

1743.

HUME CAMP-
BELL
v.
HUME, &c.

The Honourable ALEXANDER HUME CAMPBELL,	}	<i>Appellant</i> ;
DAVID HUME, Esq. Sheriff-Depute of Berwickshire, and JOHN SIN- CLAIR, - - -	}	<i>Respondents.</i>

1st March 1743.

MEMBER OF PARLIAMENT.—ACT 7. GEO. II. c. 16.—No action lies upon this statute against the Sheriff, for making a double return ; but action lies against the clerk chosen by the minority of the meeting, who secede from the rest, for returning to the Sheriff the candidate elected by that minority.

[Dict. III. 438.—Elchies, No. 13, *voce* Memb. of Parl. and No. 3, *voce* Appeal.]

No. 68. By the above act, it is provided, that ‘ if the clerk
‘ of any meeting of freeholders, for the election of
‘ a Commissioner to serve in Parliament for any
‘ shire in Scotland, shall *wilfully return* to the
‘ Sheriff, any other person than him who is duly
‘ elected, or if any person, pretending to be clerk,
‘ not duly elected, shall presume to act as clerk,
‘ and shall make such a return, the party offend-
‘ ing shall forfeit L.500, to be recovered by the
‘ candidate to whose prejudice such false return
‘ is made.’

It is also provided, ‘ that any Sheriff who *shall*
‘ *wilfully* annex to the writ any *false or undue*
‘ *return* shall forfeit L.500.’

At the meeting of the freeholders of Berwickshire in May 1741, for electing a member of Parliament for the county, the candidates were Mr. Hume Campbell (the appellant,) and Sir John Sinclair. Considerable divisions took place—the particulars of which it is unnecessary to investigate. The result was, that the meeting was split into two parties; that a preses and clerk were chosen by each, and that two returns were made to the Sheriff, one by Sinclair (as clerk to the minor division of the meeting) in favour of Sir John Sinclair, as the person duly elected Commissioner for the county—the other by another person as clerk of the majority in favour of Mr. Hume Campbell.

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Mr. Hume, the Sheriff, annexed both returns to the writ.

Upon this the appellant preferred a petition and complaint, both against the Sheriff and against Sinclair, founded upon the above act, and concluding against each for the penalty of L.500.

The Court, upon advising the petition and complaint, found (Dec. 9, 1741) that in the case of “*double returns*, no action lies against the Sheriff upon the statute of the 7th of the King, intituled “an act for the better regulating elections, &c.; and found that there is no sufficient evidence for proving the complaint against Sinclair, the clerk, and that neither his assuming the office of clerk, nor his returning Sir John Sinclair to the Sheriff, as the person elected by the meeting in which he acted as clerk, does subject him to the penalty provided by the said statute for a wilful false return, and therefore assoilzied” both defenders from the whole conclusions of the libel.

The appeal was brought from this interlocutor of 9th Dec. 1741.

Entered
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Pleaded for the Appellant:—A false *double* return is as much against law and justice, and as prejudicial to the candidate duly elected—as a false single return, and must therefore be considered an undue return within the words and meaning of the statute; and this statute being a remedial law, calculated for the preservation of the constitution, and the rights of the freeholders, ought to be construed in the manner most proper to attain these ends.

Against Sinclair (the clerk) it was maintained to be clear from the evidence; that, though not chosen by the meeting, he did presume to act as clerk, and did wilfully return a person as duly elected who was not elected by the majority of the freeholders—and, that being present during the whole proceedings, he must have known, not only that he himself had not been duly elected to the office of clerk, but likewise that the appellant was the person duly elected by the majority, commissioner for the county.

Pleaded for the Respondent, (Mr. Hume:)—By the words of the statute, no person complaining of a return made to his prejudice, is entitled to recover any penalty from the Sheriff, except the person entitled to be returned, and not returned. But where there is a double return, and the Sheriff, on account of the difficulty of the case, submits the whole to the judgment of the House of Commons, to decide upon the right of the parties, neither of them can say that he is not returned, or entitled on that ground to maintain an action against the Sheriff.

If the words of the statute do not extend to double returns, no rule of construction ought to carry the penalty further than the words warrant. Cases omitted in framing penal statutes, ought not to

be brought within them by construction, on the ground that though not within the words, they were within the plain meaning of the legislature: such statutes are always strictly interpreted.

Pleaded for the Respondent, (Sinclair:)—There is no evidence that the respondent had wilfully made a false return, that is, contrary to his own knowledge and conviction. He acted as clerk, because he thought he had been so elected, and the return made by him was that which, if his own election had been good, ought to have been made.

After hearing counsel, “it is ordered and adjudged, “ &c. that so much of the said interlocutor, whereby “ the Lords of Session found, ‘ that in the case of ‘ double returns, no action lies against the Sheriff ‘ upon the statute of the 7th of the King, intituled ‘ an act for the better regulating the elections, &c. ‘ and therefore assoilzied the said David Hume ‘ the Sheriff, from the petition and complaint ‘ mentioned in the said appeal, whole conclusions ‘ thereof, and penalties craved thereby, and de- ‘ cerned and declared him quit thereof, and free ‘ therefrom, now and in all time coming,’ be, and “ the same is hereby affirmed; and that so much of “ the said interlocutor, whereby the Lords of Ses- “ sion found, ‘ that there is no sufficient evidence ‘ for proving the complaint against John Sinclair, ‘ the clerk, and that neither the assuming the of- ‘ fice of clerk, nor his returning Sir John Sinclair ‘ to the Sheriff, as the person elected by the meet- ‘ ing, in which he acted as clerk, does subject him ‘ to the penalty provided by the said statute for a ‘ wilful false return; and therefore assoilzied the said ‘ John Sinclair, the clerk, from the aforesaid petition, ‘ and complaint, whole conclusions thereof, and pe-

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‘ nalties craved thereby, and decerned and declared
‘ him quit thereof, and free therefrom, now and
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“ reversed ; and it is hereby declared, that the re-
“ spondent, John Sinclair, is guilty of wilfully mak-
“ ing a false return to the Sheriff of the shire of Ber-
“ wick, contrary to the said act of Parliament, and is
“ liable to the penalty thereby inflicted ; and it is
“ therefore ordained and adjudged, that the said
“ John Sinclair do forfeit and pay to the appel-
“ lant, the sum of five hundred pounds sterling,
“ according to the said act of Parliament : And
“ it is hereby further ordered, that the Court of
“ Session do give all the necessary and proper di-
“ rections for carrying this judgment into execu-
“ tion.”

For Appellant, *Ro. Craigie, Wm. Murray,*
Alex. Forrester.

For Respondents, *Fr. Chute, C. Erskine.*