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ELPHINSTONE v. CAMPBELL, &c.

HONOURABLE W. ELPHINSTONE, - *Appellant;*
CAMPBELL and Others, - - *Respondents.*

House of Lords, 30th April 1787.

RIGHT OF VOTING.—Whether a conveyance of a superiority of lands held under strict entail, conferred a substantial right of voting; or was a mere nominal and fictitious creation of a right, resorted to for the purpose of giving a right to vote for a member of Parliament?

At the Michaelmas court, held for the county of Renfrew, within a few days of an approaching election of a member to serve in Parliament for the county, the appellant claimed to be enrolled as a freeholder, upon a life-rent right of superiority, and produced the following titles, viz. 1st, Charter by the crown in favour of John Shaw Stewart, Esq. of Greenock., one of the candidates, and an heir of entail to Sir John Shaw, late of Greenock, dated 3d Feb. 1774, containing, *inter alia*, the twenty merks land of old extent of Fynart, part of the barony of Greenock. 2d. Disposition by the said John Shaw Stewart to the appellant, the Honourable Mr. Elphinstone, in liferent, dated 16th April 1785, of the said twenty merk land of Fynart, with an exception of the property, which had been recently separated from the superiority, in the usual manner, by a trust feu. 3d. Sasine thereon in liferent, dated 22d April 1785.

It was stated by the appellant, that the lands contained in this disposition were retoured to a forty shilling land of old extent and upwards, by the retour of James Shaw of Greenock, dated, October 1594.

The respondents thought proper to challenge this title as nominal and fictitious, in so far as it gave the appellant no real property in the lands; but were titles devised and completed, solely with the view of voting.

The respondents farther objected, that when the statutes of 1661 and 1681, relative to the qualification of electors, were passed, the legislature had no idea, and did not foresee that so bad a use could be made by them, as to make them the handle of creating a number of freehold qualifications upon one estate, by granting wadsets and liferent conveyances of the superiority to different persons, merely to en-

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able them to vote in elections of members of Parliament. The idea of the legislature, in those days, was to annex the rights of voting to real landed property; the only superiorities then existing were real and substantial estates; and no such thing was then known or dreamed of, as for one and the same person to have three or more votes in a county, because he happened to be possessed of three or more forty shilling lands. But the objection came with the more force, when it applied to the granter of a liferent superiority, who was expressly prohibited from alienating, by the fetters of an entail, of the estate so alienated.

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The Court of Session pronounced this interlocutor:—"The "Lords having advised this petition and complaint, with the "answers thereto, replies, duplies, and writs produced; they "find the respondent's qualification is nominal and fictitious; "sustain the objection to his enrolment; find that the free-"holders did wrong in enrolling the respondent on the roll "of freeholders of the county of Renfrew; therefore grant "warrant to, and ordains the Sheriff clerk of the said county "to expunge the name of the said Mr. William Elphinstone, "the respondent, from the said roll, and decern."

Against this judgment the present appeal was brought.

Pleaded for the Appellant.—Although the appellant has only an estate for life in the lands on which he claimed to be enrolled as a freeholder; and although the yearly profits of that estate are trifling in point of value, yet he is equally entitled to the privileges of a freeholder, as any person who is vested in the fee of the estate of the greatest yearly value.

By the original constitution of Scotland, at least as far back as information can be got from authentic history or record, all the immediate vassals of the crown were obliged, without distinction, to give attendance in the King's great council of Parliament. The subordinate vassals neither were obliged nor had a title to appear in that assembly. They sat in the courts of the barons under whom they held their lands, and were understood to be sufficiently represented and protected by them. Even the taxation imposed upon land by Parliament was, in the first instance, laid upon the immediate vassals of the crown alone, although they were at the same time allowed, in their own courts, to levy a certain proportion from their vassals retainers.

In process of time the number of the immediate tenants of the crown became so great, and the estates held by some

of them were so small, as to render it necessary to relax, in some degree, from the rigour of the ancient law. Statutes were accordingly passed in the reigns of James II. and James the IV. of Scotland, dispensing with the attendance of all barons and freeholders whose estates were within a certain extent; but still every tenant of the crown, how small soever his estate might be, and whether the property or *dominium utile* remained with himself or had been granted to a subvassal for payment either of a feu or blanch duty, had an undoubted right, if he chose to exercise it, to attend and give his voice in Parliament.

At last, in 1587, a material alteration took place, by the introduction of representatives from each county; but although the right to vote in the election of such representatives was confined to those who were possessed of a forty shilling land in free tenantry, and had their dwelling within the shire; yet it was not required that they should be possessed of the property or *dominium utile.* The old idea of attaching the seat in Parliament to the immediate tenants of the crown was still retained, and of course a bare superiority entitled its owner either to elect or be elected. Neither was there any distinction between persons who has the right of superiority fully and absolutely invested in them, and those who had only right to it during their own lives.

Although the plan laid down by the statute 1587 for the election of commissioners from shires appears to have been abundantly plain, it should seem that several questions had arisen with regard to the right of voting in these elections. And, to prevent such questions in time to come, it was declared by the act 1661, cap. 35, " That beside all heritors " who held a forty shillings land of the King's Majesty *in* " *capite*, that also all heritors, liferenters, and wadsetters, " holding of the king, and others who held their lands for- " merly of the bishops or abbots, and now held of the king, " and whose yearly rent doth amount to ten chalders of " victual, or one thousand pounds (all feu duties being de- " ducted) shall be, and are capable to vote in the election of " commissioners of Parliament, and to be elected commis- " sioners to Parliament, excepting always from this act, all " noblemen and their vassals."

To discover whether an estate on which a vote was claimed by the owner of the superiority yielded ten chalders of victual, or £1000 Scots of free rent, might often be attend-

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ed with difficulty. Many questions might have still arisen, and much time been consumed in Parliament by trying the merits of controverted elections. The legislature, therefore, passed a new act in 1681, which, after reciting "the "great delay in dispatch of public affairs in Parliament, and "Convention of Estates, occasioned by the controverted "elections of commissioners from shires," laid down a variety of rules for regulating these elections in time to come.

By this statute it was enacted, "That none shall have "vote in the election of commissioners for shires or stew-"artries, which have been in use to have been represented "in Parliament and conventions, but those who at the time "shall be publicly infeft in property or *superiority* and in "possession of a forty shilling land of old extent, holding of "the king or prince, distinct from the feu duties in feu lands, "or where the said old extent appears not, shall be infeft "in lands in public burden for His Majesty's supplies for "four hundred pounds of valued rent, whether kirk lands "now holden of the king, or other lands holding feu waird "or blench of His Majesty as king or prince of Scotland. "And that the apprisers or adjudgers shall have no votes in "the said elections during the legal reversion, and that, "after the expiring thereof, the appriser or adjudger first "infeft shall only have vote, and no other appriser or ad-"judger coming in *pari passu*, till their shares be divided, "that the extent or valuation thereof may appear; and that "during the legal, the heritor having right to the reversion "shall have vote, and likewise proper wadsetters having "lands of the holding, extent, or valuation foresaid, which "rights to vote, proceeding upon expired comprising, adju-"dication, or proper wadset, shall not be questionable upon "pretence of any order of redemption, payment, and satis-"faction, unless a decree of declarator or voluntary re-"demption, renunciation, or resignation be produced; and "that apparent heirs being in possession by virtue of their "predecessor's infeftment, of the holding, extent, and valu-"ation foresaid, and likewise *liferenters*, and husbands for "the freehold of their wives, or having right to a liferent, "by the courtesie, if the said liferenters claim their vote, "otherwise the fiar shall have vote; but both fiar and life-"renter shall not have vote, unless they have distinct lands, "of the holding, extent, or valuation foresaid; but that no "person infeft for relief or payment of sums shall have

" vote, but the granters of the said rights, their heirs or " successors."

Upon this statute then, which is the latest act relative to the qualification of electors, it is clear, 1st, That it adhered to the ancient law and practice, by giving the right of voting only to those who were infeft and in possession of lands held by them immediately of the king or of the prince; 2d, That it gave that privilege to those who were so infeft and in possession, although the right was only a naked superiority, and the property or *dominium utile* was vested in others holding under them. 3d, It gave the right indiscriminately to those who were infeft and in possession of such superiority, in virtue of a proper wadset, redeemable for payment of a certain sum, or in virtue of a liferent right to terminate at their own death, as well as to those who had the absolute fee of the superiority vested in them, and were able to dispose of it, or to transmit it at pleasure, without the possibility of challenge. 4th, It made no distinction, whether the profits arising from the superiority on which the vote might be claimed were great or small. In that respect, a superior who could claim a feu duty from his vassal of £500 per ann.: and another who could only demand a penny Scots, a pair of spurs, an ounce of pepper, or the blast of a horn, stood upon the same footing; and, lastly, It made no distinction whether the right of superiority, either in fee or in liferent, had been acquired merely with the view to obtain a vote in the election of a commissioner, or for other pnrposes. But, hence, it necessarily follows that a liferent of a naked superiority, though attended with no profit whatever, and although purchased and obtained in gift from the person in whom the fee was vested, for the sole purpose of enabling the liferenter to elect, or to be elected a commissioner to Parliament, did, by the act 1681, constitute a legal and perfectly unexceptionable freehold qualification.

Supposing therefore the case to be quite a new one, the appellant should humbly apprehend that no good objection could lye to his right to vote. The case, however, is far from being of that sort. On the contrary, it has been established by a variety of decisions of the Court of Session, and by several judgments of your Lordships, that liferent rights of superiority, though affording the most trifling yearly profits, and although obviously created for the sole purpose of enabling the grantees to vote in elections for members to serve in Parliament, afford unexceptionable freehold qua-

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lifications, noways liable to the imputation of nominal and fictitious.

Thus in the cases of Ferguson, 20 July 1746, and the Stewart and Hay, 24 June 1747; Forrester *v.* Fletcher in 1755; and case of Campbell of Shawfield, 1 Dec. 1760, House of Lords, and other cases, the same objection now made was repelled.

Pleaded for the Respondents.—1. Because the lands on which the appellant claimed a right to be enrolled as a freeholder, being settled under the fetters of a strict entail, with the usual prohibitory, irritant and resolutive clauses, against alienating, contracting debt, and altering the course of succession, the said John Shaw Stewart, Esq. was expressly prohibited and debarred from conveying the said lands to the appellant for any purpose whatever. 2. Because although it may be *jus tertii* for the respondents, as freeholders, to maintain a challenge competent to heirs of entail, there can be no doubt they were at liberty to show that the title is defeasible at the pleasure of third parties, which every qualification upon an entailed estate unquestionably is. 3. Because the said title appears on the face thereof to be *a created* title, and granted with a view solely of giving the appellant a freehold qualification, in order to enable him to vote in the election of a member to serve in Parliament for the county of Renfrew, without conferring any beneficial or patrimonial interest whatever; and is therefore *nominal* and *fictitious* in the direct terms of the oath introduced by the act 7 of Geo. II., and contrary to the spirit and meaning of all the other election laws. 4. Because such fictitious and fraudulent operations seldom fail to throw the title-deeds of estates into great confusion, and produce numberless questions concerning the rights of property and succession in Scotland, the consequences of which are extremely injurious. 5. And because if such rights were tolerated by law, and established into a system, the privileges of the real freeholders would be annihilated, and the power of electing the representatives for counties in Scotland thrown entirely into the hands of a few great families, most of whom are otherwise represented, and the ancient principles of the constitution, though fixed at the Union, and confirmed since, would be reversed.

After hearing counsel,

Lord Chancellor Thurlow said,

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LORD CHANCELLOR THURLOW :—

" MY LORDS,

" The great importance of this cause, and its general reference, as has been observed by the counsel upon both sides, to the laws of Scotland with respect to sending members to Parliament, will undoubtedly entitle it to every degree of the most anxious attention which your Lordships can possibly bestow upon it.

" The manner in which it struck my mind, laid me under no small difficulty and embarrassment, whether we could enter into the question of fraud in this case. It strikes the mind with indignation, where a fraud upon the law has been actually committed, that the court, and judges composing that court, are the only persons, and should be the only single persons in all the country, that are unconscious of the fraud, and incapable of going into it, and consequently not able to decide upon it; that would be rendering justice deficient, and embarassing the court by its own rules of decision.

" Where there is actual fraud, your Lordships would certainly be anxious to pursue that fraud with all the diligence and effect it can possibly be pursued with, in order to do justice in the matter; when I use the word fraud, I lie under the necessity of explaining that I speak of fraud purely in the legal sense. It happens, that by the law of Scotland and of this country, and of every country in the world, there is a great number of things that are called fraud in law, which will carry along with them no degree of baseness or dishonour; therefore, I hope I shall be understood as speaking of this *subject*, and by no means conveying the slightest imputation with regard to the *person* whose name has been so often mentioned, and who has been spoken of in very high terms in this case, and I make no doubt he deserves to be spoken of in the highest terms as a man of honour. I have not the honour to know him nor Mr. Stewart, but it would be extremely hard, when one is using phrases of this sort, that they should be looked upon as personal; when I say, this is a practice to disappoint the law of the land, and in that way constitute a fraud upon it, *that* is my true meaning.

" Upon the other hand, I should be extremely sorry to proceed by any rule, in the discovery of fraud, which could be so gross and so extensive as to cut down those votes,which, by the law of Scotland, undoubtedly are admissable; for it has been very well observed; and properly agreed by the counsel upon both sides, that your Lordships do not sit here trying this cause as a House of Parliament, but you sit here as a Court of Session merely; and you ought to pronounce no judgment in this place but that which the Court of Session ought to have pronounced in the court below; and, for that purpose, you should lay out of your consideration every view of policy, every view of conveniency,—you should lay out of your consideration every

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circumstance and ingredient whatever, except that which the letter of the law prescribes.

"In considering this case, I take it to be extremely clear, that, by the law of Scotland, the estate which is pretended to be conveyed in these deeds, if it be a real estate, taken and enjoyed by the grantee of that estate fairly and *bona fide* for his own use and benefit, does give a vote for a member to serve in Parliament.

"My Lords, by the ancient law of Scotland, as your Lordships perfectly well know, every vassal of the crown, every baron, properly speaking, appeared in Parliament, and his sub-feus were, in ancient times, not regarded much more than tacks are now. He represented the whole land; it was of no consequence to his title, for appearing in Parliament, how much of the beneficial interest was in him; he represented the whole land. Afterwards, when the attendance of the lesser vassals or barons, who held of the crown, was dispensed with, and they appeared only by their representatives, those who voted for the representatives, voted for them in the very same right that they sat in Parliament by, consequently, the right to vote for the representative was in the immediate tenant of the crown, let those who held under him enjoy ever so much of the beneficial part of the estate.

"In 1681, when the mode of electing in Scotland came to be settled, those principles were exactly followed, and the right of voting was given either to the wadsetter of a superiority, or to the liferenter of a superiority, and it was given to them without regard to the quantity of real and beneficial interest which they held in the land.

"In the times I am alluding to, certainly the object of sitting in Parliament, however it might touch the minds of individuals, did not apply to them in the same way as, from the lapse of time and change of circumstances, it has done since. The utmost point that then could strike the ambition of a gentleman, was the honour of representing a considerable number of people in the county in which he lived, and of being preferred by them to that seat in Parliament. That ambition there was, but it did not go the length of dispensing with the constituents paying the expenses of their representative in Parliament. I speak only of what took place after the act 1681, if I do not confound that statute with the 12th of Anne; but, from that time to this, the law has certainly received no change whatever; because, though a great many acts of Parliament have been made for securing due observation of the law, yet the law, as made in 1681, none of them offer to make a change in it, nor by construction can be understood to have made a change. Your Lordships will see what the law was in 1681. It is true superiorities gave the vote, it is also true every man who had such an estate had a vote, and it was in the contemplation of the law, as it was regulated in 1681, that the right of voting should be preserved to each individual; I mean in contradistinction to this, the qualifications which, your Lordships know, is forty shill-

ings land of old extent holden of the king, or £400 of valued rent as a superiority, gave a right of voting;—but no one person, if he had 40 or 500 such estates, which, by being divided into so many parts, would have given so many votes, could, while the estate was in him, be entitled to any more than one vote. At the same time, if the estate came by accident to be divided, each of the persons to whom it fell in that manner would have a right of voting

"Hence your Lordships see there are two points equally deserving your attention as a court of justice. I am not considering now whether political power should be in proportion to the extent of property, or whether the man who held an estate that contained the 40 or the 500 votes should have them all. That is not our business,—we sit as a court of justice, to carry the law as it stands into execution; and there are two points in the law, as it stands, which it behoves your Lordships anxiously to see executed, as far as the rules of the law can go. The one is, that every person who has an estate to which the law annexes the vote, should be enabled to give the vote; the second, that no person should be able to give more than one vote for the estate so abiding in him. It was argued, but little insisted upon, nor do I believe it was capable of being much insisted upon, that the difference of times between 1661 or 1681, and the present hour, made a difference in the right of voting; that because at that time there was no such practice as that of stripping the estate of all its beneficial enjoyment, and afterwards of conveying out the mere superiority for the purposes of supplying votes, so it could not then be in contemplation to give the right of voting to the description of votes now brought to the bar. I confess my opinion, as far as that goes, is clear, that by the act of 1681 they meant to give the privilege to the *slightest estate* which, upon paper, could be drawn forth within the letter of the statute of 1681; so that if a man, entitled to a forty shillings land, were to feu it out, taxing the casualties, or charging them in any other manner, so as to reduce the estate to a superiority of but a penny value yearly, I take it to have been the intention of the statute of 1681 to give to that estate a vote. Now, if the case were supposable, I would say, that when the estate had been so stripped as to leave no actual value in it of above a shilling a year, the person having such an estate would be entitled to vote. As to what they call wadsetting, your Lordships know perfectly well that it is the conveyance of an estate liable to be enjoyed so long as it is *not redeemed*, but liable to be *redeemed* upon payment of a sum supposed to be advanced upon it; and if the sum advanced had been twenty shillings, or reduce that to sixpence, or if it had been ten shillings, or lower down, so low as a penny Scots, imagining the case of such a wadset as that to be clear of any fraudulent purpose, my opinion is that wadset gives the right of voting.

"I will put the case, if possible, even stronger than that,—I will suppose that a gentleman of estate, who does not care a farthing for either of the candidates, or for politics, should resort to the opportu-

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nity of selling the superiorities of it,—I do not know that the act of 1681 would prevent him from doing so, by the means of feuing out the estate, and then sending those superiorities to market, in order to be purchased out and out by other persons for their own benefit, according to the law of villinage; and the right of representation in Scotland has most lamentably and unfortunately fallen off its ancient basis, in so much, that the whole value of the landed property in that country, speaking largely and generally about it, may be in the hands of those that would have no concern whatever in the choice of the representative of the county, which might be placed in the hands of men who have no earthly estates but such as I have been describing,—*that* certainly was not the object of the law; but if it be a political object, and an honest object, to give to the land of Scotland its due weight in parliamentary representation,—I am afraid that it is not to be obtained by a judgment of any court of law, but resort must be had to Parliament, to cure the great mischief that has happened to the constitution of that country, as well as other countries, where the change of circumstances has been such, that the rule and order of government not being changed conformable to it, things have been turned so absolutely round, as to disappoint all the good sense and sound policy upon which the constitution stood originally. I have been anxious to state this as to what I look upon to be the right of voting in Scotland. I am afraid, in practice it has been reduced to the condition of a burgage tenure here; and when I mention that tenure, it may be necessary to make some observations upon it.

"I know the House of Commons is a competent Court to decide upon all questions of the election of their own members, and there stands upon their journals various decisions supporting burgage tenures, which I do not mean to impeach, or throw the smallest reflection upon in the world.

"There is a latitude and sovereign power that belongs to the House of Commons, that perhaps never ought to bind itself by those narrow rules a court of justice should go by. If the title to a seat in Parliament had been in England, as now in Scotland, referred to the decision of a court of justice, we might, without complaining, venture to guess that a gentleman could not have been at liberty to send his steward with ten or a dozen parchments, to be distributed among as many voters round a green table, and then to pick them up after the election was over. I rather believe *that* could not have happened; but whether there be or not that peculiarity in the burgage tenure of England, it is abundantly clear an abuse like that does not exist in the constitution of Scotland; it is also undoubtedly clear by the statute of 1681, and various acts of Parliament, by which they have tried to secure it against fraud since that time, that how slender soever the beneficial interest may be that is taken by the conveyance, it must be taken *bona fide*, and be the absolute property

of the person pretending to property in it; and, consequently, if there be any means of impeaching it with fraud, those means are open with respect to this species of burgage tenure. There was a great deal of dispute at the bar, upon what should be deemed a nominal and fictitious vote, created or reserved only for the purpose of giving a vote at the election, and not a real and true estate in the grantee of the estate, for his own use and benefit only, and for the benefit of no other person. I speak of the words of the oath, for whether the words of the oath alter the law or not, and I think they do not alter it, they are certainly a parliamentary recognition of what the law was at that time. It seems, therefore, upon every question of that sort that arises before the Court of Session, the *single* point for them to try is, not what is the extent of the estate, but whether that estate is vested in the grantee *bona fide*, and is a true and real estate for his own use and benefit only, and for no other purpose; for if the *jus disponendi* remains in any other person, it is in vain that the parchment conveys the right to him, for the real use of the estate remains in another, and that objection to the estate is now competent.

" I did put the case to the gentlemen at the bar, of one species of title,—I admit to be a good one,—it is the wadset. I will suppose an estate of sixpence a year value, were mortgaged for ten shillings, at 5 per cent, and that the supposition was, that twenty or thirty pounds had been paid for making out all the charters, sasines, and other instruments, by which the estate was to be conveyed away, and the question was to arise merely upon the state of that transaction; what would be the effect of it? I did not perceive it was argued a moment, but *ex facie* upon such a transaction as that, it would be deemed an international evasion of the law upon the part of the granter and grantee.

" It is argued, that in Scotland trust could only be proved by writing, and, consequently, there could be no means of proving the granter retained any interest whatever in the estate, unless it were so proved. I do not know of any proposition that appears to me so perfectly contrary, not only to the common and received notions of law, but even to common sense, and, more particularly, the common sense requisite upon the present occasion.

" By the nature of the thing, the writings must be all clear, but the question made by the statute is, Whether those writings are sincere as well as clear—whether they convey an estate for the sole use of the grantee, or for the use of the granter? It is said, *that* must appear out of the writings themselves. It is manifest the question is a question of fraud; and till I heard it argued here, I never heard that a question of fraud was not to be made out by a parole evidence, proving such facts as infer fraud. In the case of such a wadset, my idea is, that it would be a fraudulent vote, though he had taken an estate sufficient as the law

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of Scotland says for the purpose of voting, but had taken it in such circumstances as showed that it was not calculated to serve his own purposes, therefore, it afforded pregnant evidence of fraud. This is a case where there is a liferent of a shilling value, that is, it is absolutely nothing. I am speaking of the appellant's title. But if ever such an estate was bought out and out, with a view, not to the enjoyment of a shilling a year, but for the purpose of enjoying the franchise, which, by the constitution of that country, is annexed to that estate, provided that is distinctly and clearly done, I should apprehend that estate would convey the vote.

"But if a person conveys the estate to another, who, instead of paying the purchase money, and instead of paying the expenses of conveying it, holds it at the expense of the granter himself, and more particularly so, if he held it under an honorary engagement, that he could never disturb the title deeds of the granter, (there are a thousand ways it might be stated), in that case, the person that holds it would be thought of in the most reproachable manner in the world, if he was to offer to interrupt the title of the granter; if he holds it under an honorary engagement the most imperfect in point of actual obligation, in my opinion, he holds it fraudulently. The right of using it is not in reality, or in fact in him. Rumour says, that in this and in that county in Scotland, great lords, who have vast estates, so as even to divide the county among them, have taken upon them to convey by parcels the superiority to two or three hundred different persons, for the purpose of giving them what have been called confidential votes. If they are called confidential, I should have no difficulty in saying what I think of them, namely, that they are no votes at all; because, from the very moment a man holds the estate with any degree of confidence, there is a want of a legal and complete right. I am glad it has occurred to me to mention it here; because it is a matter very important for your Lordships' consideration, if those estates, by any of the confidential holders, were to be withheld from the family that granted them, that family has no way whatsoever to get them back again, no process of confidence would enable them to get them back, they would be obliged to prove a fraudulent conveyance; and the law would not permit a man to plead upon his own fraud. The estate therefore could not be drawn back by the granter, upon the plea of fraudulent confidence, and yet it is not held by the grantee legally. I do not care for pointing out by what means, but this information has been conveyed to me in such a form, that I verily believe it will not be long before your Lordships will hear of disputes to a great amount, turning upon the grounds I am now stating. It happened, not a great while ago, that the estate of no inconsiderable family was thus granted out, and the gentleman did not think himself at liberty to avail himself of it, he was prevailed upon not to do it; but if he had thought proper, he might have availed himself of it, and have kept the estate.

"This brings me to the consideration of the vote now in question. The fact seems to be admitted to a certain extent, I wish it had been more fully so. This estate of Mr. Stewart is an estate held under the strictest entail known by the law of Scotland. He was under the necessity, in the first place, to violate the conditions of that estate, by making the subinfeudation to a person in confidence. I hope he knows whom to trust; how he is to get *back* that estate is more than I know.—After he had made that subinfeudation, he conveys the superiority to Mr. Elphinstone and several other persons; those conveyances were also breaches of the entail, to which the heirs of entail were not bound to consent; and if an heir of entail, after he had come to such an agreement, should think fit to resile, there could be nothing to stop the declarator. You cannot allege your own fraud to stop a declarator at the instance of another.

"Mr. Elphinstone is supposed to have taken this estate, subject to be called back in this manner by the heir of the entail.—It is gravely alleged, upon the part of the appellant, and it is certainly true, nobody can challenge the estate but the heir of entail. If he was to challenge it, he could get back the estate, but till that is done the estate does remain in the estimation of law, the estate of the voters; but the question is, not whether it is not in the estimation of law the estate of the voters, but whether, according to the tenor of the transaction, a court of justice can or cannot discover that this is a species of estate which Mr. Elphinstone would not have taken upon his own account, or upon any account, but that of the granter's request. If you were to lay it down as a rule in the case, that, provided he had paid 10 guineas for the estate, or 20 or 30 pounds for the conveyance of it, that should prove it a *bona fide* estate, you would decide upon one of those objections, but not upon the other, and lay down a general rule which I certainly do not. I am not laying down a rule of law; I am not laying down a rule of evidence; I am not laying down a rule of presumption, nor, in short, any one rule by which the court can be afterwards bound. It must be upon the general state of the transaction, that the court can collect that the estate, instead of being intended to be used or disposed of by the grantee, was intended between them to be at the use and disposition of the granter, and wherever a case affords circumstances sufficient fairly and roundly to raise that presumption in an unanswerable degree, or to raise it in a degree which the party himself cannot answer, in such a case as that, the vote must be held to be void.—Some cases have been quoted, as decided by your Lordships, in which it is supposed to have been laid down as a rule, that the party himself could not be examined as to the *bona fide* manner in which he held the estate. Cases were adduced, which *prima facie* go someway towards affording an inference that such were the ideas in your Lordships' minds at the time of that decision. I beg, in the first place, to remark, that you have laid down no such rule by any de-

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cision, consequently, when these cases come to be argued, if ever they should again, the question will not be, Whether it is absolutely true, that no man can be examined that has once taken the freeholder's oath? Many of them do not choose to do it, and I do not wonder at it. For though no disgrace or baseness could be imputed to a making a vote of this sort, it cuts a little closer, when the voter comes to take the oath. I do not wonder that a man of honour should say, as was said at the bar, that he took this estate as a real and true estate, for his own use and benefit only, and not another's. But I doubt whether Mr. Elphinstone would have sworn so in this case. I am sure he would not, if he had felt in his own mind any honorary obligation, even though not a legal one, to use or to dispose of that estate at the requisition of the granter. If your Lordships will cast your eye over the statute, you will find that the whole scope and object of the oath was, that the Court of Freeholders (who had not the means of a long examination, and cannot pursue the case in the manner a Court of Justice would, and are to pursue it by such short means as they have in their power) may have reference to the oath of the party. Are there words in this statute that can prevent the Court of Session from going farther in such a case as this? If there are any in it, it is more than I yet know or am inclined to agree to, unless I find that the cases, taken altogether, do absolutely fix it upon me by the authority and reasons of them. It is every day's experience in every court of justice in the world, (and there is no reason for the contrary, where a man is giving testimony upon an estate or other interest, which has been drawn into question), and I know of no interest whatsoever, which can prevent a man being again examined after taking an oath. A case occurs to my mind, upon a policy of insurance. A great number of underwriters may have actions brought against them upon the terms of the agreement, it would be strange, if the broker or other witness examined in the one cause, could never be examined again; it would be extraordinary, if he could say, I have been sworn in a cause already, you cannot examine me again. In the Court of Chancery there is no such rule; a person being sworn upon one cause, will not prevent his being examined on another. It appears to be impossible that such a maxim should have been set up. I do not see upon what ground it would have been necessary to the decision of these cases, nor upon what ground it is possible to declare that a man must not be examined in what they call a judicial examination, because he has once before taken the freeholder's oath. I am inclined to believe, if they examine accurately those cases, they will find, that the objection was to the form of particular interrogatories, and not to be bottomed upon that principle, that a man who has been examined once, can be examined no more.

" My Lords, this case comes before your Lordships under particular circumstances. A great many such cases were under the view of

the Court of Session at the same time. In some of them evidence was given, and they were argued in the Court of Session at large; but this was argued *ore tenus* without evidence or fact stated in writing. Without a distinct view of the evidence that was given in the case, particularly where it is attended with such doubts and nicety as this, I should be extremely sorry to be forced into a decision, where every article and every circumstance of it was not so perfectly before the Court as it ought to be, in order to found the judgment which your Lordships ought to pronounce upon it.

"No case can come before this House, where the utmost anxiety should not be used to adhere closely to the rules of law, and if there be a case distinguishable from another in that particular, I should say this is one which, by the peculiar constitution of the kingdom of Scotland, the Court below ought to judge of with the utmost attention, as the right of a seat in Parliament may depend upon it, and upon account of the great and momentous concern which is involved in it. Therefore, I will not propose more to your Lordships, than to remit this back to the Court of Session, with a view they should proceed to the examination of all the points in it, that their decision may be founded upon the evidence stated amply and decisively before them, and they should decide what steps ought to be taken in the matter."

Lord Loughborough,

"I shall not detain your Lordships long, by entering into any state of the law, or discussing, to any extent, the circumstances of the case. That has been done so fully and ably by the noble and learned Lord upon the Woolsack, that I shall content myself with expressing my sense of the great obligation which the House and the public owe to the noble and learned Lord, for so clear and luminous a deduction of the law of Scotland, with respect to the right of election, guarding it against any supposition, that there can be an intention to innovate upon the established right of election, as it stood at the Union, and at the same time, doing the Court of Session that justice which is due to them for the attempt they have made in the present case, to have the law executed according to its true spirit, showing their intention not to pervert the precautions the law has used to secure the real right of election against the devices used for creating fraudulent qualifications. I perfectly concur with the noble and learned Lord. The direct decision of the question here would be premature; and, therefore, I must express my assent to the noble and learned Lord's motion, to remit it to the Court of Session, that they may hear the points further, and go through it again, and determine it in the manner they shall see proper."

The question was then put by the Lord Chancellor, and carried unanimously, That the cause be remitted back to the Court of Session in Scotland, to hear parties further there-

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upon, with liberty to receive such new allegations and evidence as the occasion may require.

It was therefore ordered and adjudged, that the cause be remitted back to the Court of Session in Scotland, to hear parties further thereupon, with liberty to receive such new allegations and evidence as the occasion may require.

For the Appellants, *Alex. Wight; Wm. Adam.*
For the Respondents, *Ilay Campbell, R. Dundas.*

THE GOVERNOR and COMPANY of the BANK of ENGLAND, - - - *Appellants;*
WILLIAM PULTENEY, Esq. - - *Respondent.*

House of Lords, 14th December 1787.

HERITABLE SECURITY—RANKING—INDEFINITE PAYMENTS—ASSIGNATION.—A creditor held an heritable security for repayment of his advances, to the extent of £12000. He also held an adjudication debt against the same debtors, for a bank debt paid by him for them, which was not included in the heritable bond. On the bankruptcy of the debtors, and ranking and sale of their estate, Held, that he was entitled to impute indefinite payments made to him to his least secured debt, so as to make the heritable bond cover the whole debts due to him within the amount of that security; and, therefore, that he was preferable, both for the balance due on the bond debt, as well as for the adjudication debt. In this last debt, another party was bound as co-surety. Held, that on payment, he was not bound to grant the creditors an assignation to his claim.

Robert and William Alexander, late merchants in Edinburgh, having become bankrupt, an action was commenced in the Court of Session, for the purpose of ranking their creditors upon the price of their estates, which were brought to judicial sale.

Among the creditors appeared the respondent, who claimed, in virtue of an heritable security, a preference on the estate of Cluny, situated in the county of Fife, for a debt of £12,000, or, at least, for the balance remaining due by the bankrupts.

The debt was contracted in the year 1769, by Mr. Pulteney accepting bills drawn upon him by the bankrupts for the following sums :—