No 185. is no ground for such a presumption in this case. Colonel Blair had been many years married, without having any children; and it is evident now, by the certificate of the Lady herself, which has been produced in process, that no nearer heir is to be expected. In fact, Mr David Blair has been served heir to his brother, which establishes a legal presumption, that there is none nearer.

The Court dismissed the complaint. Their Lordships, upon considering the two first grounds of complaint, expressed a decided opinion, that they were entirely without foundation. And, with regard to the possibility of Colonel Blair's widow being pregnant, it was observed, that the service now expeded was sufficient presumptive evidence of the contrary.

For Complainer, *Clerk, Ross, W. Erskine.* Agent, *A. Young, W. S.*
Alt. *Solicitor-General Blair, Hay, Williamson, Cathcart.* Agent, *A. Macwhinnie.*
Clerk, *Menzies.*

J. *Fac. Coll. No. 86. p. 190.*

SECT. VII.

Husband in Right of his Wife.

1745. *January* 19.

No 186. FREEHOLDERS of LANARK *against* HAMILTON.

A HUSBAND cannot be enrolled upon his wife's right of apparency; but must make up titles in her person.

Fol. Dic. v. 3. p. 426. D. Falconer.

*** This case is the second branch of No 11. p. 8572.

1781. *March* 7.

No 187. CHARLES DALRYMPLE and JAMES BREMNER *against* JAMES FARQUHAR GRAY.

It is not necessary for the husband to wait a

AT the meeting for electing a Member of Parliament for the county of Ayr, held in October 1780, Mr Farquhar Gray claimed to be enrolled upon the following titles:

No 187.
year after his wife's infeftment, before he can be enrolled.

1*mo*, Instrument of sasine of the lands of Gillmillscroft, in favour of Alexander Farquhar, deceased, father-in-law to the claimant, dated 20th March, and registered 20th April 1745, proceeding on a charter under the Great Seal in his favour.

2*do*, Retour of the general service of the claimant's wife, Jean Farquhar, as nearest lawful heir of tailzie to the said Alexander Farquhar, dated 19th February 1779.

3*tio*, Charter of resignation under the Great Seal, in favour of the said Jean Farquhar, of the lands of Gillmillscroft, dated 23d February 1779.

4*to*, Instrument of sasine following thereon, dated 28th April, and registered 6th June 1780.

Mr Farquhar Gray's claim, founded on his wife's infefment, was the first taken under the consideration of the meeting. Before it was discussed, some of his friends thinking it exceptionable, as his wife's sasine was registered about six months only before the election, advised him to withdraw it, and to demand an enrolment in virtue of his wife's apparency as heir to her father. He did so, and was admitted to the roll accordingly.

In a complaint against this enrolment, at the instance of Messrs Dalrymple and Bremner, it was

Pleaded, To entitle a person to be enrolled in the character of apparent heir the predecessor's titles must be produced, by which is meant not the instrument of sasine alone, but the whole feudal investiture. In this case, the production consisted of an instrument of sasine, in favour of the predecessor, said to proceed on a charter, which was not produced. The title of the claimant, therefore, was essentially defective, the enrolment, of course, unwarrantable, and the claimant fell to be expunged from the roll.

Answered for Mr Farquhar Gray, At a meeting for election, no previous claim is necessary. Upon the rights produced for the respondent, he was entitled to claim, 1*mo*, On his wife's apparency; and, 2*do*, Upon the complete feudal title made up in her person.

Supposing the respondent's claim to be unsupported on the first ground, it is, however, clearly well founded on the second; for the only objection that can be suggested is, that Mrs Farquhar Gray's sasine was not recorded sooner than the 28th April 1780; from which it may be inferred, that, being within year and day of the meeting for election, the respondent ought not to have been admitted to the roll. But the obvious answer to this objection is, that, when a husband claims to be enrolled in virtue of his wife's infeftment, it is not necessary that the same should be recorded a year before enrolment.

By the statute 1681, it is not required that the claimant's infeftment should be completed any given time before enrolment. So stood the law, till the 12th of Queen Anne, when the practice of conveying estates in trust, on the eve of an election, for the purpose of creating nominal votes, was become frequent. This statute proceeds on a recital, 'That, whereas of late, several conveyances

No 187. ' of estates have been made in trust, or redeemable, for elusory sums, nowise ' adequate to the true value of the lands, on purpose to create and multiply ' votes in elections of Members to serve in Parliament for that part of Great ' Britain called Scotland, contrary to the true intent and meaning of the laws ' in that behalf,' to prevent these abuses, it is enacted, ' That, from and after ' the determination of this present Parliament, no conveyance, or right what- ' soever, whereupon infeftment was not taken, and sasine registered, one year ' before the *teste* of the writs for calling a new Parliament, shall, upon objec- ' tion made on that behalf, entitle the person or persons, so infeft, to vote, or ' to be elected, at that election, for any shire or stewartry in that part of Great ' Britain called Scotland; and, in case any election happen during the con- ' tinuance of a Parliament, no conveyance, or right whatsoever, whereupon in- ' feftment is not taken, one year before the date of the warrant for making ' out a new writ for such election, shall, upon objection made in that be- ' half, entitle the person or persons, so infeft, to vote, or be elected at that ' election.'

As, by the same statute it was provided, that, to entitle a husband to vote in right of his wife, the wife must be an *heiress*, and have the *property* of the lands, it is inconceivable that the enactment requiring completion of the investiture, a year before enrolment, could apply to that case, unless it had been meant even to prevent persons from marrying heiresses, on purpose to multiply nominal votes. And all doubt on this head is removed by an express clause, declaring, ' That the right of apparent heirs, in voting at elections, and the right of ' husbands by virtue of their wives' infeftments, be reserved to them as former- ' ly; any thing in this act contained to the contrary notwithstanding.'

The only other statute, material to be observed, is that in the 16th of the late King, in which there is the following clause: ' That no purchaser, or sin- ' gular successor, shall be enrolled, till he be publicly infeft, and his sasine re- ' gistered, or charter of confirmation be expede, where confirmation is neces- ' sary, one year before the enrolment.'

The respondent's wife is served heir general of tailzie to her father, which gives her right, not to the lands of Gillmilscroft alone, but to every subject descendible to heirs of that character. It is obvious, therefore, that statute has no relation to the present case

Replied, Mr Farquhar Gray's claim was founded solely on his wife's right of apparency. The judgment of the freeholders proceeded on that claim alone, the illegality of which is now admitted by Mr Farquhar Gray himself. Such being the case, it is incompetent for the Court of Review to judge, whether the claimant might have been justly enrolled, had his claim been founded on other grounds. The law requires that a claim should be exhibited to the freeholders, reciting the particular titles and character on which the enrolment is demanded. A claim either unwarranted by the titles, or unsuitable to the character of the claimant, is equal to none. The judgment of the Court,

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therefore, sustaining the enrolment, would, in effect, declare, that a person producing titles to the freeholders, without any claim, is entitled to be enrolled.

It has been always understood, that a husband, claiming in right of his wife, was in no better situation than the wife herself would have been, could she exercise the privilege of voting in her own person. Had Mr Farquhar Gray produced the same titles in his own right, no enrolment could have proceeded on them. In the character of apparent heir, the defect in his production is admitted; and, as having the feudal right of the lands vested in him, the objection of his not being infeft a year before must have been fatal to his enrolment.

It is needless to argue upon the statute 1681. The law, since that period, has suffered a total alteration; and no person, other than an apparent heir, can be enrolled, unless his infeftment be registered a year before enrolment. As to the saving clause, founded on by Mr Farquhar Gray, as suspending the operation of the statute of the 12th of Queen Anne, in the case of husbands claiming in right of their wives' infeftment, it cannot, in sound construction, have that meaning. Apparent heirs are contained in the same exception. As their right of being enrolled required no infeftment in their persons, the Legislature could not think it necessary to guard them against a law which related to a requisite at no time essential to their qualification. The only clause applicable to both enacts, 'That no person or persons who have not been enrolled, and voted at 'former elections, shall, upon any pretence whatsoever, be enrolled or admitted 'to vote at any election, except he or they first produce a sufficient right or 'title to qualify him or them to vote at that election, to the satisfaction of the 'freeholders formerly enrolled, or the majority of them present.'—From this part of the statute, the saving clause meant to except husbands and apparent heirs.

Observed on the Bench, There is no necessity for lodging a claim for enrolment previously to a meeting for election. A person, therefore, added to the roll on that occasion, may support his enrolment in the Court of Review, by showing that his rights laid before the freeholders entitled him to be enrolled, though in a character different from that in which the freeholders sustained the claim. The statutes requiring the completion of the freeholders investiture a year before enrolment, cannot, in sound construction, extend to the case of husbands claiming in right of their wives' infeftments.

"THE LORDS dismissed the complaint."

Act. *Geo. Fergussen.* Alt. *Rolland.*

C. *Fol. Dic. v.* 3. *p.* 426. *Fac. Col. No.* 46. *p.* 82.

*** See Paterson against Ord, 1st February 1781, No 11. p. 3121, *voce* COURTESY.