No 177.

*** This case is reported by Lord Kames:

GORDON of Ardmealie, *anno* 1733, disponed the lands of Zeuchrie to his eldest son Archibald, who, upon a charter under the Great Seal, was infeft. But it was understood, that though the land was of a sufficient valuation, it could not entitle Archibald to elect or be elected a Member of Parliament, because of a reservation to the father, not only of his liferent, but of a power to alien and contract debt without limitation. Archibald died without issue, and the succession opened to his brother James, who, wanting a qualification to be a voter, obtained from his father, 15th July 1752, a renunciation, not only of his liferent, but of all his powers and faculties. Upon the production of these titles to the Michaelmas Head Court 1752, James claimed to be enrolled as heir apparent to his brother; and he being accordingly enrolled, a complaint was brought before the Court of Session, by Abercrombie of Glassoch, insisting upon the following *objection*, That Archibald Gordon himself, the predecessor, against whom the said reservations subsisted during his life, had himself no right to vote; and that no man who claims as apparent heir can have a better title than his ancestor.

"THE LORDS sustained the objection, and ordained James Gordon to be expunged from the roll."

Sel. Dec. No 46. *p.* 52.

No 178.

1755. *January* 17. GALBRAITH *against* CUNINGHAM.

A FREEHOLDER is entitled to be enrolled upon the right of apparency, though he has already made up his titles; for the privilege of being enrolled immediately, is given to heirs, not because they are in the state of apparency, but because it seems reasonable that they should have the same right to vote as their predecessor, though they should not have made up a proper feudal title; and the act 1681, when giving that privilege to heirs, could not with propriety mention any other but apparent heirs; because, as the law then stood, even a singular successor was entitled to be enrolled as soon as he was infeft.

Fol. Dic. v. 3. *p.* 425. *Fac. Col.*

*** This case is No 51. p. 8644.

No 179.
An apparent heir of a naked superio-

1755. *March* 5. JOHN MURRAY of Philiphaugh *against* Dr JOHN NIELSON.

SAMUEL NIELSON, at his death, left a disposition of his lands of Etrick-house, to certain trustees for uses. The disposition contained procuratory of resignation,

No 179.
rity, found entitled to be enrolled as a freeholder.

and precept of sasine, in the usual form. Dr Nielson, the defender, his immediate elder brother, was served his heir of conquest in general. The trustees obtained themselves infeft base to hold of the heir; and, for a sum paid, they granted in his favour a discharge and renunciation during his life, of the procuratory of resignation, binding themselves, during his life, neither to execute that procuratory, nor to obtain a charter of confirmation of their base infeftment, nor of adjudication in implement of the disposition. The Doctor produced to the freeholders of the county of Selkirk his brother Samuel's titles, and his own general retour, together with the discharge and obligation above-mentioned; and was thereupon enrolled as apparent heir of conquest to his brother.

John Murray, the pursuer, offered a complaint against this enrolment, and *objected* to it, 1*mo*, That an apparent heir to a naked superiority cannot be said to have such possession as seems to be required by the act 1681, Cha. II. p. 3. cap. 21. namely, a possession of the rents and profits.

2*do*, That Samuel, the predecessor, was denuded by the disposition to the trustees; and that the effect of that disposition could not be said to be taken off by the discharge and renunciation which the trustees had granted; for that an apparent heir can only be enrolled in respect of his predecessor's titles; whereas this is a new title in favour of the heir, which cannot aid the predecessor's title; and this seems to be admitted by the Doctor's paying a sum in consideration of it.

3*tio*, The renunciation of the power of using the procuratory during the Doctor's life, is only a personal obligation upon the trustees; it would not bind purchasers; and though it might make the trustees liable in damages, yet it does not prevent even them from executing the procuratory, or from obtaining a charter of confirmation. In short, the whole circumstances show this right of Dr Nielson's to be nominal, fictitious, and created on purpose to enable him to vote for a Member of Parliament.

Answered for Dr Nielson to the *first* objection; That he is as fully in possession as an apparent heir can be, and as a naked superiority will admit of.

To the *second*; That, by the law of Scotland, a disposition does not denude the disponer. He is held to be the vassal, until denuded by the infeftment of the disponee, and, as such, would be entitled to vote, were it not for the statutes made, which appoint freeholders to take the oaths of possession, and that they are under no obligation to convey their rights. For this reason, if a disposition shall be repudiated or discharged, it is as much annulled, and the disponer is as fully in possession, and as little under any obligation to convey, as if the disposition had never been made. And this rule is equally applicable, whether the disposition is discharged as to the whole subjects contained in it, or only as to part of them; whether both as to the superiority and property, or as to the superiority alone. Neither does it make a difference, whether this discharge be granted before or after the disponer's death; for, in either case, it is not a new right, to which new titles must be made up; it is no more than a document that

No 179. the possession is continued, and that there is no longer an obligation to convey to another; and the heir's giving a consideration for the discharge and obligation, is no admission that it is a new right.

To the *third*; That it is sufficient if the defender's right be properly established, and cannot be lawfully destroyed or impaired. The law presumes not any man's fraud; *quæ contra bonos mores sunt, nec facere nos posse credendum est.*

"THE LORDS repelled the objections to the defender's qualification, and found, That he is sufficiently entitled to continue on the roll of freeholders for the shire of Selkirk; and therefore dismissed the complaint."

Act. *Montgomery.* Alt. *Ferguson.* Clerk, *Forbes.*

S. *Fol. Dic. v.* 3. *p.* 425. *Fac. Col. No* 149. *p.* 222.

1781. *February* 10. MOODIE *against* BAIKIE.

No 180.
A person claiming to be enrolled as a freeholder, in the character of apparent heir, produced his ancestor's sasine, but not the charter upon which the sasine proceeded. His claim was rejected.

MR MOODIE, claiming to be enrolled as a freeholder in the county of Orkney, in the character of apparent heir, produced his ancestor's sasine, but not the charter upon which the sasine proceeded.

To this production, Mr Baikie

Objected: By statute 16th Geo. II. no person can be admitted to the roll of freeholders, as apparent heir, who does not exhibit a complete feudal title, in the person of the ancestor. An instrument of sasine is merely a relative writing, to which no credit can be given, if unsupported by the charter or other deed to which it refers.

This objection was sustained by the freeholders. Mr Moodie complained to the Court of Session, and there exhibited the predecessor's charter. But

"THE COURT dismissed the complaint."

For Mr Moodie, *Ilay Campbell*, et alii. Alt. *Rolland*, et alii. Clerk, *Tait.*

C. *Fol. Dic. v.* 3. *p.* 425. *Fac. Col. No* 31. *p.* 56.

1781. *February* 10. GEORGE HALDANE *against* THOMAS TRAILL.

No 181.
The claim of an apparent heir was set aside, though he produced titles, and his grandfather and father had been enrolled on the same lands, because there

AT a meeting of the freeholders in the county of Orkney, in 1780, Mr Trail demanded an enrolment, in the character of apparent heir.

In support of this claim, he produced two retours of the ancestor, and the instruments of sasine following hereon, both dated in 1723, and duly recorded.

To this claim Mr Haldane

Objected: To connect an instrument of sasine with the retour upon which it proceeds, it is necessary to produce the precept issued from the Chancery, by which the Sheriff is warranted to infeft the person served, in the lands contain-