No. 6. of Fife, leaves the disponee and his heirs at perfect liberty both as to the time of the sale and the consideration for which it is to be made; and the clause of return is an event which probably never will take place.

The Court, upon the whole circumstances of the case, thought the qualification nominal, and therefore dismissed the complaint.

Act. *Gordon.* Agent, *R. Dundas, W. S.* Alt. *Monypenny.* Agent, *Geo. Steuart, W. S.* Clerk, *Pringle.*

F. *Fac. Coll. No.* 124. *p.* 275.

1803 *December* 24. MAXWELL *against* MACDOWALL.

No. 7. Nominal and fictitious qualification.

ALEXANDER MAXWELL, younger of Terraughty, purchased from the Earl of Galloway a freehold qualification in the county of Wigton for £110. The disposition was to the purchaser, and the heirs-male of his body; whom failing, to the Earl, and the heirs-male of tailzie and provision in the Lordship and estate of Galloway.

The disposition had been made out by the Earl's man of business, and Maxwell had paid nothing for doing so.

Maxwell claimed to be enrolled at the meeting held for the purpose of electing a knight of the shire, 27th June 1802; but the freeholders rejected the claim.

On advising a petition and complaint, with answers, replies and duplies, the Court confirmed this judgment, as, under all the circumstances of the case, this qualification seemed to be entirely nominal and fictitious, and very similar to that of Souter, 26th November 1803, No. 6. APPENDIX, *supra.*

As the election-law, particularly the statute 1681, confers the right of voting upon a person who is infeft in a real estate in liferent, as much as upon one who has a real estate in fee, there is no reason why the former should not be allowed to exercise his franchise as well as the latter, if the estate be a solid and substantial one; but, in the same way, if it be a nominal and fictitious one, the person who is infeft in the shadow of a fee, can no more be entitled to vote than he who is possessed of a liferent of the same description.

Act. *A. Campbell,* senior, *A. Campbell,* junior. Agent, *A. Young, W. S.* Alt. *Hay, Gillies.* Agent, *T. Adair, C. S.* Clerk, *Menzies.*

F. *Fac. Coll. No.* 132. *p.* 291.

1804. *June* 19. FRASER *against* LORD WOODHOUSELEE.

No. 8. Upon the death of an

THE late Mr. Fraser of Balnain executed an entail of his estate in Invernesshire, by which his daughter, Mrs. Fraser Tytler, succeeded, upon his death, as

heir of entail. As those parts of the estate which held of the Crown did not afford a freehold qualification, a part of the superiority of the estate was purchased by her husband from the person who was then superior, and likewise the superiority of some other lands in the county, which, when added to the original valuation of what held of the Crown, exceeded £400 Scots. A supplementary deed of entail was executed by him of these additional superiorities, in the terms and conditions of the original entail.

No. 8. original complainer against a judgment of freeholders, it is competent to any other freeholder at the meeting to prosecute the objection.

Upon these superiorities, the Honourable Alexander Fraser Tytler of Woodhouselee, one of the Senators of the College of Justice, claimed to be enrolled, in right of his wife, at a meeting of freeholders, held for the purpose of electing a knight of the shire of Inverness. It was objected by Simon Fraser, Esq. younger of Lovat, "That his Lordship is not entitled to be enrolled upon the "superiorities upon the lands of Ballecherinochs and Aigas, recently purchased "by his spouse, and to which superiority she did not succeed as heiress; as it "is established law, that husbands are not entitled to be enrolled, or to vote "in right of lands to which their spouses did not succeed as heiresses: 2*do*, "That the objection applies still more forcibly in this case, since even these "superiorities are entailed; so that even Mrs. Fraser herself is but in effect a "liferentrix; and by the entail, the courtesy of the claimant, and of the hus-"bands of all heiresses, is excluded."

Construction of the act of Queen Anne with regard to the husband's right of voting on his wife's estate.

These objections having been repelled by the freeholders, Fraser presented a petition and complaint to the Court of Session.

Before the petition came to be discussed, the complainer died, and William Fraser, Esq. one of the freeholders, took up the complaint, and gave in replies to Lord Woodhouselee's answers.

Upon this it was objected, that the original complaint had fallen by the death of Mr. Fraser younger of Lovat, in whose name alone it was presented; and that as William Fraser was present at the meeting of freeholders, and acquiesced in their judgment without taking any protest, it was not competent for him, after on interval of four months, to insist that Lord Woodhouselee should be struck off the roll.

But the Court, by a great majority (January 23, 1804), repelled this preliminary objection, and sustained the title of William Fraser to insist in the complaint. It was conceived, that the complaint of one freeholder, was the complaint of every freeholder who might take it up, even if it had been formally withdrawn by the original complainer; that this was not a question of private patrimonial interest, but regarded a political body, every member of which must be considered as equally interested in the discussion, though carried on in the name of one only; and that therefore the death of either party made no difference, provided the complaint had been made according to the statutory requisites; that the contrary doctrine might produce collusion between the objector and the claimant, which, indeed, had been sometimes attempted.

No. 8. Having repelled the objection to the title of the complainer, the Court ordered the merits of the case to be stated in memorials. The complainer

Pleaded: The 12th Queen Anne provides, "That no husbands shall vote "at any ensuing election, by virtue of their wives infeftments who were not "*heiresses*, or who have not right to the *property* of the lands on account of "which such vote shall be claimed." The term "heiress," can have no other meaning than that the wife holds the lands by succession, and not by singular titles; and the term "property," used in the statute, must be understood as referring to the *dominium utile*, the substantial and beneficial interest in the subject, in opposition to the *dominium directum* or naked superiority. Altho', in common language, *property* may be used in contra-distinction to *liferent*, in legal language the term opposed to liferent is *fee*. The sound construction, therefore, of the statute is, that to entitle a husband to vote in right of his wife, she must not only be an heiress, but possess the *dominium utile* of the subject; for the clause does not say that the husband shall vote if his wife be the heiress, or have the property, which might infer a disjunctive alternative, but that no husband shall vote except in those cases; and, consequently, her not being an heiress, or her not having the property, must either of them preclude the husband from the right of voting.

As part of the superiority was purchased since the death of her father, it is evident that Mrs. Fraser Tytler succeeded to this by a singular title, and not as heiress; consequently her husband, by the first provision of the act of Queen Anne, has no right to vote, not possessing sufficient qualifications independent of this superiority. And it is equally evident, that he is excluded by the second provision, since, so far as regards the superiorities of lands belonging to a third party which forms part of the qualification, his wife does not possess the *dominium utile* of the lands.

Answered: The act 1681, cap. 21. declares, "That husbands for the free-"holds of their wives, or having right to a liferent by the courtesy," shall have votes in the election of commissioners for shires. The act of Queen Anne, upon which the present objection is founded, does not take away this right of voting; for it is expressly provided in the act, "That the right of "husbands, by virtue of their wives' infeftments, be, and is hereby reserved to "them as formerly, any thing in this act contained to the contrary notwith-"standing."

The sole object of the act of Queen Anne, was to defeat the creation of nominal and fictitious votes; and the meaning of the clause upon which the complaint is founded, is that a husband shall be entitled to vote on the freehold of his wife, when the same belongs to her in fee, and not merely in liferent. According to the opposite construction, this clause goes greatly beyond the object of the Legislature; for it was no more necessary, in the view of destroying confidential votes, to prevent husbands from voting upon superiorities truly belonging to their wives, than upon those belonging to themselves; and it

No. 8.

can never be thought, that it was the intention of the act of Parliament to make a partial change of the great principle upon which the whole election laws depend, that the right of voting depends on the *dominium directum*, and not on the *dominium utile*. Such accordingly is the interpretation which has been uniformly given to this part of the clause: Wight, B. 3. p. 238; Nisbet against Hope, 23d February 1790, No. 231. p. 8855; and is implied in the 16th Geo. II. which in a great measure supersedes the regulations of the act of Queen Anne, and makes no mention of any such limitation.

The objection founded on the other clause of the statute, that Mrs. Fraser was not an heiress, but a singular successor, as to part of the superiorities, was repelled; Skene against Sandilands, January 25th 1786, No. 188. p. 8814.

The Lords, upon advising the memorials, by a great majority, repelled the objections.

It seemed to be the general opinion of the Court, that the objection was founded upon too critical an interpretation of the act of Queen Anne, which was never intended to make such a fundamental alteration upon the principles of the election law of Scotland.

For Complainer, *Ross, Campbell, jun.* Agent, *R. Dundas, W. S.* Alt. *Gillies, Mackenzie.* Agent, *K. Mackenzie, W. S.* Clerk, *Pringle.*

J. *Fac. Coll. No.* 167. *p.* 378.

1806. *March* 11. ELLIOT *against* FREEHOLDERS of SELKIRKSHIRE.

No. 9.
The eldest son of a British Peer is entitled to be enrolled among the freeholders of a county in Scotland.

THE Honourable Gilbert Elliot, the eldest son of Lord Minto, claimed to be enrolled among the Freeholders of Selkirkshire, which was (3d October 1805) refused by the meeting, upon the ground that he was the eldest son and heir-apparent of a British Peer.

Mr. Elliot complained to the Court, who (11th March 1806) determined that the Freeholders did wrong in refusing to enrol him. The case of Abercromby, 9th March 1802, No. 119. p. 8726. was considered decisive of the present.

For Complainer, *Cranstoun.* Agent, *A. Paterson.* Alt. *Colquhoun.* Agent, *Wm. Balderston*, W. S. Clerk, *Home.*

Fac. Coll. No. 245. *p.* 549.

1807. *February* 10. DUFF *against* SIR GEORGE ABERCROMBIE.

No. 10.
It is necessary, in splitting a cumul-

THE Earl of Fife was superior of the lands and estate of Straloch in the county of Banff, valued at £800 Scots. By a disposition, of this date, (13th