1791. *May* 31.

ALEXANDER MILNE *against* FREEHOLDERS OF ABERDEENSHIRE.

No 154.
Found competent, after the four kalendar months, to try the objection of nominal and fictitious. Reversed upon appeal.

MR MILNE had stood on the roll of the freeholders of Aberdeenshire for many years, without having suffered any change of his circumstances, when an objection made to his qualification, as being nominal and fictitious, was sustained by the freeholders.

In consequence of this, he preferred a complaint to the Court, founded on the following clause of the statute 16th George II; 'If any person shall be enrolled, whose title shall be thought liable to objection, it shall and may be lawful for any freeholder standing upon the said roll to apply, by summary complaint, to the Court of Session, &c.; so as such application be made within four kalendar months after such enrolment, &c.; and if no such complaint shall be exhibited within the time aforesaid, the freeholder enrolled shall continue upon the roll, until an alteration of his circumstances be allowed by the freeholders as a sufficient cause for striking or leaving him out of the roll.' The freeholders, on the other hand, to obviate this argument,

Pleaded; The statute 1681 empowered the Court of Session, during the recess of Parliament, to determine summarily concerning objections made to the votes of freeholders standing on the roll; but without creating any limitation as to the time of bringing forward those objections.

After the union of the two kingdoms, when the idea of nominal qualifications was first conceived, a trust-oath was introduced by act 12th of Queen Anne, while in other respects the power of objecting remained as before.

An oath more comprehensive than the former was authorised by 7th George II; but still no limitation in point of time, nor any repeal of act 1681, took place.

The statute 16th George II. followed next; and it remains to be considered, whether it produced an alteration in that respect, effecting a repeal of all the antecedent statutes, and of the common law.

Objections relative to a person's connection with the lands on which he claims to be enrolled as a freeholder, may not only be directed against his right and title, which are *juris*, but against other matters, which are *facti*. Of the latter, the circumstance of possession affords a plain example, which, though an essential ingredient in a freehold qualification, involves neither right nor title. Nominality belongs evidently to the same class. Like possession, it is not *juris*, but *facti*, and has no reference to right or title.

These two sorts of objection are clearly distinguished by this important particular, that while, on the one hand, whatever regards the title may be fully discovered within a short period, by examination of the title-deeds; the nature of the possession, or the fictitious quality of the freehold, on the other, may unavoidably be kept secret for a great length of time.

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It cannot then be supposed, that this statute was meant to include in the limitation of four months, though fully sufficient for one enquiry, another quite different, to which any given period, and especially so short an one, might naturally prove altogether inadequate.

The object of the trust-oath authorised by 7th George II. which has no relation to the validity of titles, is to ascertain the fact of possession, and of the real or nominal nature of qualifications. Accordingly this mode of enquiry, to which, it is an indisputed point, the limitation of four months has no reference, may be put in practice at any time A thing which of itself seems decisive of the present question; because it tends to show, that the statute now under consideration is not applicable to objections of that nature. And as it is now established by the judgment of the House of Lords, in the case of Macpherson, No 150. p. 8769.; that the objection of nominal and fictitious may be verified *prout de jure*, as well as by the trust-oath, it seems to follow as a consequence, that those other means may in like manner be employed at any time, independently of the statutory limitation. In other words, as the statute 16th George II. has not in this respect repealed that of 7th George II. so it has as little repealed the common law concerning objections to the votes of freeholders.

Nor are the terms of the statute in question inconsistent with this view of its meaning. For though it limits to four months the time for exhibiting complaints against enrolment, unless there be an alteration of circumstances; yet it is plain, that this expression relates only to rights and titles, as expressed in other parts of the statute, which are truly the title-deeds, and *juris*, and not to the other class of objections, which are *facti*.

Answered; As the objection of nominal and fictitious is so general as to comprehend almost every other, it is obvious, that if this were not excluded after the four months, the statutory prescription, enacted for the most salutory purposes, would in effect be totally abrogated.

Accordingly, in the terms of this statute, which are plain and express, there is not room left for any such idea. The words, as above quoted, are, 'Any 'person whose title shall be thought liable to objection,' and also in another part of the same passage, 'A person who had not a right to be enrolled;' than which surely no form of expression could more clearly denote the objection of nominal and fictitious.

Thus, let it be supposed, that within the four months a complaint, under the authority of the clause of the statute cited above, should be brought against a person enrolled, because his title is nominal and fictitious, or brought at the instance of one who has been struck off the roll, in consequence of a pretended objection of nominal and fictitious; would it not be absurd to say, that this clause did not apply to that objection, which in effect would be to deny altogether the competency of such complaint? For at common law the Court has no jurisdiction over the rights of freeholders in questions of election.

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But if it does apply to that objection, then the unavoidable consequence is, that the subsequent part of the clause must in like manner apply to it; for surely no words can be more express than these: 'So as such application be 'made within four kalendar months after such enrolment.'

The Court "found the objection of nominal and fictitious competent to be proponed after the lapse of four kalendar months."

To this judgment, on advising a reclaiming petition, and answers, the Court adhered.

For Mr Milne, *M. Ross*, et alii. Alt. *Wight*, et alii. Clerk, *Gordon*.

S. *Fol. Dic. v.* 3. *p.* 420. *Fac. Col. No.* 182. *p.* 368.

Similar judgments were afterwards given in various other cases.

*** This case having been appealed, the judgment of the Court of Session was reversed.

1797. *February* 10. John Macadam *against* James Home.

No 155. The objection of nominal and fictitious against a liferent of superiority, found to be removed by an onerous disposition to the fee of it, granted on the morning of the day of election, at which the claim of enrolment was made.

John Macadam, in 1789, obtained a disposition in liferent of the superiority of lands affording a freehold qualification in Ayrshire, upon which he was soon after infeft; but he did not claim to be enrolled till 17th June 1796, at the meeting for electing the Member for the county, when, besides the former titles, he produced to the meeting a disposition of the fee of the superiority, dated that day, and bearing to have been granted for an onerous cause.

The meeting, after putting a number of questions to him, rejected his claim.

In a petition and complaint, in which James Home, who made the objection in the court of freeholders, was cited as a defender, the points at issue came to be, 1*mo*, Whether the disposition to the liferent was nominal and fictitious? and, 2*do*, Supposing that question determined in the affirmative, Whether the disposition to the fee gave the complainer a right to vote at the meeting?

On the *second* point, the defender contended, that a disposition obtained in such circumstances, and upon which the claimant was not infeft, did not remove the objection of nominal and fictitious; March 1791, Cases of Cheap and Ferrier.——*See* Appendix.

Answered; A person claiming enrolment, must not only hold an estate giving a qualification, but he must produce the titles feudally vesting it in him to the freeholders. By the act 1681, c. 21. it did not signify how recently the right had been obtained; but, by 12th Anne, c. 6, and 16th Geo. II. c. 11, it was made necessary that the titles produced should be completed a year before the claim of enrolment is made. These statutes, however, make no alteration on the former law as to the nature of the claimant's right to the estate to which