

1790. *January 20.*SIR WILLIAM DUNBAR, BARONET, *against* JOHN DAVIDSON.

## No 161.

A freeholder's refusal to take the oath of trust, implied by his retiring from the meeting, even before it had been proposed to tender the oath to him.

AT the Michaelmas meeting of the freeholders in the county of Caithness, in the year 1789, John Davidson, being then on the roll of freeholders, gave his vote in the election of Preses and Clerk.

After this, a good deal of altercation ensued; but no business was done, until one of the freeholders tendered the oath introduced by 7th Geo. II. to several of the voters, and, among others, to Mr Davidson; but, by this time, Mr Davidson had left the meeting.

The freeholders having refused to expunge Mr Davidson's name from the roll, Sir William Dunbar preferred a petition and complaint to the Court of Session. In defence, Mr Davidson

*Pleaded,* The right of voting as a freeholder being the creature of positive statute, the proceedings, with regard to it, must be precisely regulated by the different enactments which have been made in that behalf. Thus it has been found, that the oath introduced by the 7th of the late King, could not be put before the election of Preses and Clerk, although, in this way, the fate of the return may be determined by those who have no right to vote. In the same manner, the mere absence of a freeholder, when this oath is tendered, cannot deprive him of his right of voting. For this purpose, it is necessary that he should refuse to take the oath; a circumstance which cannot, with truth, be here alleged; 24th February 1773, Sir Ludovic Grant against Archibald Duff, No 157. p. 8778.

*Answered,* There is a great difference between extending a regulation merely statutory, to a case which the words of it cannot, with any propriety, reach, and controuling those devices which are calculated, without offending against the letter of the law, to elude its true meaning. In the one case, the powers of legislation are necessary for remedying an imperfection, which the act of the Legislature itself has occasioned. In the other, those to whom the execution of the law has been entrusted, only give a proper effect to the enactment as it has been made. Though, therefore, it has been decided, that the trust oath could only be tendered when the freeholders were employed in voting for a Member of Parliament, or in adjusting their roll, these being the only two cases provided for by the statute; yet in a question, whether a freeholder has refused to take the oath, when duly tendered, the Judges must be authorised to pronounce a decision agreeable to the circumstances of the case, as they really happened. If it should be determined by the freeholders, that the oath, when duly tendered, should not be put, this would be deemed equivalent to a refusal, if the freeholder to whom the oath was tendered did not declare his readiness to swear. And the absence of a freeholder at a period so critical, after he had voted in the election of Preses and Clerk, and when he

could not be ignorant of an intention to put the oath, must be viewed in the same light. Without this, it would be in the power of a person, once admitted to the roll of freeholders, to give his vote in the election of Preses and Clerk as long as he lived, however exceptionable his freehold qualification might be; 9th December 1780, Ferguson against Campbell, No 158. p. 8778.; 7th July 1784, Brodie against Urquhart, No 159. p. 8779.

All the Judges seemed to think, that if any freeholder had declared his purpose of putting the oath before Mr Davidson left the meeting, his absence afterwards would be construed into a refusal to swear, unless he could give a sufficient reason for his quitting the meeting. And a majority being of opinion, that Mr Davidson's conduct was not less ambiguous,

After advising the petition and complaint, which was followed with answers,

THE LORDS found, "That the freeholders did wrong in not expunging the name of Mr Davidson from the roll," &c.

A reclaiming petition was afterwards preferred for Mr Davidson, and refused.

Act. *Wemyss, et alii.*

Alt. *George Fergusson, et alii.*

Clerk, *Home.*

G.

*Fol. Dic. v. 3. p. 421. Fac. Col. No 102. p. 190.*

1790. February 12.

ROBERT BRUCE ÆNEAS M'LEOD and DAVID URQUHART *against* HUGH ROSE.

MR ROSE was enrolled among the freeholders in the county of Cromarty, as wadsetter of the superiority of certain lands. He afterwards acquired the right of reversion; and being thus fully vested in the superiority, he conveyed the fee of it to another person, reserving to himself the liferent. After this, Mr Rose restricted his liferent to certain parts of the estate, in virtue of which he had been enrolled; still, however, retaining as much as, in point of valuation, entitled him to stand on the roll of freeholders.

While matters were in this situation, an objection to Mr Rose's continuing on the roll was, in terms of the statute 16th Geo. II. lodged by Messrs MacLeod and Urquhart, two freeholders in the county. Mr Rose, at the same time, preferred a petition to the freeholders, stating the proceedings which had been held, and desiring to be continued on the roll, in virtue of the right of liferent still belonging to him.

When the Michaelmas meeting in 1789 was constituted, Mr Rose was not present; and, accordingly, his name was not mentioned in the minutes taken down by the Clerk. But having afterwards come into the Court Room, without, however, proceeding to qualify himself for voting, by taking the oaths to

No 161.

No 162.

What deemed a refusal to take the oath introduced by the 7th Geo. II. cap. 16.