1787. *February* 20. WILLIAM MACDOWAL *against* GEORGE BUCHANAN.

No 142.
An heir of entail obtained an obligation from the substitutes, not to challenge alienations he was about to make in order to create freehold qualifications. The curator for some of those substitutes accepted one of the rights. Found to be nominal and fictitious.

MR SPEIRS of Elderslie held his estate in the county of Renfrew under a strict entail, by which the granting of wadsets or liferents of the superiority was expressly prohibited.

As this stood in the way of his creating freehold qualifications, Mr Speirs obtained from such of the existing heirs of entail as were of age, and from the tutors and curators of those who were minors, an obligation, whereby, on the narrative, 'That the liferent-conveyances proposed by Mr Speirs were not within the meaning, though within the words of the prohibition, since they were not attended with any deterioration of the estate, but, on the contrary, might increase the influence of his family,' they became bound to refrain from bringing any action against him on that account; and likewise, in case of any challenge by the after existing heirs of entail, by which the estate might devolve on them, to account to him for the rents, as if no forfeiture had been incurred.

This obligation, or deed of consent, was subscribed by Mr George Buchanan, as curator of some of the heirs of entail. He afterwards accepted one of the liferent-estates created by Mr Speirs, the yearly produce of which was only 6d 8-12ths Sterling. He was enrolled as a freeholder at the meeting for election in 1786, and took the oaths prescribed by law.

Mr Macdowall, a freeholder in the county, complained to the Court of Session of this enrolment, *insisting*, that Mr Buchanan's qualification was nominal and fictitious. In support of this objection, it was

Pleaded; In Scotland the right of chusing representatives to serve in Parliament has ever been so constituted, as to afford at the same time a proof of the interest which the elector has in the welfare of the state, and a pledge for the independence of his conduct. Thus it has been required, that he should be possessed of a landed estate of some value. It has been farther established, in order to preserve an equality among the persons entitled to this important privilege, that the influence of each landholder should not be in proportion to the extent of his property, but that every one truly possessed of the legal qualification should have the same weight in the national councils.

A formal promulgation of these rules, which result from the original frame of our government, was not necessary. Indeed, as attendance in Parliament was at first esteemed a burden, rather than a privilege, it would be singular if any limitation of this sort had existed. But afterwards, when it became an object of ambitious pursuit, the Legislature interposed, for correcting the abuses which had thus been introduced, and bringing back the system of election to its constitutional basis. As it was at first attempted to fabricate illicit qualifications, by means of redeemable rights, wherein the elector was entirely subject to the will of the person from whom the qualification had been obtain-

No 142. ed, or by conveyances in trust, in which the feudal estate, though apparently in the voter, was, as well as the right of voting, substantially in another, the statute 10th Anne, c. 6. was enacted, for declaring, in terms of the common law, that neither redeemable nor confidential estates afforded a proper right of voting. For the more speedy discovery also of those disabilities, which did not appear from the writings exhibited to the freeholders, every claimant was required to swear, that he did not hold the estate in trust, or under an obligation to reconvey.

Afterwards new methods of creating fraudulent qualifications were devised, the estate conveyed to the intended voter being so inconsiderable as to render an express limitation of his right unnecessary.

As the words of the oath imposed by the act of Queen Anne were not understood to reach this case, the act 7th Geo. II. c. 16. substituted another in its place. By this last statute, all qualifications not founded on a substantial title of property were declared to be contrary to law; the freeholder being required, under a forfeiture of his right of voting, to swear, that his estate was not nominal and fictitious. In the same manner, as every freeholder was obliged to swear that he did not hold the estate in trust, or for the behoof of another, those were, as formerly, precluded who either possessed the feudal estate, or the right of voting in that way. The statute went still farther; for, in order to prevent the partition of landed property with a view merely to create rights of voting, it required the freeholder to swear, that his estate was not created or reserved in him for this purpose.

While, however, the Legislature was thus endeavouring to preserve the right of election in those to whom the constitution had entrusted it, it never could be in view, by rendering the oath imposed by 7th Geo. II. the only criterion in questions of this sort, and thereby making every claimant the sole and exclusive judge of his own conduct, to increase those abuses which already existed. The oath was introduced merely as a test, by which, without precluding those more formal methods of investigation that might arise from the particular circumstances of every case, the question might at once be brought home to the conscience of the voter. So the oaths of bribery and corruption, which may be tendered at the election of Members of Parliament, and on other similar occasions, have never been understood to prevent any person interested from afterwards establishing the actual commission of those crimes. It is indeed true, that a claimant, having once taken the statutory oath, is not obliged to answer particular interrogatories, so as to involve him in perjury; and, on this principle, any decisions which may be quoted on the other side have evidently proceeded. But where the fraudulent nature of the qualification is clearly discernible from the right itself, and still more where the objection arising from the unproductive situation of the claimant's estate, as appearing from his title-deeds, is confirmed by other circumstances, a very different determination must be given. In the present instance, not one only, but all the requisites of a le-

gal qualification, are wanting. The conveyance in favour of the claimant, far from creating in him a substantial right of property, is evidently such as no one would accept of, unless for the purpose of a right to vote. And besides, he has in effect acknowledged, that he does not hold it for himself, or for his own behoof, but dependent on the will, and for increasing the political influence of another. No 142.

Answered; The Parliamentary representation of Scotland, as well as the form of our government, derives its original from the feudal system.

At first every immediate vassal of the Crown was obliged, in person, to attend the King's baron-courts. Afterwards those possessed of smaller estates obtained an exemption; but even when these were, in process of time, excluded, and when, in lieu of personal attendance, they were authorised to send representatives, this was not regulated by the yearly income of each Crown's vassal, which was often greatly impaired by subinfeudations, but by the public subsidies due out of the lands. Act 1427, c. 101.; 1429, c. 127.; 1457, c. 75.; 1503, c. 78.; 1587, c. 114.

The statute of 1661, c. 35. may perhaps appear to have occasioned a deviation from the general rule, by requiring the voter to be possessed of ten chalders of victual, or L. 1000 of yearly income; but this only took place where the old extent, the rate by which the taxes were anciently levied, was not known; and by act 1681, c. 21. which was in 1707 made a fundamental article of the Union of the two kingdoms, it was determined, that liferents or wadsets of superiority holding of the Crown, and of the requisite valuation either according to the old extent, or according to the valued rent, which is now the rule in exacting the land-tax, should, without any regard to the intrinsic worth or yearly produce of these rights, afford an unexceptionable title to vote.

Thus the design that has been ascribed to the Scottish Legislature, of annexing political influence to real property, and of restraining such conveyances as might be made for the sole purpose of conferring a right to vote, appears to be altogether imaginary. Nor were the British statutes of 10th Anne, and 7th Geo. II. intended to alter this part of our constitutional law. These enactments, besides disabling persons holding redeemable estates, were calculated to prevent the creation of nominal and collusive qualifications, in which either the voter did not truly hold the estate as it was described in his title-deeds, or was tied down by an express agreement, or at least by some tacit understanding, to exercise the right of election at the will or for the behoof of another. But a qualification, in which the claimant has in his person every right which the writings exhibited for him import, cannot be held to be nominal and fictitious. And although he may have acquired the estate for the purpose of voting, this will not disqualify him, if he can swear that this was done for his own behoof. Otherwise, indeed, this valuable privilege might be confined to those who are quite indifferent to the good of the community, or be entirely annihilated.

No 142. To this reasoning the peculiar situation of those judicatories in which all questions concerning freehold qualifications must be determined, gives additional force. Anciently the freeholders themselves, at their head-courts, were the only judges in matters of this sort; and the law required the feudal titles of each claimant to be exhibited before them. But as, prior to the acts of Queen Anne and Geo. II. they had no authority to examine either the person demanding enrolment, or third parties, as to the purpose of the qualification, so the oaths introduced by these statutes afford the only method of investigation which they can now use, in order to discover whether a qualification be fraudulent or not. And as no court judging by way of appeal can determine on evidence which neither was nor could be produced in that in which the question was originally tried; so it is not in the power of the Court of Session, after a claimant has, at a meeting of freeholders, taken the requisite oaths, to enter into any farther enquiry.

According to these principles almost every question that has occurred has been determined in the Court of Session; and where a contrary decision was given, it has been uniformly reversed in the House of Lords. Thus liferents or wadsets of the superiority alone, or even those in which the feu-duties as well as the casualties of superiority had been renounced, or such as had been granted by an heir of entail, the limitation of whose right appeared from the investitures of the claimant, have been found to constitute an unexceptionable freehold qualification; while every attempt to shew, from circumstances of an extrinsic nature, either acknowledged by the party himself, or ascertained by other evidence, that the estate had been created or reserved in him for the mere purpose of giving a right to vote, has been frustrated. In the present case, no obligation has been imposed on the freeholder, either to re-convey the feudal estate, or to exercise his right of voting at the will of another person; and he has farther sworn, that he has come under no engagement inconsistent with the external appearance of his right, 30th July 1745, Burnet of Crigie *contra* the Freeholders of Aberdeenshire, No 135. p. 8753; 20th July 1746, Fergusson of Craigdarroch *contra* the Freeholders of Dumfries-shire, No 136. p. 8755; 24th June 1747, Stewart of Barvennan and Hay of Balcarry *contra* the Freeholders of Wigtonshire, No 126. p. 8738; 9th January 1755, Forrester of Denovan *contra* Fletcher of Salton, No 137. p. 8755; 22d Feb. 1760, Lauchlan Grant *contra* Campbell and Others, No 129 p. 8740; 28th July 1761, Stewart *contra* Dalrymple, No 18. p. 8579; House of Lords, 9th May 1770, George Skene *contra* David Wallace, No 141. p. 8758.

When the question between these parties came to be determined, a separate objection was stated by one of the Judges, on account of the form of the writings employed in the constitution of the claimant's right. Mr Speirs, the granter, had, as usual, conveyed the property of his lands to a trustee, who took infeftment. He afterwards obtained from the Crown a new charter of the superiority, containing a precept of sasine, which he assigned in liferent, as far

as was necessary, to the several intended voters. After the liferenters were infeft, the trustee re-conveyed the property to Mr Speirs, who in this way became fiar of the superiority, and proprietor of the lands. This, it was said, was quite inconsistent with feudal principles, and equally so with the law of election, which, with regard to qualifications founded on rights of superiority, required that there should be a proper vassal, by whom the accustomed prestations might be performed. The practice of separating the property from the superiority, as had been done in this case, was said to originate from this cause. No 142.

By a majority of the Judges, however, this objection was not thought to be well founded. They observed, that there was no inconsistency, even according to the strictest feudal ideas, in one person being at the same time superior and vassal in the same lands; and this often happened in cases altogether unconnected with political considerations. The previous separation of the property and superiority, too, in the constitution of freehold qualifications, was only consequentially necessary, that the voter might be able to swear, that he was in possession of all the right that his titles imported, which he could not do, if, after being fully vested both in the property and superiority of the lands, he had re-conveyed the former to the person from whom he had obtained it.

With regard to the general question, a great difference of sentiment prevailed. By some of the Judges it was thought, that on account of the former decisions, the objection here urged was inadmissible; and that it was only by the oath introduced by 7th Geo. II. that an inquiry could now be instituted, to discover whether a qualification, *ex facie* regular, and not limited by any proper deed of defeasance, was fraudulent or not.

Other of the Judges were of opinion, that as the writing subscribed by the claimant did not, in this case, afford sufficient evidence of his holding the estate conveyed to him, in trust for the granter, or under an obligation to vote according to his wishes; so the objection of nominality, arising from the small value of the right, considered merely in a pecuniary view, was not founded in the principles of our election law. It might have been wise in our forefathers, it was said, to require from each elector a proof of his independence, and of his interest in the welfare of the community; by they had not been influenced by considerations of this sort. The right of voting, independently of any patrimonial advantage, had been made a valuable estate, and the subject of commerce; and although, from the great change of manners, this was now the occasion of many inconveniencies, it did not belong to courts of justice to apply a remedy, by giving a different effect to a statutory right than was originally intended by the Legislature itself.

Some of the Judges, again, who considered the objection as well founded, seemed to lay the strest of their opinion on the statutes 10th Anne and 7th Geo. II. Although by the act 1681, no provision was made against fraudulent qualifications, because they were at the time unknown, this, it was said, had been effectually remedied by the subsequent statutes in 1710 and 1735, which

No 142. not only marked out the circumstances by which the legal qualifications might be distinguished from those of a different description, but also established one mode of trial, by which those circumstances might be discovered in the court of freeholders, without, however, limiting the judicatories in which the question might afterwards be discussed from resorting to others equally satisfactory. It would have been a most impolitic regulation, to put it into the power of every one possessed of an illicit qualification, by taking the oath at the requisition of a person in the same interest, to place his conduct beyond the reach of challenge. It would also be contrary to the general principles of the law of Scotland, in which fraud may be proved by every sort of evidence which the circumstances of the case afford. From the former decisions it was farther said, no proper precedent could arise. It was the nature of fraud to assume various colours and disguises; and it could not with any reason be thought, that because in one or more instances the detection had appeared to be incomplete, no attempt of the same kind was ever afterwards to be permitted.

Others of the Judges, concurring in the same opinion as to the illegality of such qualifications as the present, considered them to be contrary to the statute of 1681; and that, as it was then meant to annex this valuable right to landed property, and to give only one vote to each proprietor, so every contrivance framed to evade this purpose was a fraud against the law, and of course illegal and inept. If those unreal qualifications which were now in use had existed in 1681, it could not be imagined that the statute would have been silent on that head. It therefore could not be deemed an improper exercise of authority, in Judges directed, not merely by the words, but also by the meaning of the Legislature, to give that effect to this statute which was necessary for maintaining the rights of election on a proper footing.

The judgment of the Court was in these words:

"THE LORDS having considered the petition and complaint, with the answers thereto, and having heard parties procurators in their own presence, and having advised the memorials *hinc inde*, they find, That the respondent's qualification is nominal and fictitious, and sustain the objection to his enrolment: Find, That the freeholders did wrong in admitting him to the roll; and ordain his name to be expunged." *See* No 40. p. 8625.

For the Complainer, *Lord Advocate, Blair, Geo. Fergusson, Honyman.*
For the Respondent, *Dean of Faculty, Wight, Maclaurin.* Clerk, *Robertson.*

C. *Fol. Dic. v.* 3. *p.* 418. *Fac. Col. No* 313. *p.* 482.

1787. *February* 20.

JOHN CAMPBELL and ARCHIBALD TOD *against* The Honourable WILLIAM ELPHINSTONE.

No 143.
A person was enrolled on a different of

MR ELPHINSTONE was admitted to the roll of freeholders in the county of Renfrew, at the meeting for election in 1786.