

acted as constituent members of the meeting, having voted in the election of Preses and Clerk. No 162.

*Replied,* The present case has no affinity to that of a freeholder who has conveyed away a part of the lands which belonged to him when he was enrolled; Mr Rose's original titles, and those on which he must now claim, being essentially different. But were the cases precisely the same, it would be of no consequence; for, whatever might have been said, if, before determining with regard to the propriety of putting the oath, the freeholders had restricted Mr Rose's claim, and if, after this, Mr Rose had declared his willingness to swear, the determination of the Court of Review must be regulated by the proceedings as they actually took place.

The first judgment of the Court was, for "dismissing the complaint."

But, after advising a reclaiming petition, which was followed with answers,

THE LORDS found, "That Mr Rose having refused to take the oath of trust and possession, his name ought to have been expunged from the roll."

Act. Blair, Abercromby.

Alt. Wight, Rolland.

Clerk, Gordon.

C.

Fac. Col. No. 113. p. 213.

1796. February 26.

TURNBULL against SIR DAVID CARNEGIE.

No 163.

At an election meeting, a freeholder having moved, that if any person should withdraw, after voting for Preses and Clerk, he should be held as having done so in order to avoid the trust oath; and, therefore, should be struck off the roll; a person having accordingly done so, a majority of the freeholders expunged him from the roll; and the Court of Session affirmed their decision. —See APPENDIX.

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

1803. February 25.

GORDON against HERON.

No 164.

JOHN GORDON of Kenmore was enrolled a freeholder of the stewartry of Kirkcudbright in 1789, upon his whole lands, without distinction. Their general valuation was L. 1630 Scots. He afterwards sold the lands of Hill, valued at L. 60 Scots, for the purpose of redeeming the land-tax, without applying to have the valuation disjoined, nor to have his qualification restricted to the remaining part of his estate.

At the meeting on 23d July 1803, the oath of trust and possession was tendered to Mr Gordon by Major-General Goldie, and he refused to take it, but

VOL. XXI.

49 A

The name of a freeholder, who had sold part of his estate, retaining a sufficient freehold, and who declined to take the oath of trust and possession,

## No 164.

(but with that explanation,) being expunged from the roll by the Parliamentary Preses, ordered to be replaced.

under this qualification, that he had sold a part of his estate, yet still retained what, by the valuation roll, was valued at L. 1570, thus affording a freehold qualification.

Upon this Patrick Heron of Heron, the Parliamentary Preses, expunged his name from the roll. Against this Mr Gordon complained, calling all the freeholders who were present; and

*Pleaded,* Wherever the name of a freeholder on the roll is struck off at a meeting of freeholders, it must be held, that this is the act of the freeholders; Wight, p. 146. The act 37th Geo. III. c. 138. bestows no power upon the Parliamentary Preses of doing so at his pleasure; and the right of judging, in the first instance, whether a freeholder be entitled to stand upon the roll, has always been vested in the Court of Freeholders, 7th Geo. II. c. 16. Against their judgment, then, the complaint is offered.

At the time the complainer offered his vote, he was possessed of lands valued at L. 1570 Scots; and it is established law, that a freeholder, disposing part of his original qualification, has a right to continue upon the roll, provided he has retained such a qualification as would entitle him to be enrolled on a new claim; Macleod against Sir John Gordon, 17th January 1766, No. 96. p. 8080.; and Sir Hew Dalrymple against Sir George Suttie, 1768, (*See APPENDIX*) in Wight, p. 284. A freeholder may take the trust oath as to the lands which he still retains, and on which he claims to vote, although these may not be the whole lands on which he was originally enrolled; and if those to which the trust oath applies afford a qualification, the freeholders cannot strike him off the roll.

This restriction, it is said, could not be attended to by the Parliamentary Preses, before the Court of Freeholders was constituted. But 37th Geo. III. c. 138. allows the oath of trust and possession to be put to any freeholder, before voting for Preses and Clerk, in the same way as it is now practised after the Preses and Clerk are chosen. Supposing the Parliamentary Preses to have the power of receiving or rejecting a vote when tendered, he can have none whatever to expunge a name from the roll.

*Answered,* The summary mode of petitioning the Court in election cases, is the creature of statute alone; which, by 16th Geo. II. c. 11. is permitted, when a person claiming to be enrolled shall, by judgment of the freeholders, be refused to be admitted, or where any one who stood upon the roll shall, by the like judgment, be struck off, or left out of the roll. But the wrong which is here complained of was not done by judgment of the freeholders; it was before they had any legal existence as a body; and when they were constituted, no complaint was made to them; so that they cannot be held to have refused the complainer redress. The conduct of the Parliamentary Preses can only come under the cognizance of the Court in the shape of a complaint for penalties; but no power is given to review his proceedings. The complainer, however, satisfied that the Preses followed the path prescribed to him by law, makes

no claim whatever for penalties; and although a wrong may have been committed by him and the freeholder who tendered the oath to him, yet it is not sufficient that there is a wrong, for the Court to apply a remedy in this summary manner; Rankine against Ramsay, 23d January 1767, *infra, h. t.*; Campbell of Shawfield, 9th August 1774, *infra, b. t.*; in Wight, p. 137.

The statute 37th Geo. III. c. 138. allowed the oath of trust and possession to be put to any freeholder before voting for Preses and Clerk; but the duty of Parliamentary Preses is purely ministerial; he has no power of judging, and it is incompetent to enter into any discussion before him. He has no power to alter or amend the oath, but must put it in the precise words of the statute; Fraser against Sir John Gordon, No. 156. p. 8777.; \* Banks against Jeffrey, 6th June 1792, *See APPENDIX*; and if the freeholder refuses, his name must be expunged. The mode usually adopted is to fill up the oath for each freeholder, with the name of all the lands on which he has stood on the roll; which seems to be the meaning of the words, "the lands and estate of

" for which I claim a right to vote;" as otherwise, a freeholder might insert the name of a different estate, when denuded entirely of his original freehold; and the question is, Whether it be sufficient that only a part of the original estate should be inserted. If this were the case, it would leave with each person the power of cognoscing his own qualification; a right which exists, in the first instance, in the freeholders, who are entitled to be satisfied of the claimant's right, of which they could not judge till after being constituted by the election of Preses and Clerk.

*Observed* on the Bench, That the respondent's construction of the act 37th Geo. III. would make it inconsistent with the act 16th Geo. II. which says, that a freeholder standing on the roll is not to be struck off, unless upon sufficient objections, arising from alteration of title, &c. The act 7th Geo. II. does not mean that *all* the lands upon which a freeholder was originally enrolled, must be inserted in the oath, but implies the very contrary. The oath is not a test of qualification, except in one particular, *viz.* that the estate is not held by him in trust, nor nominal and fictitious. As to the sufficiency of his title in other respects, such as, whether his circumstances have been so altered, by partial alienations, as to reduce him below a legal qualification, this can only be judged of after the meeting is constituted, and in the form of an objection lodged against his title. It is said, that he might have complained after the election of Preses and Clerk, and got the meeting to replace him on the roll. But this is not a form which any of the acts require. In fact, the wrong was done not by the Parliamentary Preses alone, but by the meeting, who refused to admit his vote, when tendered, for the choice of their Representative, and who made up a new roll, leaving out his name. Besides, even

No 164.

if he had left the meeting when his name was expunged, or neglected the proper steps at that period, he is entitled, within four months, to come into this Court, and to prove his title to be continued or replaced on the roll. This is merely a question of enrolment; the question, whether his vote ought to be counted or not for the election of Preses and Clerk, or of their Representative, not being *hujus loci*, but competent only before the Committee of the House of Commons. The blank in the oath ought to be filled up by the party himself, not by the person who calls the roll, who has no power to exercise his judgment about the matter, but must call the roll as it stands. If the party acts improperly in filling up this blank, or swears falsely, he will be liable in the consequences of such conduct. A person standing on the roll is not obliged to say that he has all the lands which he had twenty or thirty years ago, but that he has all for which he claims, *i. e.* maintains his right of voting; or, in other words, of continuing on the roll; and to this there can be no opportunity of contradiction till after the meeting is constituted.

The Court (25th February 1803) found, that John Gordon ought not to have been expunged from the roll of freeholders; therefore, ordained him to be replaced; and found Patrick Heron and Major-General Goldie liable in expenses.

To which judgment the Court adhered, (10th March 1803,) by refusing a reclaiming petition, without answers.

For Gordon, *H. Erskine, J. Clerk, Arch. Campbell, jun.*  
 Alt. *Solicitor-General Blair, Hay, Williamson, Catbcart.*  
 Clerk, *Menzies.*

Agent, *Tho. Grierson, W. S.*  
 Agent, *And. Macwhinnie.*

F.

*Fac. Col. No 90. p. 197.*


---

 S E C T. V.

Freeholders must be infest on proper Titles, and their infestments recorded, year and day before Enrolment.

1755. *January 17.*JOHN BUCHANAN of Carbeth *against* FREEHOLDERS of STIRLINGSHIRE.

No 165.

It is sufficient that the infestment entitling to a vote, be re-

A COMPLAINT being made to the Court of Session by John Buchanan of Carbeth against the freeholders, for sustaining the following objection as sufficient to bar him from the roll, viz. That his infestment was not registered a year before the test of the writ for calling a new Parliament. It was *answered*, That