

No 217.

pecially as no other month of September had occurred betwixt the date of the charter and the sasine founded on, and the lodging of the claim, the Court repelled the objection.

*Supplement to Wight, p. 17.*

1802. July 6.

DAVIDSON *against* ELPHINSTONE.

No 218.

A mandate is necessary to authorise a claim for a person residing abroad to be enrolled at a meeting of freeholders. See No 211. P. 8837.

A CLAIM of enrolment was made in the name of the Honourable Charles Elphinstone, at a meeting of the freeholders of Stirling, on the 13th January 1802. This claim was brought forward by Robert Hill, writer to the signet, in the capacity of agent to the petitioner, who produced the following titles; 1. Charter of resignation under the Great Seal, in favour of the said Mr Hill, dated the 5th, and written to the Seal, and registered the 14th of July 1800; 2. A disposition from Hill to the petitioner, dated 5th September 1800, containing an assignment to the charter of resignation, and to the unexecuted precept of sasine; 3. Instrument of sasine, following on the charter and disposition, in favour of the claimant, dated the 8th, and recorded on the 24th, December 1800.

Harry Davidson, one of the freeholders, *objected, first*, That the titles did not afford legal evidence of old extent, in terms of the act of Parliament; and, *secondly*, That, as the claimant was out of the kingdom, and as no special mandate from him was produced, the claim made in his name by Hill could not be received. The freeholders repelled these objections; and Davidson complained, by a petition to the Court; in which, reserving the intrinsic objection to the titles, with regard to the preliminary objection of there being no special mandate, he

*Pleaded*; Every individual who is out of the kingdom of Scotland, and who means judicially to claim any right, can do it only by the intervention of some person possessing a mandate or power for that purpose. The possession of title-deeds does not afford a presumption of this mandate, sufficient to entitle the holder to insist in a suit in the name of a person abroad; Bankton, B. 4. Tit. 3. § 25. Stewart, No 17. p. 353.; and there is no provision in the statutes relative to the election of Members of Parliament, exempting claims for enrolment as a freeholder from this general rule of law, and conferring upon a court of freeholders the power of dispensing with this requisite. There is no evidence that Mr Elphinstone wished to acquire this estate, and still less that he inclined to be enrolled upon it as a freeholder; for possibly he may be conscious of labouring under some one or other of the personal disqualifications. The act 16th Geo. II. c. 11. § 7. expressly requires a claim to be made previous to every Michaelmas meeting; and a claim is equally necessary at a meeting for election. It further provides, That every party who may conceive himself

aggrieved by the judgment of the freeholders, may apply summarily, by complaint to the Court of Session; and an indispensable requisite for insisting in this complaint, when the pursuer is abroad, is a formal mandate. It makes no difference that Mr Elphinstone appears here as a defender, since, in the original court of freeholders, he came in the character of a claimant. And accordingly this point was decided, Dundas against Ferguson, July 20. 1780, No 211. p. 8837, by which a mandate was held to be requisite.

*Answered;* The production of title-deeds at a meeting of freeholders is a sufficient mandate for enrolment. Although some express authority may be necessary for instituting a suit in the name of a person abroad, which may eventually be attended with serious patrimonial consequences, it is altogether different with respect to a claim for elective franchise. Every possible hazard is incurred whenever the feudal title is made up; and the insertion in the roll of freeholders being in all cases an advantage to the party, is to be presumed to be agreeable to his intentions, though there be no written authority for that purpose. In this case, Mr Elphinstone is already upon the roll, and appears in Court *in possessorio*, as a party defending a right already in his person, not *in petitorio*, craving that a right might be granted in his favour. Unless this were admitted, persons in his situation, while abroad in the service of their country, might be deprived of their most valuable rights, by omitting to comply with a form which, in many cases, it is impossible to observe. There is nothing, accordingly, in the statutes, relative to the election of Members of Parliament, which supports such critical accuracy in opposition to material justice; and the only case quoted in favour of such a doctrine, Dundas against Ferguson, July 20. 1780, alluded to, was decided by a very narrow majority of the Court, and in circumstances materially different from the present. It was with respect to an enrolment at a Michaelmas meeting, and not a meeting for election; and the claimant had remained several years in this country without giving any authority for the proceeding. Yet, even in these circumstances, the justice of this decision has been doubted; Wight on Elections, page 154.

THE LORDS sustained "the objection stated, That no mandate was produced for the Honourable Charles Elphinstone at the meeting for election, or has been produced in this Court; and therefore find, That the freeholders did wrong in enrolling him in the roll of freeholders of the county of Stirling; and grant warrant to, and ordain the Sheriff-clerk of the said county, to expunge his name from the said roll; and find it unnecessary to give any judgment on the other points of the cause, and decern."

And, upon advising a reclaiming petition, with answers, they, by a great majority, adhered to this interlocutor.

For the Petitioner, *Lord Advocate Hope, Robertson, Boyle.*

For the Respondent, *Erskine, Campbell, W. Erskine.*

Clerk, *Home.*

Agent, *A. Abercromby, W. S.*

Agent, *Ro. Hill, W. S.*