objection stated against the votes of Captain John
" Montgomerie, and Mr. John Gulland, founded
" on their non-residence within the Burgh, (which
" is a circumstance of notoriety, and consistent
" with his own private knowledge,) is a good ob-
" jection, and that they are not legal councillors of
" this Burgh. He would therefore have no hesita-
" in setting aside both their votes, if it was clearly
" competent to him to determine that matter; but
" not being satisfied, that it is his duty, as returning
" officer, to judge of the validity of the votes which
" may be tendered to him upon the present occa-
" sion; resolves not to call for, but to mark the
" votes which may be tendered under protest by
" Captain John Montgomerie and Mr. Gulland, re-
" serving for consideration, when he shall decide
" in whose favour the commission is to be made
" out, the legal effects of such votes, and whether
" or not the same ought to be received; declaring,
" that notwithstanding his own conviction of the
" real invalidity of any votes to be tendered by
" Captain Montgomerie or Mr. Gulland, he shall
" reckon them before making out a commission in
" favour of a delegate, if, after due consideration
" and advice, he shall find, that it is not strictly
" competent to him, as clerk of the burgh, to de-
" cide the question of their legality or illegality,
" and to reject them accordingly."

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The names of Captain John Montgomerie and Mr. Gulland not being called, there appeared thirteen votes for General Maitland, and twelve votes for General Campbell. Captain Montgomerie and Mr. Gulland then came forward and voted for General Campbell "protesting that they ought to have "been called by the clerk, and ought now to be "added to the list of those who voted for General "Campbell. Whereupon General Campbell protested that he was duly elected delegate of this "Burgh, and required the clerk immediately to "make out a legal commission in his favour, and "thereupon took instruments: and Sir John Henderson protested that General Maitland was duly "elected delegate by a majority of votes, and required the clerk immediately to make out a legal "commission in his favour, &c."

Set or constitution of Inverkeithing.

The set or constitution of the Burgh of Inverkeithing as far as it appears material to the present question is in these words: "The council consists "of fifteen persons at least; viz. the Provost, two "Baillies, the Dean of Guild and Treasurer, and "ten or more *inhabitant Burgesses*. They proceed in their election thus: Upon the 29th Sept., "yearly, the magistrates and old council meet in "the forenoon within their tolbooth; and when "these of the old council who are desirous of an "ease have demitted their offices, they choose as "many new councillors in their room to keep up "the number; and first they elect the provost, "then leets five of the council, and choose two out "of them bailies of the ensuing year; next leets "three and chooses the dean of guild; and last,

"two, and chooses the treasurer: all swearing the "oaths *de fideli* and secrecy, &c." These were pointed out as peculiarities in the constitution of the burgh; 1st, that the number of councillors is unlimited; 2d, that there is no annual election of the whole council, though there is an annual election of magistrates, the councillors once chosen continuing for life unless they resign or become disqualified. 3d, The councillors must be burgesses having residence within the burgh.

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The clerk intimated his intention to apply to Mr. Adam (now the Lord Chief Commissioner) for advice whether he ought to reckon the votes of Captain Montgomerie and Mr. Gulland, and requested the counsel who had attended the election on the part of General Campbell, and the agent who attended on behalf of General Maitland, to go with him to Mr. Adam. The former declined going, and then the clerk went alone; and having laid the minutes of the proceedings and circumstances of the case before Mr. Adam, he, in conformity to the advice received, rejected the votes, and made out the commission in favour of General Maitland; and thereupon the petition and complaint was presented by General Campbell.

Clerk rejects the votes.

It is to be particularly observed that there was no averment, in the petition and complaint, that General Campbell was duly elected delegate. The books or records of the burgh were not produced to show that the names of Captain Montgomerie and Mr. Gulland were there inserted as members of council, and that General Campbell was duly elected; and there was no distinct admission of these facts on the

Defect of averment and proof.

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Act. 16 Geo. 2. cap. 11.

part of the clerk; the circumstances of his having entered the names of Captain Montgomerie and Mr. Gulland in the minutes, and his having administered the oaths to them, not being considered by the House of Lords sufficient to constitute an admission that they were members of council.

The clause on which the complaint was chiefly founded was the 26th of the statute 16 Geo. 2. cap. 11. which provides, "That at every election of "commissioners for choosing burgesses for any dis- "trict of burghs in that part of Great Britain called "Scotland, the common clerk of each borough "within the said district, shall make out a com- "mission to the person chosen *by the major part of* "*the Magistrates and Town-Council assembled* for "that purpose, which Magistrates and Town-Coun- "cil shall take the oath of allegiance, and sign the "same, with the assurance, and shall take the other "oaths appointed to be taken at such election, by "this or any former act, if required; and the said "clerk shall affix the common seal of the burgh "thereto, and sign such commission, *and shall not* "*on any pretence whatsoever*, make out a com- "mission for any person as commissioner, other "than him who is chosen *by the majority as afore-* "*said*; and if any common clerk of any borough "shall neglect or refuse duly to make out, and sign "a commission to the commissioner elected by the "majority, as aforesaid, and affix the seal of the "burgh thereto, *or if he shall make out and sign a* "*commission to any other person who is not chosen* "*by the majority*, or affix the common seal of the "burgh thereto, he shall for every such offence for-

" feit the sum of 500*l.* sterling to the person elected
" commissioner for the said burgh, as aforesaid, to
" be recovered by him or his executors in the man-
" ner herein after directed; and shall also suffer im-
" prisonment for the space of six calendar months,
" and be for ever after disabled to hold or enjoy the
" said office of common clerk of the said borough,
" as effectually as if he was naturally dead."

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And a subsequent clause declares, " That every
" penalty or forfeiture by this act imposed in that
" part of Great Britain called Scotland, shall, and
" may be sued for, and recovered by way of sum-
" mary complaint, before the Court of Session,
" upon thirty days notice to the person complained
" of, without abiding the course of any roll; which
" said complaint the Court of Session is hereby au-
" thorized and required to determine; as also to
" declare the disabilities and incapacities, and to
" direct the imprisonment as herein provided."

The judgment of the Court of Session was as fol-
lows: " The Lords having advised this petition,
" with the answers, replies, and duplies, and writs
" produced and referred to, sustain the complaint:
" Find, that the Respondent, David Black, has for-
" feited the sum of 500*l.* sterling, and decern
" against him for payment thereof to the com-
" plainer; order the said David Black to be im-
" prisoned for the space of six calendar months, and
" declare him for ever disabled to hold or enjoy the
" office of common-clerk of the burgh of Inver-
" keithing, as effectually as if he was naturally dead:
" find him liable in the expences of this complaint;
" allow an account thereof to be given in, and remit

May 22, 1813. Interlocutor first appealed from.

Jan. 15, 1814. Interlocutor second appealed from.

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" to the auditor to tax the same and report." And to this judgment their Lordships unanimously adhered, on advising petitions with answers. From this judgment the clerk appealed.

The Court was unwilling to carry the imprisonment into effect until the appeal should be determined, lest the judgment should be reversed; and the complainer agreed not to call for the imprisonment in the mean time.

For the Appellant it was contended that in cases of burgh elections for delegates the statute afforded no fixed rule for the guidance of the officer; that there was no roll in any burgh in Scotland to which the officer might refer, as there was in cases of elections of members for counties; and that from the peculiarity of the *set* of Inverkeithing, where there was no annual election of the whole council, it was impossible there could be such a roll; that the clerk was therefore under the necessity of exercising his judgment, and of deciding, attending to the constitution of the burgh, whether the persons objected to were legally members of the council; that by the constitution of the burgh residence was an essential qualification for a councillor; and that a person, though regularly admitted, and though the councillors were for life, by becoming non-resident ceased, *ipso facto*, to be a councillor; that in a case in 1745 reported by Lord Elchies, the Court expressly found " that by the *set* of this burgh " councillors behoved to be *residing* burgesses;" and it had always been understood to be the law that the mere circumstance of non-residence operated as a disqualification. Objections on that ground had

Elchies, Rep. No. 22. v. Burgh Royal.

been made in 1760, 1774, and 1791, and the answer had uniformly been a denial of the fact, the relevancy not being disputed. The set and practice would have been sufficient; but the point had been adjudged by the Court of Session and House of Lords in the case of *Haldane v. Holborn.** There was another authority to the same effect in Bankton, in his work published in 1752. The decision of the second division in Clarkson's case, 14th May, 1814, was different; but when the return in this case was made, the clerk had the authority of the Court of Session and House of Lords in his favour; and also a judgment of the Court in 1807, ordering the name of Captain Montgomerie to be struck out of the list of councillors on account of non-residence. The town clerk having been called upon to exercise his judgment, acted throughout *bonâ fide*, and this was a good defence, even though his decision were erroneous; and had been so held in cases less favourable to the returning officer, as in the case of Culross, arising from the annual election of 1803. The present case was essentially different from that of *Gordon v. Forbes*, not only because it was incontrovertibly clear from the very statute under which Forbes acted as a commissioner of supply that he was not qualified, but also because Forbes was not bound to act, and Black was. This was not a singular example of a case not provided for by the statute; there were many others, such as that of *Gordon v. Rose* in 1768, referred to by Wight and Bell, and that of *Glass v. Magistrates of St. Andrews* in 1754. That the clerk had in this case acted *bonâ fide* was evident from the whole

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* Kames, Sel. Dec. v. *Citation.*

——v. Montgomerie, (case of Inverkeithing,) 1807. Vid. Wight, p. 338.—Case of Elgin, 1771.—Young v. Johnston, 1766.

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proceedings. The fact of non-residence was clear, and had been admitted in the pleadings on both sides. The objection of non-residence had indeed been made on former occasions, but the clerk was not bound to decide upon it till it became material to the return; and for the same reason the entry of the names in the minutes, and the administration of the oaths by the clerk, was no admission on his part that the parties were members of council. As to General Campbell's objections they were not specific, and it was therefore not necessary to give any decision upon them. The clerk then did give the commission to him who had the majority of legal votes. But supposing the clerk not to have the right to act as he had done, General Campbell had himself called upon him to exercise his judgment, and reject votes as bad for non-residence; and the complaint was therefore barred *personali exceptione*. It was also argued that this being a penal statute the strictest construction ought to be applied, and that, as the complaint was in the nature of a criminal prosecution, it was necessary that a criminal purpose should appear before the penalties could be incurred.

Bell v. Magistrates of Inverkeithing, 1777.

For the Respondent it was argued that the act 16 Geo. 2. cap. 11. applied to all the burghs in Scotland; that there was a particular provision as to the county of Sutherland, but none as to the burgh of Inverkeithing, and that those who prepared the act must have been well acquainted with the constitution of Inverkeithing. If the act did not apply, the rights and privileges of the councillors of this burgh were at the mercy of the clerk. The notion

that the defect in the act was to be supplied by the judgment of the clerk was founded on a single expression in the set, that the councillors must be inhabitants; and it was said that they must be so not only when admitted, but that by their non-residence they *ipso facto* ceased to be councillors. But the import of the clause in the constitution, declaring that the council was to consist of fifteen persons who must be inhabitant burgesses, was by no means clear; and many instances might be cited from the records of the burgh of persons admitted and acting as councillors who did not reside within its precincts. The case in 1745, from Lord Elchies, was too shortly stated to be considered as an authority, and that of *Haldane v. Holborn* reported by Lord Kames under the title *Citation,* depended on a principle which had no application to the present question. It might be doubted also whether councillors regularly admitted, whose election remained unchallenged for two months from the period of admission, could be removed by the magistrates at a subsequent annual election, or by the Court of Session, upon the ground of a supervenient disqualification; the councillors being for life by the *set* of the burgh. And though in one judgment of the Court of Session in 1807 a different rule was adopted, that was a single judgment reclaimed against, and was no authority. But supposing that a councillor must be resident within the precincts, and by non-residence became disqualified, his name must remain on the record till expunged by the council or Court of Session, according to the mode pointed out in the judgment of 1807; and the clerk

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was not entitled to look beyond that record. But supposing this mode of redress under the statute to be incompetent, the question recurred whether the enrolment of the councillor was to be held null *ipso jure*, and whether the nullity might be declared by the *fiat* of the clerk. The doctrine was adverse to every principle of the law of Scotland, in which no instance could be pointed out of effect being given to an irritancy of a vested right, without a declarator. The clerk had no right to look beyond the record, and was bound by the statute to reckon the votes of all whose names appeared there. The statute had clearly ascertained who were the magistrates and town council, or persons by whom the delegate was to be chosen; that they were those persons who had been enrolled by the votes of a majority of magistrates or other persons, who by the constitution of the burgh had a voice; and that upon that roll or book or list they must remain till ordered to be struck off, and till they were struck off either by the magistrates themselves at a subsequent annual election (for it was possible to conceive a burgh where this might be competent), or by an extracted decree of the Court of Session, upon an application under the statute; that the title of the elector of a delegate consisted in the entry of his name in the burgh record under the keeping of the town clerk, and that every man whose name was to be found there, entered as a magistrate or councillor, must be admitted and inserted at the meeting for election; that in the present case Captain Montgomerie and Mr. Gulland were admitted, entered in the minutes, and qualified; and that no

exertion of the mental faculty was required or permitted on the part of the clerk, but to count the votes of this meeting, which constituted the town council assembled. The duty of the clerk was clear and imperative. He was bound to call all the names which stood on the record or books of the burgh as councillors, without taking upon him to judge or determine whether they ought to be there or not; and by entering the names of Captain Montgomerie and Mr. Gulland on the minutes, and administering the oaths to them, the clerk had in this case admitted that their names stood in the books as members of council. The statute 16 Geo. 2. cap. 11. applied to all the burghs in Scotland, and the difference between the phraseology of that statute and of those previously in force (2 Geo. 2. cap. 24. and 7 Geo. 2. cap. 16.) particularly the omission in the last statute (16 Geo. 2.) of the words "to the best of my judg- "ment" in the oath of the returning officer, and of the word "wilfully," in the clause imposing the penalty for neglect to return the person duly elected, was relied upon in support of the proposition that the clerk was bound by the record without any further exercise of judgment. The duty of the clerk was clear and imperative, and *bona fides* was in this case no defence; and upon that principle the case of *Gordon v. Forbes* had been decided. But the clerk had never before rejected votes on the ground of non-residence, though the objection had been made at former elections, and it was clear therefore that he had not acted *bonâ fide*. The opinion of Holt, Ch. J. in the case of *Ashby v. White*, relative to the duty of a returning officer, was quoted. The

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2 Geo. 2. cap. 24. sect. 3. 7 Geo. 2. cap. 16. sect. 8. 16 Geo. 2. cap. 11. sect. 35.

Vid. Sta. Tri. Oct. Ed. vol. 14, p. 789.

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object of the act was to deprive the clerk of all judgment respecting the votes; his duty being confined to looking at the council book; and if the names of the persons claiming to vote appeared there as members of council, he was bound to reckon them. (*Lord Eldon*, C. Must not the town books be produced to prove that General Campbell was duly elected commissioner? That must be proved, as the penalty is given by the statute to the person duly elected commissioner. In a case of this kind you must be held to strict proof.) It appeared from the minutes that he was duly elected. (*Lord Eldon*, C. If this statute affects a person whether he acts *bonâ fide* or not, and there are such acts both in England and Scotland, then we may have to determine here that the clerk has incurred the penalties of 500*l.* fine, and six months imprisonment, and incapacitation, even though he might have acted *bonâ fide*; and the act says that these may be sued for and recovered by way of summary complaint. If a subject in this country were made liable to such penalties, and his acting *optimâ fide* were no defence, though the penalties might be suèd for by summary complaint, yet we would take care that it should contain all the averments necessary to make out the case. If such a petition had been presented here it would have required averment that Captain Montgomerie and Mr. Gulland were part of the magistrates and town council assembled, and held that character; and that General Campbell was duly elected delegate by the majority, as the penalty of 500*l.* is given to the person elected commissioner. And we would re-

quire not only that the averments should be nice and precise, but we would also require strict proof; and I suggest that to Mr. Erskine, that he may consider whether there is averment, or evidence, or admission enough to support this judgment.) *Mr. Warren.* There are two averments in the petition and complaint: 1st, That General Campbell had the majority of votes. That appears by the minutes. 2d, That the commission was not made out for General Campbell. That does not appear in the minutes, but it is admitted by Black; for he answered without objecting, and the whole of his reasoning proceeds on the supposition that the commission was not made out for General Campbell. If he had objected it would have been proved. (*Lord Eldon,* C. If this had been a case in the law of England, could there have been any proceeding without the production of the commission itself?) Not in England. (*Lord Eldon,* C. Then suppose this a proceeding in England, would not the judgment be wrong on another ground? Suppose it bad as to the imprisonment, I take it that if it is bad in part it would be bad in the whole. But here nothing is said as to the place where the imprisonment is to be, nor when it is to commence. Now I take it that in England you cannot order an imprisonment to commence *in futuro* except where you are ordering two imprisonments at the same time.) Certainly if this had been an English proceeding, these objections would have been unanswerable. (*Lord Eldon,* C. We could not proceed a step here without the production of the town books.) *Mr. Erskine.* We produced authentic extracts. (*Lord*

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Eldon, C. I take it to be clear that it is not sufficient that the clerk entered the names in the minutes, and qualified them by administering the oaths, as he might be mistaken; and here, in order to prove that they were councillors, it would be necessary that the books should be produced. We are here upon a statute as severe in its penalties as can well be.) *Mr. Erskine.* I can only state that we have evidence here as far as Black himself held it to be material, and in the pleadings by Black our statement was acquiesced in as true. He would have been heard on the competency, as well as on the merits. (*Lord Eldon*, C. There is no averment, evidence, or admission, that I see, that these names were taken from the council books. *Lord Redesdale.* You ought to have proved two things: 1st, that General Campbell was duly elected commissioner; 2d, that Black made the return contrary to the majority of legal votes. *Lord Eldon*, C. Who are the magistrates and town council? those that appear as such on the books. But there is no evidence that these names were there, equal to the best evidence. *Lord Redesdale.* By the constitution of the burgh you should prove that they were inhabitant councillors, in order to show that you were duly elected. *Lord Eldon*, C. Where in the pleadings does it appear that these names were on the books? It is clear that all in the sederunt were summoned, and that the names were taken down. But is it proved that those summoned and present were town councillors?) *Mr. Erskine.* Our averment is that all these names in the sederunt were in the record; and that is not contradicted. (*Lord Eldon*, C. Where is that

averment in the complaint?) *Mr. Erskine.* With respect to the terms of the judgment, a second petition might have been presented below as to the time of commencement and the place of imprisonment. The reason why we did not insist upon it was, that the clerk might not be deprived of the benefit of his appeal.

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In the reply, the point of want of sufficient averment and proof, first suggested by the Lord Chancellor, was insisted upon. In a case so perilous as the present, the defender was perfectly justified in allowing the complainer to go on proving as he chose, without stating any objection while the defect might be rectified; and then, if the judgment should be against him, taking advantage of the defect upon appeal to a higher tribunal.

Sir Samuel Romilly and *Mr. Murray* for the Appellant; *Mr. Warren* and *Mr. Erskine* for the Respondent.

Lord Eldon (C.) This case arose out of the conduct of Mr. Black, who your Lordships will recollect was town clerk of the burgh of Inverkeithing, and the petition and complaint which I have now before me states, "That by an act passed in the 16th "year of his late Majesty entitled 'An act to ex- "'plain and amend the laws touching the elections "'of members to serve for the Commons in Par- "'liament for that part of Great Britain called "'Scotland, and to restrain the partiality and re- "'gulate the conduct of returning officers on such "'elections,' it is declared by the 22d section that

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Petition and complaint.

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" whereas at the election of members to serve in " Parliament for the districts of boroughs in that " part of Great Britain called Scotland, it often " happens that more persons than one claim to be " admitted to vote as commissioners for the same " borough, which furnishes pretences to the clerks " of the presiding boroughs for partially making " false and undue returns: For remedy thereof, be " it enacted by the authority aforesaid, that at the " annual election of magistrates and councillors, and " in all the proceedings previous to the election of " the magistrates and councillors for the succeeding " year—" (Recites the 22d, 23d, and 24th sects.)

The petition and complaint then proceeds to state the 26th section of the act. But first I would call your Lordships' attention to the previous provisions which regulate the elections for counties: and there undoubtedly the legislature has prescribed, to the person who is to collect the votes, a clear and intelligible rule of conduct, from which if he deviates, it is his own fault; since the rule is so clear and plain that he cannot mistake it: for it is enacted, " that at every election of a commissioner " to serve in parliament—" (reads sect. 12 and sect. 13, except the last part relating to equality of votes). So that there being a roll of persons who are to be taken as electors, if their names are upon that roll, the plain rule, by which he is to regulate his conduct, is to allow the vote of every man who is upon the roll, without taking upon him to decide whether the name is properly inserted or not; and, on the other hand, to refuse the vote of every person whose name is not upon the roll.

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Your Lordships will observe, that by the 22d sect. of the act, which I have before read, it appears to be taken for granted, that there is in every burgh in Scotland an annual election of all the magistrates and councillors, which, as I find from these proceedings, is said not to be the case with Inverkeithing.

Then by the 26th section, it is enacted, "that at "every election of commissioners, for choosing "burgesses for any district of boroughs in that part "of Great Britain called Scotland, the common "clerk of each borough within the said district, "shall make out a commission to the person chosen "commissioner by the major part of the magis-"trates and town council assembled for that pur-"pose; which magistrates and town council shall "take the oath of allegiance, and sign the same, "with the assurance, and shall take all the other "oath appointed to be taken at such election, by "this or any former act if required: and the said "clerk shall fix the common seal of the borough "thereto, and sign such commission, and shall not "on any pretence whatsoever make out a commis-"sion for any person as commissioner, other than "him who is chosen by the majority as aforesaid: and then comes this very strong and severe clause, which I am about to read to your Lordships: "*and if any common clerk of any borough shall "neglect or refuse duly to make out and sign a "commission to the commissioner elected by the "majority as aforesaid; and affix the seal of the "borough thereto, or if he shall make out and sign "a commission to any other person, who is not "chosen by the majority, or affix the seal of the*

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"*borough thereto, he shall for every such offence* "*forfeit the sum of* 500*l. sterling*:" but that forfeiture is, in the express language of this clause, "*to the person elected commissioner for the said* "*borough as aforesaid, to be recovered by him or* "*his executors in the manner hereinafter directed,* "*and shall also suffer imprisonment for the space of* "*six calendar months, and be for ever after disabled* "*to hold or enjoy the said office of common clerk* "*of the said borough, as effectually as if he was* "*naturally dead.*"

The rule here given to the clerk is, that he is to grant a commission to the person who has the majority of the magistrates and town council assembled, and that he is to withhold the commission from him who has not that majority; and he is to do, and forbear to do, these respective acts at the hazard, not only of forfeiting 500*l.* to the person elected commissioner, but also of suffering six months imprisonment, and that sentence of degradation and infamy which disables him to hold or enjoy the office of common clerk of the burgh as effectually as if he were naturally dead.

Notwithstanding all that one has read in these papers, and heard at the bar, respecting the difference between the language of the above mentioned clause, and that of the penal clause in 7 Geo. 2. and the difference between the words of the oath to be taken by the returning officer as prescribed in 16 Geo. 2. and the words of the oath to be taken by him as prescribed in 2 Geo. 2.—I say, notwithstanding all we have heard as to the language of former acts of parliament, one of which says, that if the returning officer "shall *wilfully* annex to

7 Geo. 2. cap. 16. sect. 8.

16 Geo. 2. cap. 11. sect. 35.

2 Geo. 2. cap. 24. sect. 3.

"to the writ any false or undue return, &c." he shall forfeit 500*l.*; while the other requires the officer to swear that he "will return such person "or persons as, *according to the best of his judg-* "*ment*, shall appear to him to have the majority "of legal votes;" and notwithstanding the observations made respecting the omission, in the act 16 Geo. 2. of the word "*wilful*" in the penal clause, and the words, "according to the best of my judg- "ment," in the oath—it is impossible, I think, not to regret that, when this act of parliament was made, which distinctly pointed out the rule with respect to counties, the clerks of burghs were left to regulate themselves by this direction, that they were to return according to the majority of magistrates and town council assembled, the statute itself giving no direction by reference to the roll of those annually elected, and much less by reference to the records of such a burgh as Inverkeithing, where there is no annual election; and that if they committed a mistake they were to be liable in the penalty of 500*l.*, and six months incarceration, and rendered incapable of holding the office of town clerk as effectually as if they were naturally dead. One cannot help regretting that an act, so penal in its consequences, was not rendered so plain, that he who runs might read, and he who read must understand his duty, as is done with respect to those who are to perform this duty in county elections. However, it is not so in the act; and yet if this be the right construction which they put upon it, the clerk, in case of mistake, is liable not only to this forfeiture of 500*l.* to the penalty of

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six months imprisonment, and incapacitation for life, but also to a prosecution for perjury. Where an act of Parliament is so frightfully penal as this is, I trust, I do not go too far when I say, that in no part of this kingdom can it be permitted that a person should be found to be so liable upon loose pleadings, and on proof which does not contain the essence of the crime charged.

Petition and complaint.

I now proceed to state this petition and complaint, which I protest I cannot read without pain. No court in this part of the island, I am sure, would permit such matter as I am now about to read to remain on its records; and I say so the more readily, as your Lordships have heard it stated at the bar, that it was a surprise upon one of the judges who had signed it. If this act shuts out altogether the question of *bonâ fides* (and whether it does I do not mean now either to assert or deny), and renders it imperative on the clerk, whatever his own judgment may be as to the qualification, to return according to the majority of those who have the character of magistrates or councillors, whether they ought to have it or not: if such be the meaning of the act, it would be enough in this petition and complaint, charging the clerk with having incurred a penalty of 500*l.* charging him with an offence for which he was liable to be imprisoned for six months, with a crime which rendered him liable to infamy and incapacitation, and to a prosecution for perjury; temperately and soberly to have stated that such persons were convened for the purpose of choosing a delegate, that he did not return according to the majority, and that the consequences of

the law attached upon him. The mistake of the clerk in thinking that he ought to exercise his judgment as to who were or were not councillors, if it was a mistake, seems to have been so common among the persons present, certainly among the principal persons, that it might have led him, who preferred the complaint, to have done so in terms as moderate and temperate as the necessity of the case would allow. But instead of that the petition and complaint proceeds thus:—"These severe but "necessary penalties, thus enacted by the legislature "against the partiality, fraud, and malversation, "of the common clerks of burghs in matters of "election, have hitherto in general been found suffi-"cient to achieve the objects for which they were "intended; and it was to have been expected that "the example which was recently made by your "Lordships, &c.," then referring to what had happened to the town clerk of another burgh, whose name I will not mention, because I hold it to be one of the most sacred duties of a judge, when a person has undergone the punishment of the law, and the law has done with him, never to mention that man's name if that will do him any farther prejudice. "But in the late election for Inverkeithing, "a striking example has been afforded of a public "officer, who, disregarding alike the provisions of "the statute, and the solemn warning given by "your Lordships, and who, totally unrestrained by "the obligation of his oath, the fear of disgrace, "and of condign punishment, has, after mature "consideration, and with his eyes open, incurred "the whole penalties of the law, and subjected

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" himself, over and above, to a criminal prosecu-
" tion, and the consequences of deliberate perjury.
" The misguided and the guilty individual who has
" thus had the audacity and wickedness to expose
" himself to the vengeance of the law is *David*
" *Black*, town clerk of Inverkeithing: and against
" him the complainer, impelled by a sense of the
" duty which he owes to himself, to the community
" of which he is a member, to the independent
" burghs whom he has the honour to represent in
" parliament, and to the public at large, now calls
" on your Lordships to award to the fullest extent
" the penalties of the statute. In order that your
" Lordships may be more fully able to appreciate
" the motives—" (This is a proceeding, observe, in which the complainer contends that the motives are not a proper subject of judicial consideration :)—

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" which could have induced an individual to pursue
" a line of conduct which must be attended with
" consequences so fatal to his fortune and his re-
" putation : it is proper to mention, that, at the late
" general election, there were two candidates for
" representing in Parliament that district of burghs
" to which Inverkeithing belongs, *viz.* the Honour-
" able Lieutenant General Thomas Maitland, and
" the complainer. The former of these was sup-
" ported in his canvas by those partizans in the vi-
" cinity of Inverkeithing, and by other individuals
" of greater note, whose predilections, it is noto-
" rious, accorded with those political sentiments
" which the said David Black has continually and
" openly avowed. At the last Michaelmas election
" the greater part of the council, amounting to

" twenty-seven in number, were cordial in sup- May 16, 1817.
" porting the interest of the complainer. But from
" the extraordinary zeal and activity with which the
" canvas was carried on" (this is pleading!) " by
" those indefatigable individuals with whom the
" complainer had to contend, and particularly by
" the Earl of Lauderdale (a peer of the realm),
" Lord Maitland, and Mr. James Gibson, writer to
" the signet; thirteen members of the council, pre-
" vious to the day of electing the delegate (which
" took place only a fortnight afterwards), were in-
" duced to rally round the standard of General
" Maitland. Fourteen members of council how-
" ever remained steady in the interest of the com-
" plainer; and hence it was obvious that the whole
" enterprise on the part of the General must prove
" abortive, unless, either by open force or secret
" fraud, the legal majority should be deprived of
" its due influence in the approaching election.
" From the eruptions" (this is pleading!) " which
" were, during the canvas, frequently observed to
" be made from the coal-pits in the neighbourhood,
" by a class of men whose services upon such ad-
" ventures your Lordships are not to be informed
" had more than once been resorted to, apprehen-
" sions were entertained that the contest was to be
" decided by those friends to the freedom of elec-
" tion. But a recollection of what such an appeal
" to the bowels of the earth had formerly cost some
" of the individuals at present engaged, seems to
" have prevented a repetition of that controlling and
" decisive argument. The latter mode of warfare
" was accordingly at length resolved on, which,

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"though attended with less danger, both to the "purses and the persons of the leaders, was in its "result equally powerful. Fortunately for the suc- "cess of their measures, they had an ally who had "both the means and the inclination to serve them. "This was no other than the said David Black, "whom the result has proved to have been a willing "and ready tool, prepared to go all lengths in ad- "vancing the views of those who had thus deter- "mined to avail themselves of his assistance." And then, after some other circumstances, it goes on to state the minutes of sederunt, and a list of the magistrates and councillors present, as to whom it is only necessary to mention the names of John Montgomerie and John Gulland. There had been some proceeding against them in the Court of Session, to remove them from the situation of councillors of this burgh; and an interlocutor for removing them had been pronounced; but against that a reclaiming petition had been presented, and the judgment did not become final; and I think the fair conclusion is, that they were not removed by that proceeding.

Then it has been said that the clerk administered the oaths to these persons, and that therefore he must be guilty of this offence.

The meeting being thus constituted, Sir John Henderson entered an objection to the votes of General Campbell, Duncan Montgomery, Alexander Montgomery, and Mr. Gulland, and called upon the clerk, not only not to receive the votes of these four persons, but also not to call their names in the course of any vote that might that day take place in the council. The answer to this is stated in the

minutes to which I refer your Lordships. And then there follows, in the petition and complaint, this assertion—" That there is an omission in the minutes " is therefore unquestionable; but it is obviously " of no consequence whatever, as let the pleadings, " which the parties interested might make, be what " they would, David Black was bound himself to " have known the limits of his own duty, and to " act accordingly." Granting them that, still the complainer was bound to show that he had been duly elected commissioner.

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The petition and complaint then proceeds :— " From what transpired during this discussion, the " complainer has already mentioned, that he saw " very well that David Black was prepared to go " all lengths, and that he had determined to act as " if he had been appointed by law, not for the pur- " pose merely of receiving the votes of the magis- " trates and town council assembled, but to judge " of the validity of the votes of which that assem- " bly was composed, and under that usurped cha- " racter to give effect to the objections which had " been stated to the votes of four of the individuals " in the complainer's interest. In this situation he " thought it adviseable, in order that the corrupt " determination of this individual to promote the " views of his political partizans might be more " glaringly exposed, to state similar objections to a " number of individuals who were much more ob- " noxious thereto than those against whom Sir John " Henderson entered a protest, satisfied, that if his " suspicions were well founded, David Black would

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"either repel or pass them over altogether." It was on this conduct of the complainer that it was contended that he himself, by proposing objections similar to those proposed in behalf of General Maitland, had done that which had a tendency to mislead the clerk, of whose conduct he complained, and that he was barred *personali exceptione*.

The judges however got over this. According to the notes which I have before me, one of them said, "At first I was stumbled by it, but I think "General Campbell just said, 'Since you are to ex-"'ercise such a power, do it fairly.'" Another says, "As to the personal objection to General Campbell, "I should think if his motion had misled Black; "or contributed so to do, it would have barred the "complaint. But I think that is not in the nature "of things, and that plainly he was not misled." Another said that, "Had General Campbell been "the first to come forward, and lead Black into "error, the objection would have barred his com-"plaint. But it was the other party who led, and "then General Campbell was right to make his ob-"jection." And the Lord Justice Clerk says, "Ge-"neral Campbell only assisted in misleading." But with respect to this point of personal exception, if the proceeding had been by one of the parties against the other, it might be a material question who was the first to object, and who led the other into error. But it must be recollected that this is a proceeding by one of the parties against the clerk, and what signifies it to him which of them began to mislead, if the other contributed to do it.

General Campbell might, I think, with great propriety have said, "I call upon you to pay no attention to these objections, but, if you do attend to them, I have objections of the same kind to which I call upon you likewise to attend, giving you notice however that you ought to pay no attention to such objections on either side." But if General Campbell made his objections without any explanation, then he in some measure concurs in misleading the clerk; and perhaps the best answer is, the admission of Mr. Black in page 21 of the Answers, that he was not in fact so misled.

It is immaterial whether the clerk was the political friend or enemy of either the one or the other of the parties, or had no political partialities at all. We have nothing whatever to do with that.

It apppears that Mr. Black, for his own satisfaction and direction, took the opinion of a gentleman of the name of Adam, whom we have all long known, and who had certainly great practice in the law of Scotland at this bar. Some of the judges very truly and properly stated that Mr. Adam was a good English lawyer; and if Mr. Adam was not then a good Scotch lawyer also, I hope the judges are by this time convinced that he has since improved in Scotch law; and I trust that this difficulty will not arise again. But Mr. Black having thought proper to consult this gentleman, who, besides his extensive practice in Scotch law at this bar, had great experience in election cases; Mr. Adam gave him a reasoned opinion, which as Mr. Black says, led him to make the return which he did make;

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that is, led him to think that, by the constitution of this burgh, a councillor by ceasing to be an inhabitant ceased to be a councillor, and that therefore he might reject these votes, which he accordingly did, and gave the commission to one who was stated in these proceedings not to have the majority of the magistrates and town council; and thereupon the present action was brought.

Interlocutor 22 (signed 25) May, 1813.

The judgment is, "That the Respondent, David "Black, has forfeited the sum of 500*l.* sterling; and "decern against him for payment thereof to the "complainer. Order the said David Black to be "imprisoned for the space of six calendar months, "and declare him for ever disabled to hold or enjoy "the office of common clerk of the burgh of In-"verkeithing, as effectually as if he was naturally "dead."

An objection was made by one of your Lordships, that as the imprisonment, which was part of the judgment, was put off *sine die*, the judgment could not be sustained. The answer was, that, by the practice in Scotland, application might again be made to apply the judgment, and that then the court fixed the time and place of imprisonment. This is altogether irreconcileable to our notions of law; but, supposing that to be consistent with the law of Scotland, there is another difficulty, which, though I do not mention it as one on which your Lordships are to act, is a difficulty which I cannot at this moment answer; that is, that though the principle may apply to a case where the judgment is for imprisonment only, I doubt whether it ap-

plies to a judgment which gives the fine and imposes the incapacitation, but postpones the imprisonment. Suppose that however to be reconcileable to the law of Scotland.

But it is a wholesome principle in a case so penal as this, that we (always recollecting that we are sitting here at present as the Court of Session) should require distinct averment, and clear proof, to the utmost extent to which they may by the law of Scotland be required. Now it ought, I think, to have been distinctly alleged and clearly proved, that the complainer was duly elected commissioner; and *that* could be made out only by evidence or admission of the other party, that the fourteen persons in his (the complainer's) interest were of the body of the magistrates and town council; and that again, unless admitted by the other party, could be made out only by the production of the roll, made up at the last election in those Burghs where there is an annual election, or the records of the burgh where there is no annual election, if this burgh cannot be considered as out of the operation of the statute.

Having taken every possible pains to understand this case by reading these papers, and attending to the able arguments at the bar, and having particularly asked the gentlemen who argued the case for the Respondent to point out where this distinct averment and clear proof appeared, I have not been able to find them: and I am as much bound to act according to my own judgment, as Mr. Black was bound to have exercised no judgment of his own, supposing that to be the true construction of the

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statute. I do not think that taking the names of the persons assembled, and putting them down in the minutes of sederunt, and the administration of the oaths, which is all that he admits, are sufficient for the purposes of this proceeding. He no where admits, "these are persons whose names are on the "records of the burgh, but I think they ought not "to be there." He only put down the names of those assembled, who had been summoned by Green the summoning officer, and who had come in consequence of that summons. But to make him liable in such a proceeding as this, it ought to be shown that he admitted that these were persons whose names were on the records; or otherwise, that fact ought to have been established by the production of the records themselves; and without this, it is not proved that the complainer was duly elected by the persons who were the majority on these records.

Suppose an officer, who had to perform the duty at a county election, had refused to admit the vote of one whose name was upon the roll; if he, by that refusal, became liable to the penalties of this statute—and one cannot well see why, in that case, he should not—can a court of justice find him liable without averment that the name of the person whose vote was so refused was on the roll, and without the production of the roll to show that his name was actually there?

Then, whether these votes were or were not improperly rejected, and without going into that; for want of sufficient allegation, and particularly for want of sufficient proof that the complainer was duly elected

commissioner, which resolves itself into another proposition—for want of proof that the names of the persons, whose votes were so rejected, were on the record, my opinion is, that the judgment cannot be sustained.

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Lord Redesdale. I have but a few words to add to the observations which have fallen from the noble Lord, in which I perfectly concur. The legislature meant that the person who should be duly elected commissioner might bring the action; and that the person guilty of the described offence should be liable in certain penalties. The consequence is, that this being a criminal proceeding, the acts must be distinctly alleged and clearly proved, which are necessary to entitle the party to bring the action, and to entitle the court to inflict the penalty.

It does not appear to me that the legislature, though it gave permission to proceed in this summary way, at all intended to dispense with as much precision as would be required in a more solemn and protracted mode of proceeding. But, in looking at the proceedings in this case, there appears no distinct allegation, nor any thing resembling distinct allegation, that the complainer was duly elected commissioner, and, if it is not alleged, it is not in issue.

Then supposing it to be alleged, is it proved? I have found no evidence to prove it as it ought to be proved; for it is clear that it could be legally proved only by the production of the town council books, and it is admitted that they were not pro-

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duced; so that it stands on the evidence of the minutes taken at the time of election, which are not sufficient to prove the fact that the complainer was duly elected commissioner.

The same proof is necessary to show, that the persons who voted, or offered to vote for the complainer, formed the majority of the body of the magistrates and town council, of which there is no proof. I think, therefore, that these proceedings loosely begun were as loosely carried on; that what ought to have been alleged was not alleged; and that what ought to have been proved was not proved; and that the Court therefore could not properly give judgment according to the act of parliament.

Doubts whether, with respect to clerks of burghs, the true construction of the act is that which the Court below put upon it.

But though there had been distinct allegation and clear proof that the complainer had been duly elected commissioner, I very much doubt whether the true construction of the act is that which the Court below has put upon it: for the statute has not drawn the same line for the conduct of persons in Black's situation, as it has done for the conduct of returning officers in county elections. In county elections a clear line is drawn; and the officer, by adhering to the prescribed rule, acts without peril. But here the officer is to seal the commission to the person elected by the majority of the magistrates and town council: but then the statute has drawn no line by which the officer is to determine who are the majority of the magistrates and town council; and therefore it appears to me that the strictness of the statute does not apply to such cases as this.

And if the constitution of this burgh of Inverkeithing is, in fact, such as it is represented in these proceedings to be, Black seems to have done no more than he was entitled to do: for your Lordships will observe, that, in order to support this action, it should have been alleged that the complainer was duly elected commissioner by the major part of the magistrates and town council; and, in order to show that he was thus duly elected, he must have stated what was the constitution of the burgh; and the act has regard to the constitution of the burghs, and proceeds on the supposition that different burghs have different constitutions. Why then, if it ought to have been alleged and set forth what the constitution of this burgh was, it must then have appeared, that every councillor ought to be an inhabitant of the burgh; and then the question would have been raised, whether a councillor, by ceasing to be an inhabitant, was not, by the constitution of this burgh, to be considered as *ipso facto* dismissed from his situation of councillor, and whether the clerk was not justified in rejecting the votes of persons in that situation. That at least is a question which still remains to be tried.

Then when it is considered that, with respect to county elections, a clear line is drawn by the statute for the conduct of the returning officer, and that with respect to burgh elections no such line is drawn, the interpretation, which the Court below has put upon this statute, is one which your Lordships will be but little inclined to adopt, if it can possibly be avoided. It seems to have been the intention of the legislature, that the acts, which would

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subject the clerk to the statutory penalties, should be acts done in breach of his oath. In the section, which relates to the perjury, it is enacted that, "if "any person shall presume, *wilfully* and *falsely*, "to swear and subscribe any of the oaths required "to be taken by this act, and shall thereof be lawfully "convicted, he shall incur the pains and punishments "of perjury." That leaves it doubtful at least, whether the legislature did not mean that the acts subjecting the clerk to the penalties should be done *wilfully* and *falsely*, which seems necessary in order to constitute the crime of *swearing* wilfully and falsely, that is, corruptly, or meaning to swear that which one knows not to be true. So that it is, at least, doubtful whether the Court below has not put a construction on this statute with respect to the common clerks of burghs which it cannot well bear.

But whether that is so or not, it appears to me, that there is a failure, both of allegation and proof, that the complainer was duly elected commissioner; that what ought to have been averred is not averred; and that if it had been averred, it is not proved; and on that ground, I think, the judgment cannot be sustained.

Judgment of the Court below REVERSED.