"We must therefore remit to the Court to review their judgment as to the dry dock, and to consider as to this along with the other property."

It was therefore ordered and adjudged, That the several interlocutors complained of, so far as they find that the pursuer is still entitled to claim her legitim, be, and the same are hereby affirmed; and it is further ordered, that the cause be remitted back to the Court of Session to review the interlocutors complained of, as to all other matters, and particularly to determine, at one and the same time, upon the rights of parties with respect to the dock and pertinents, the tenement of houses, and the share in the Ropery Company, mentioned in the interlocutor, dated 17th, signed 22nd November 1803.

For the Appellants, *John Clerk, James Moncreiff.*

For the Respondent, *Sir Sam. Romilly, David Cathcart, Robert Bell.*

NOTE.—It is stated in the Faculty Collection, vol. xvii. p. 684, that after the remit back to the Court of Session, "the case was set-"tled extrajudicially, in consequence of the defender having paid a "considerable sum of money to the pursuer" (respondent).

THE HON. CHARLES FLEMING of Cumbernauld, *Appellant;*

GEORGE HARLEY DRUMMOND, Esq. one of the Freeholders of the County of Kincardine, ... } *Respondent.*

House of Lords, 23d July 1811.

FREEHOLD QUALIFICATION—FICTITIOUS RIGHT TO VOTE.—In this case, objections were stated to the claim of a party claiming to be enrolled as a voter. The Court of Session sustained the objections, without taking or ordering any proof as to the fictitious nature of the claim. In the House of Lords, case remitted, with liberty to receive such evidence.

The appellant being seized and possessed, as a liferenter or tenant for life, of certain lands in the county of Kincardine, called the Kirklands of Kinneff, &c. held by him immediately of the Crown, and those lands being of an extent which by law entitles the holder to vote in the election of a

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member of Parliament for the county, he presented his claim in terms of the statutes, to the freeholders assembled, at Michaelmas 1808, praying that his name might be inserted in the roll of freeholders, and he produced therewith his title-deeds, and the evidence of the valuation of the property.

To this claim the respondent, as one of the freeholders, objected, in the following words:—"The titles produced "by the claimant afford only a bare liferent superiority to "the lands specified in his claim. They are nominal and "fictitious, and confidential, and therefore the claimant "ought not to be enrolled;" to which objection it was answered, "That the qualification objected to is neither "nominal nor fictitious, having been obtained by the claim-"ant, purely for his own benefit and advantage. A liferent "vote, honourably and fairly acquired, and without the "claimant being under any confidential obligation whatever, "such as the present, is unexceptionable, and by law cannot "be called in question."

The Court of Freeholders having sustained the claim, and ordered the appellant to be enrolled, the respondent presented a petition and complaint to the Court of Session, as allowed by the statutes, praying the Court to find, that the freeholders of the county of *Kincardine* did wrong in enrolling the appellant, and to ordain his name to be expunged from the said roll. In the complaint, it was stated, that the complainer meant to support the objection he had urged at the meeting of the freeholders, (namely) that the appellant's pretended freehold is nominal, fictitious, and confidential, and such as the Court could not sustain; that the real nature and character of freehold qualifications, and whether they were substantial rights, or fictitious conveyances, for the purpose merely of serving political views, and advancing the interests of the granter, is to be gathered, not only from the appearance *ex facie* of the titles, but from every circumstance connected with the transaction. The titles in this case, it was said, evinced that it was not a real or substantial freehold; it was the conveyance merely of the liferent of a bare superiority, yielding no reddendo that could be taken into consideration. The Crown charter appeared to have been expede for the purpose of creating this nominal qualification, and another of the same description, in the person of Mr. W. G. Adam, the appellant and that gentleman being both the nephews of Lord Keith, the

granter, by whom the charter was expede, and the one of them, in like manner, the nephew, while the other is the son of the present representative of the county, who is brother-in-law of the right honourable granter of these rights.

The appellant having put in answers, denying that his freehold was nominal, and this being denied, he contended that it was incumbent on him to prove the fictitious nature of the right, while in fact he had not condescended upon any means of proof whatever. The Court of Session, after some further pleading, pronounced this interlocutor :—"The "Lords sustain this complaint, and find that the freehold- "ers of the county of Kincardine did wrong in enrolling the "respondent in the roll of freeholders of said county, at "the Michaelmas meeting held on the 4th October 1808; "and therefore grant warrant to and ordain the sheriff- "depute to expunge his name from the said roll: Find the "respondent liable to the complainer in expenses; appoint "the account thereof to be given into Court, and remit to "the auditor to tax the same, and to report."

2nd and 7th Dec. 1809.

On reclaiming petition, the Court adhered.

June 25, 1810.

Against these interlocutors the present appeal was brought to the House of Lords.

Pleaded for the Appellant.—The statute 1681 defines the qualifications of those entitled to be enrolled. By that statute it is enacted, that those *publicly infeft* in property, or superiority in lands, of the extent and valuation mentioned, shall have right to vote in the election of the commissioners of shires, and *likewise liferenters*, if the liferenters claim their vote. The law thus standing, it is not meant to be disputed that the statute gives the right of freehold to a party actually and *bona fide* the owner of such estate; but, at same time, *possession*, in the literal sense, could not be understood, when the right was given to a superior, and not to the vassal; and, from the beginning to the end of the statute, there is not a syllable defining the *quantum* of beneficial interest which the superior must have. It is sufficient that he stood in the relation of immediate tenant to the Crown in lands to a certain extent, though his vassal, or the actual possessor, drew the whole fruits. By the 7th Geo. II. c. 16, a certain oath, called the trust-oath, is prescribed for every claimant to take, when required so to do, otherwise his name is to be expunged. Imposing these oaths gave rise to questions, as if it had altered the law, while it evidently left the law precisely as it was, and only estab-

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lished one mode of discovering the truth, or whether the estate claimed upon really belonged to the claimant. With the quantum of the beneficial interest accruing to the claimant, or the legal interest being a liferent or a fee, or the claimant being a superior only, and not full proprietor, the oath, and the statute by which it was introduced, had nothing whatever to do. But the terms of it for a time, and till it was explained by numerous decisions of the Court of Session and of your Lordships' House, startled scrupulous persons. For a long time it was supposed that the oath was the only mode of discovering, whether the claimant's estate was held for his own benefit, or was nominal and fictitious, created to serve the purposes of another person; and this doctrine was certainly countenanced by several decisions of your Lordship. But, in the case of Forbes *v.* Macpherson, the Court of Session having refused to allow a claimant to be examined upon interrogatories, an appeal was taken, and your Lordships' judgment reversed the decree below, and ordered, "That the respondent do confess or deny the averments in appellant's pleadings." Since that time, it has been considered settled law, that the freeholders may insist on a claimant answering pertinent questions, and by every other competent mode of proof, according to the course of the Court of Session, may make out that the qualification is nominal. The appellant was willing to submit to examination, and to let the respondent into every other means of proof that could be suggested, but the respondent declined the offer, and rested his cause on what was said to appear on the face of the title, or was to be inferred from circumstances notorious and undenied.

Ante vol. iii. p. 169.

Pleaded for the Respondent.—The expiscation of questions of this kind is by two modes, 1. By means of the trust-oath; and, 2. By special interrogatories. An objector, or a body of freeholders, may resort to these or not just as he pleases, or they may submit the case to the judgment of the Court merely upon the proofs, as exhibited by the titles, the situation of the parties interested, and concomitant circumstances; or the qualification may be investigated by a proof at large. In the cases of Elphinstone and Macpherson no doubt was entertained upon this point. Here the appellant's title is the liferent of a superiority; and as in his pleadings in the Court below, he did not controvert the respondent's averment, that it was an estate perfectly unsubstantial, and yielding no return, this fact, *ex concessu* of the

Ante.

party is fully established. The respondent averred it was a gratuitous conveyance; and this has never been denied. The crown charter, and the foundation of this and Mr. Adam's qualification, is a deed which pertains to Lord Keith, the granter; and though it is denied that this charter was obtained for the mere object of creating these two qualifications, it has certainly been made use of for that purpose. Nor can a favourable inference be drawn from the circumstance, that the date of the other titles in these gentlemen's favour do not precisely correspond. The disposition by Lord Keith to Captain Fleming is dated the 20th, and his sasine 29th June 1806, while the disposition to Mr. Adam is dated 30th August, and his sasine the 5th September. This seeming disconnection can have no effect. Besides, the situation and the circumstances of the parties, the granter and the grantee, furnish a most conclusive inference, amounting even to proof of the appellant's objection. The granter is a peer of the realm, a rank to which he has been exalted as the reward of his public services. The grantee, on the other hand, is a gallant officer in the British navy, the nephew of the noble granter, and in no way connected with the county, but having estates in Lanark and Dumbarton, with which alone he is politically connected. These circumstances are sufficient indications of the state of matters; and it is impossible to view the relative situation of these parties without at once perceiving that the appellant's right is a fictitious one.

After hearing counsel, it was

Ordered that the cause be remitted to the Court of Session to hear parties further thereupon, with liberty to receive such new allegations and evidence as the occasion may require, and with liberty for the complainer in the Court of Session, to call upon the defender to confess or deny such averments, as to the alleged nominality, as the complainer, by interrogatories or otherwise, according to the course of the Court, shall call on him to confess or deny. And it is ordered and adjudged, That the Court do review the interlocutor appealed from, and determine whether it is sufficiently established that the freeholders of the county of Kincardine did wrong in enrolling the respondent; and also to determine whether such facts shall be sufficiently established by what hath been already made to appear to the said Court, together with any such evidence or

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proof as may be received, or made under such liberty as aforesaid. And it is further ordered, That the appellant be for the present restored to his place in the roll of freeholders aforesaid, but with liberty for the Court of Session to ordain the proper officer to expunge his name from the said roll, in any stage of their proceedings, under this remit, in which justice shall appear to the said Court to require the Court so to ordain.

For the Appellant, *Sir Samuel Romilly, Fra. Horner.*
For the Respondent, *Thos. Plummer, R. Hamilton, James Wedderburn.*

NOTE.—Unreported in the Court of Session.

LIEUT.-COLONEL ALEXANDER MACDONALD of Lyndale, sometime Major and Commandant of the Caledonian Volunteers, } *Appellant;*

CAPTAIN GEORGE ELDER, late of the Cambridgeshire Militia, now a Captain in the Royal Rifle Regiment, . . } *Respondent.*

(*Et e contra.*)

House of Lords, 24th July 1811.

CONTRACT—OBLIGATION—PROOF OF PAYMENTS—PAROLE—JUDICIAL DECLARATION.—(1.) Circumstances in which it was established by letters, &c., that the appellant had come under an obligation to procure the respondent a commission in the army; and having failed to do so, was liable in a sum equal to procure an ensign's commission at the time. (2.) Held that it was incompetent to prove payment of money by witnesses, or otherwise than *scripto vel juramento*, and, therefore, that the appellant was not entitled to call for a judicial declaration from the respondent (pursuer.)

This was an action raised by the respondent against the appellant, in the following circumstances, as set forth in the summons :—" That an agreement was entered into betwixt " the pursuer and the said Alexander Macdonald, whereby, " on the one hand, the pursuer was to raise a certain num- " ber of men at a certain rate, for said corps, and, on the " other, the said Alexander Macdonald was to procure or " present to the pursuer, a commission as ensign in said