did not hold of the king, but of the *trustee of the public*; and that though the trustee happened to be the king in this case, yet that did not vary the matter, since he was not superior *qua* king, or *jure coronæ*, but by another title. While these estates were in the persons of the Commissioners of Enquiry, it is certain that the proprietors had no claim to a vote. Now the crown is come in place of the Commissioners of Enquiry, with neither more nor less power than they had; and so can give no more privileges to those vassals than they had before. *2do*, Any body may apply to the Barons of Exchequer and get these superiorities put up to sale; and if he is the highest bidder he will carry them off, as happened in the case of Gabriel Napier, and then the proprietors of those lands will hold of him; so that their holding of the Crown is too precarious and uncertain to entitle to a vote, since they may be deprived of their holding, and rendered vassals of subjects without any deed of theirs. *3tio*, When the king enters a vassal *supplendo vices* of the contumacious superior, though he is superior to all intents and purposes, during the life of the contumacious superior, yet the vassal has no title to a vote, (it was so decided in the late parliament,) because the king is only superior for a time, and not *jure coronæ*, but as come in place of another. Now our case is rather stronger; because in that case the king holds the superiority absolutely for his own behoof; whereas in our case he holds it in trust for the public, and is obliged to apply the profits and casualties of it to the use of the public.

It was argued for the affirmative,—*1mo*, That, by the Act 1681, all the vassals of the crown are entitled to vote. The proprietors of these lands are vassals of the crown, because they must hold of somebody, and can hold of nobody but the king; and though the profits of those superiorities be appropriated to the use of the public, yet that does not hinder the vassals to have all the privileges of the king's vassals. *2do*, As to the uncertainty of the holding, it is true, that, if these superiorities are bought in Exchequer, they will hold no longer of the king but of a subject; but the same uncertainty is in the case of superiorities falling to the king by forfeiture. In that case the king has a power of interposing a donatar betwixt him and the vassals; but, till he does that, it will not be denied that they are in every respect vassals of the crown.

The Lords found,—That these lands entitled to vote.

1741. *January* 28 *and* 29. BRECHIN ELECTION PROCESS.

[Elch., *Burgh Royal*, No. 15.]

IN this case there were several objections made to the execution of the summons, which the pursuers endeavoured to supply, by giving in what they called a suppletory or explanatory execution. The question was, Whether such explanatory execution could be received.

The Lords found, That it could not, *as containing several facts not mentioned*

in the first execution, after the first execution had been produced in judgment and quarrelled as null. The principal objection against the execution was, that it did not bear a designation of the dwelling-house, or that it did not express where the dwelling-house was situated. The pursuers answered that, as the summons was raised against persons pretending to be bailies of Brechin, and as by the sett of the burgh all the magistrates and councillors must reside in the town, it might easily be inferred that the dwelling-house mentioned in the execution behoved to be *in Brechin*. It was replied that there was no necessity to suppose that *pretended bailies*, (so they were designed in the summons,) resided in *Brechin*.

The Lords found that this was a defect in the execution. *Dissent. Elchies.*

The question came next whether the defect could be supplied, by the messenger adding the place where the dwelling-house was situated. It was argued for the defenders, that, when the execution was produced in process, it was out both of the messenger and pursuer's hands; it became part of the record of court, and the warrant and foundation of the whole judicial procedure; it being defective, (as their Lordships have found,) the process is at an end, and there is nobody in the field against whom an interlocutor finding that it can be supplied, or any other interlocutor, can pass: that, by the ancient form, before written executions were introduced, the messenger and witnesses appeared in court and swore to the verity of the execution; then, to be sure, there could be no amendment of an execution, and it cannot be that there is any alteration in that respect, made by the act appointing written executions, which rather makes the solemnity and strictness of executions greater than less: that it is true the Lords have, by their decisions, so far deviated from the ancient form as sometimes to allow amendments of executions, but that was only in cases where the objection to the execution was no more than a dilator, and where the pursuer had a right of action in his person at the time he was allowed to amend the execution: here, the objection is peremptory, not only of the instance, but of the cause; and the pursuers, at the time they crave to amend the execution, have no right of action, the eight weeks being expired. And lastly, the Lords have found, in the same cause, that a suppletory execution could not be received as containing new facts: that the dwelling-house is situated in Brechin is certainly a new fact, and so material that the want of it was judged a nullity in the execution, and therefore by the former interlocutor it cannot be supplied. To this it was answered by the pursuers, That it was a mistake to say that it was the execution, as returned by the messenger, that was the foundation of the process: that it was the actual service or intimation of the summons, the *injus vocatio*, that was the foundation of the judicial procedure, and, if that was right, the action was legally brought into court, though perhaps the execution returned by the messenger might be defective: that the records of the court were frequently altered and amended, as in the case of a libel: that, where the objection is peremptory of the cause, it is less favourable than where it is only peremptory of the instance; but even there are examples that an amendment has been allowed where the objection was peremptory of the cause: that there was no new fact proposed here but only an explanation of the old.

The Lords found that the not designation of the dwelling-house could be supplied.—*Dissent. Preside et Elchies.* The *ratio decidendi* was the practice and course of decisions.

1741. *February* 7, 8, &c. ELECTION PROCESS of DUMFRIES-SHIRE.

[Elch., No. 4, *Member of Parliament.*]

IN this case the Lords found that the Privy Council of Scotland had no power to annex or disjoin counties. The Court seemed to be of opinion that a charter from the crown, before the 1681, was sufficient evidence of the old extent, as being liable to no suspicion that the extent was heightened in order to create a vote. But the same regard was not given to charters from subjects, because in them, the old extent, which was the rule for the relief of the taxation, which the superior had from the vassal, was determined commonly by private paction betwixt them. Nevertheless they found that a charter from a subject, in the year 1610, was sufficient evidence for a jury to retour the old extent in 1736. This carried by the President's casting vote. Arniston *non liquet*, Elchies *Dissent.*

N.B. In this case the retour alone was not thought sufficient evidence unless supported by some other document, nor was the objector put to the necessity of reducing the retour; but they found, that even a charter from the crown in the 1613, designing the lands to be a four-pound land, was not sufficient evidence of the old extent, because the lands were church lands, and it did not appear that there ever was any general commission to retour all the church lands of Scotland, or that these lands in particular ever were retoured; and because lands were frequently designed to be pound and penny lands without any regard to the old extent, perhaps from the real rent; and thus they explained the Act 233, 1594.—*Dissent. Preside.*

Item, The Court was of opinion, that the meaning of the Act of Parliament 1681, requiring that the old extent should be *distinct* from the feu-duties in feu-lands, was to obviate an abuse that had crept in some time before, (Arniston said, about the Reformation,) of retouring lands holding feu either of the king or church to the avail of the feu duty by way of old and new extent, whereas, by the taxation Act 1597, the feu duties ought to be deduced, and the free rent of these lands only considered, in rating the extent; therefore, when the feu duty and the old extent was the same, there was just reason to suspect that the lands were retoured in the abusive manner above mentioned, and not in the way prescribed by the Act of Parliament 1597.

Item, The Lords found that a freeholder could be enrolled at a Michaelmas head court so as to vote for preses and clerk at the election, though happening before the year and day was expired. They went upon the same principles