1755. *March* 4. DALRYMPLE, &c. *against* REID.

No 104.

LANDS mortified to a college, and afterwards alienated, give a qualification; and it is no objection, even upon the act 1681, that they hold neither ward, feu, nor blench; for, besides temporal lands of those different tenures, that statute expressly mentions church-lands; and mortified lands fall under that very predicament. Much less can any difficulty arise from the 16th Geo. II. which specifies no particular tenure, but bears in general 'lands holden of the King or Prince.'

Fol. Dic. v. 3. *p.* 414.

*** This case is No. 33. p. 8613.

1759. ELLIOT *against* SHAW and OLIVER.

No 105.

FOUND, that a disposition of lands, containing an assignation to the charter, but reserving the property to the granter, with infeftment thereon, is not a proper title for enrolment; for a reservation of this kind does not constitute the grantee vassal to the granter.—*See* APPENDIX.—*See* Bald against Buchannan, 8th March 1786, *voce* SUPERIOR AND VASSAL.

Fol. Dic. v. 3. *p.* 426.

1760. *March* 6.

Sir MICHAEL STEWART *against* The BOROUGH of PAISLEY.

No 106.
Body-corporate cannot stand on the roll of freeholders.

THE town of Paisley was first erected in 1488, into a borough of barony, in favour of the abbot of Paisley, and was by him disponed to the Bailies and Town Council, to be holden of the abbot. Afterwards, in 1658, William Lord Cochran, the lord of erection of the abbey of Paisley, resigned the superiority of this borough, in favour of the Magistrates, Town Council, and community, to be holden of the Crown; upon which a charter under the Great Seal and infeftment were expeded.

The lands belonging to the borough, and which were thus made to hold of the Crown, were rated in the cess-books at L. 1078 : 6 : 8d Scots, of valued rent; and, among other public burdens, they were in use anciently to pay their share of the charges appoined by act 35th, Parl. 1661, to be furnished to the Commissioners elected to serve in Parliament for the shire.

In virtue of this freehold, the borough of Paisley stood on the roll of freeholders of the county of Renfrew for a long tract of years, and was in the regular use of sending a delegate to the meetings of freeholders, who was always

No 106. admitted as a constituent member, and voted in all questions at election or Michaelmas meetings.

In the year 1743, a complaint was lodged against the town of Paisley, in terms of the act of the 16th of his late Majesty, for having that borough struck off the roll; but this complaint was dismissed upon an informality, without entering into the merits of the question.—At the general election in 1754, the Magistrates of Paisley made choice of William Caldwall for their delegate; who was present, and voted at said election. At Michaelmas 1759, a new delegate, viz. Bailie Robert Fulton, was received, and voted as a constituent member of the meeting.—But Sir Michael Stewart, one of the freeholders, complained to the Court of Session within four months after that meeting, in terms of the above statute, and insisted, that the delegate of the borough of Paisley had no right to stand upon the roll of freeholders.

Argued by the complainer, The privilege claimed by this borough is of a most uncommon nature, enjoyed by no other borough in Scotland, and directly opposite to the whole spirit and intendment of the election laws. The magistrates and council are but the representasives of the borough. The town's property does not vest in them, but in the community or body-politic; and the delegate by them chosen is a subordinate representative of the borough.—It is certain, that no other freeholder can be admitted to act by proxy or delegation; and it does not occur how this should be competent to a corporation. The delegate is clearly excluded by the statute 1681, which enacts, 'That none shall vote in the election of commissioners for shires, but those who shall be publicly infeft, in property or superiority, and in possession, of a forty-shilling land,' &c. Every requsite of the statute is wanting to this pretended elector.—Neither can he take the oath of possession, which must be sworn in the identical words prescribed by the act of the 7th of the King, viz. 'That the lands and estate of for which I claim a right to vote, &c. is actually in my possession, and do really and truly belong to me, and is my own proper estate, and is not conveyed to me in trust, or for or in behalf of any other person whatsoever,' &c.

Further, it is a general rule, that no person is entitled to a voice in the election of a commissioner to Parliament, but who is equally entitled to be elected; and, as a body-corporate is incapable of the one, it cannot be entitled to the other.

In short, every paragraph of the statutes regarding elections seem to discharge this anomalous right. These statutes speak all along of freeholders, or of persons, which are used as synonymous terms, and seem plainly to exclude bodies politic or incorporate, which never were intended to be, and no where are invested with this privilege; nay, the statutes go still farther, and expressly declare, that bodies politic or incorporate are disabled to vote in elections. By the act 16th of the King, it is declared, "That where lands are holden of the

King or Prince, by a peer, or other person, or body politic or incorporate, who by law are disabled to be a Member of the House of Commons, or to vote in such elections, in such cases the proprietor, and not the superior, shall be entitled to vote." It is true, this clause is inserted in that part of the statute which respects the county of Sutherland; but it is plain, that the words are general, and declaratory of the common law, and are added as a general description of peers and bodies politic, that by law are disabled to be Members of the House of Commons, or to vote in such elections. No 106.

Answered, The Magistrates and Town Council of Paisley are infeft and in possession of an unquestionable freehold estate in this county, greatly above the valuation required by law, and they have been in the constant use and possession of voting by a delegate in all meetings of freeholders, and at all election-meetings, for near 100 years past. By act 35th, Parl. 1661, it is provided, " That besides all heritors who hold a forty-shilling land of the King *in capite*, that also all heritors, liferenters, and wadsetters, holding of the King, and others who held their lands formerly of the bishops or abbots, and hold of the King, and whose yearly rent doth amount to ten chalders of victual, or L. 1000, all feu-duties being deducted, shall be, and are capable to vote in the election of Commissioners of Parliament." Soon after the date of this statute, the borough of Paisley came to hold their lands of the King, in place of the abbot, and lord of erection; and as their yearly rent exceeded L. 1000, so, according to the understanding of the law at that time, they were admitted by a delegate among the freeholders of the county, and have continued to enjoy that privilege ever since. The act 21st, Parl. 1681, extends the privilege of voting a little further, by requiring only L. 400 of valued rent to qualify a freeholder; but there is nothing contained in this, or any posterior act, which prohibits the borough of Paisley from voting by their delegate.

The respondents believe, they are not the only incorporation possessed of a freehold estate, which, by the practice of Scotland, has been admitted to vote amongst the other vassals of the Crown, at the meetings of freeholders. One instance of this kind appears to have been contested and decided in the Parliament of Scotland on the 6th of August 1681, in the case of the double election of the Lairds of Keir and Airth, as Commissioners for the shire of Stirling; where the Parliament found, That the Master of Trinity Hospital in Stirling, who was infeft in lands mortified to the Hospital, of the valuation required by law, had a good title to vote. The decision stands on record in the following words: ' Resolved, That a master of an hospital, having lands mortified there-' to, holden of the King, being forty shilling land, or ten chalder of victual, ' being kirk-lands holden of the King, wherein the Master is infeft, may have ' a vote in the election of Commissioners to Parliament.' And to come still nearer to the present case, it appears from the records of the Scots Parliament, that the title of this very borough to vote by their delegate in the election of a Commissioner to Parliament, was formerly called in question in the year 1703,

No 106. on occasion of a controverted election for the shire of Renfrew; but their vote was sustained by a resolution of Parliament upon the 14th May, said year. The minute of Parliament, in so far as it regards that question, is in the following words: 'Item, The objection against the Town of Paisley, (That being a borough of barony, howbeit infeft, and in possession of a freehold, yet, since no burgess could be a delegate for that end, therefore the incorporation could have no vote in the election of Barons), was considered, and the House having acquiesced to sustain the vote, the objection was passed from by the party, and allowed to be withdrawn.'—The respondents are entitled to found on this as a *res judicata* in favour of the borough.

The complainer has not condescended upon any law, statute, or decision, which expressly condemns or excludes the right of voting in such cases by a delegate. The original plan of our constitution seems to have been, that all the vassals of the Crown, whether sole persons or bodies politic and corporate, should give suit and presence in Parliament. The examples were perhaps but rare of bodies corporate, other than royal boroughs holding lands of the Crown; but if any such existed before the act of James I. which dispensed with the attendance of the smaller vassals, they certainly would be obliged, as vassals of the Crown, to give suit in Parliament by their delegates; and therefore it does not occur, that the right of this borough to vote by their delegates, is either anomalous or unconstitutional. It is true, the language of the election-statutes is adapted to the common case of freeholders, entitled to vote in their own proper right; and that there is no proviso with regard to the freehold estates belonging to bodies corporate, which perhaps were not very common in ancient times; but the respondents cannot perceive, that there is any qualification required by any statutes, which does not belong to this borough, or to the delegate who votes in its right. And more particularly with regard to the trust-oath, the delegate can safely swear, 'That the estate under which he claims to vote, does truly belong to and is possessed by the borough whose delegate he is, for the borough's own use, and not in trust for any other.' It is indeed impossible, that he can take it in the precise words prescribed by the statute; but if the right of the borough is not impeached by any of the preceding statutes, surely this oath required to be taken by the other freeholders, and which, from its conception, does not precisely apply to bodies corporate, can never be deemed to imply a forfeiture of their right.

Besides, whatever doubts might arise upon the abstract question, in case the respondents were now *in petitorio*, they apprehend, that the above judgment of the Parliament of Scotland, in the year 1703, and their long possession as well before as since that decision, must secure them in the enjoyment of that right, until it be taken from them by an act of the Legislature.

Lastly, Supposing the objection to have been originally good, it is not now competent; because, by the act of the 16th of the late King, it is provided, 'That it shall be lawful for any freeholder standing upon the roll, to object to

'the title of any person then standing on the roll, and for that purpose to apply 'to the Court of Session by complaint, at any time before the 1st day of December 1743; and if no such complaint shall be exhibited within the time 'foresaid, then, and in that case, no freeholder who at present stands upon the 'rolls last made up, shall be struck off, or left out of the roll, except upon sufficient objections arising from the alteration of their rights,' &c. And therefore, as the borough of Paisley stood upon the roll at the date of the above statute, and no complaint was properly made in this Court within the limited time, such complaint is not now competent, except upon an alteration of the right or title upon which the borough was originally enrolled. It is true, that, at the last meeting, a new delegate was sent; but the accidental change of the person of their delegate, was no alteration of the right or title upon which the borough stood on the roll, nor was Bailie Fulton of new admitted and entered as a freeholder; the roll was made up as it formerly stood, the delegate for Paisley, without the adjection of any name, standing the 5th in that roll, and Bailie Fulton only produced his commission, and was marked in the minutes as the delegate for Paisley. No 106.

Replied; Whatever might be the constitution of the Scots Parliament before the Union, it is clear, from the whole strain of the election laws since that period, that no borough or body corporate can have a right of voting as a freeholder in any county. As to the case of the Trinity Hospital of Stirling in 1681, had the election laws stood as they now do, requiring both property and possession in the claimant, it is believed, that no regard could have been had to such a qualification. Besides, the claimant himself was there infeft; whereas here the community pretends to a privilege of acting by a delegate or proxy. And further, this claim of the Trinity Hospital has been long dropped, and its name does not now appear in any roll. The other decision of Parliament, *anno* 1703, in the case of this borough of Paisley, is far from being conclusive; for the words of the minute shew, that notwithstanding the objection was passed from by the party, yet the Parliament had difficulties upon it, though, at the last, they allowed the objection to be withdrawn, and acquiesced to sustain the vote. Besides, though that decision were in point, yet it would fall now inevitably to be altered, in consequence of the act 7th of his late Majesty, requiring property and possession, and an oath to be taken to that purpose by the claimant. Neither can the respondents find any protection from the act 16*to* of the late King, which ordains, that no freeholder then on the roll shall be struck off, unless complained of before the 1st December 1743. The evident purpose of that statute was not to fix unalterably the qualification of voters, but to free the persons admitted on the roll from challenge, during their own lives, where no complaint was exhibited within the time appointed. Once in a life the qualification itself does certainly become liable to challenge. Upon this plan the whole of the statute proceeds; every sentence of it relates evidently to an enrolment of persons, and not of rights or titles. The Legislature had no idea of so absurd a thing

No 106. as bodies corporate standing on the roll of freeholders of any county, and so made no provision with regard to them. The directions of the statute, therefore, cannot apply to them; the remedy is left to the common law, by which every freeholder has a proper right and interest, to have every voter, not properly qualified, removed from among them. Besides, supposing the statute did apply, there seems to be much the same alteration, when one delegate is chosen from a borough in place of another, as when a predecessor dies, and the heir craves to be inrolled in his place.

"THE LORDS sustained the objections to the vote of the Town of Paisley, and found, That the delegate of that borough had no right to stand upon the roll of freeholders of the shire of Renfrew, and ordained him to be expunged therefrom."

Act. *Wa. Stewart, John Craigie,* and *Lockhart.* Alt. *Miller.* Clerk, *Tait.*

J. C. *Fol. Dic. v.* 3. *p.* 422. *Fac. Col.* No 219. *p.* 399.

1765. *December.* M'LEOD of Cadbole *against* GORDON of Newhall.

No 107.

WILLIAM GORDON of Newhall, a minor, but within a few months of twenty-one years of age, was enrolled by the freeholders of Cromarty, with a proviso, that he should not be entitled to vote till his majority. Upon a complaint, he was ordered to be expunged, though he had become of age before the complaint was determined.——See APPENDIX.

Fol. Dic. v. 3. *p.* 422.

1768. SKENE of Skene *against* GRAHAME of Flemington.

No 108.

A PROPRIETOR had given in excambion forty acres of land to his neighbouring heritor; but, as he had received another piece of land in exchange, it was held that the transaction made no variation on his valued rent.——See APPENDIX.

Fol. Dic. v. 3. *p.* 415.

1771. *February* 14.

No 109. Captain BASIL HERON *against* JOHN SYME of Meikle Culloch.

Infeftment taken in virtue of a clause of union and dispensation in a Crown charter.—See Skene against Ogilvie, and

AT the Michaelmas meeting for the stewartry of Kirkcudbright, in October 1770, Captain Heron claimed to be enrolled a freeholder upon titles, part of which consisted of a special retour, by which the lands of Drumnaught and Glengornane were retoured to a thirty shilling land, and the lands of Torquinnoch to a ten shilling land, making together a forty shilling land of old extent.