1796. *February* 26. LINDSAY CARNEGIE *against* GARDEN.

No 176.

IT is not necessary to specify in the claim the register in which the claimant's sasine is recorded.——See APPENDIX.

Fol. Dic. v. 3. *p.* 423.

SECT. VI.

Apparent Heirs.

1753. *July* 3. Colonel ABERCROMBY *against* JAMES GORDON of Ardmealie.

No 177.
A fiar's right of his lands having been revocable, and merely nominal, a discharge of the power of revocation, granted after his death to his apparent heir, found not to give such heir a title to be enrolled on his apparency.

BY a charter under the Great Seal, dated 1733, proceeding upon the resignation of Peter Gordon, the barony of Zeuchrie was granted to him in liferent, and to Archibald, his eldest son, &c. in fee; whom failing, to his second son, the defender, &c. reserving to the father full power and liberty to sell, annailzie, and dispone the said barony, either gratuitously, or for onerous causes; or to charge the same with debt; or to grant tacks thereof, for what term, and for what rent he should think proper; and to alter the course of succession, without the consent of the said Archibald, or James his son. Upon this charter, infeftment followed in the same year 1733.

Archibald having deceased without issue, Peter Gordon the father executed a deed in July 1752, assigning his liferent-right, and discharging and renouncing his whole reserved powers and faculties in favour of James the defender.

At Michaelmas 1752, the defender upon these titles was enrolled in the roll of electors for the county of Banff, as apparent heir to his brother Archibald. The pursuer offered a complaint against this enrolment to the Court of Session, and *objected*, 1*mo*, That Archibald, the defender's predecessor, had not, when alive, any title to be enrolled; for that by the act 1681, Cha. II. Parl. 3. cap. 21. among the qualifications of voters (other than those claiming as apparent heirs), it is required, that they be infeft in property or superiority, and in possession, &c. and by act of the 12th Ann. cap. 6. it is enacted, that no infeftment, taken upon any redeemable right whatsoever, except proper wadsets, adjudications, or apprisings, allowed by act 1681, shall entitle the person so infeft to vote or be elected. Now, the right of Archibald being a redeemable and merely nominal right, he, while alive, was barred by these acts from having any

No 177. title to vote. If so, after his death, the defender can have no title, merely as his apparent heir. In the *next* place, the predecessor's right being thus insufficient in itself, it cannot be aided by the renunciation of the reserved powers in favour of the heir. Dissimilar or insufficient titles cannot be joined together.

Answered for the defender upon the *first* point, viz. Archibald's right to be enrolled; That, in the *first* place, Archibald's right did not fall under the intention of the act 12th Ann. which was to prevent the devices of multiplying votes; for, in this case, one vote only was intended, viz. to the father in virtue of his liferent, if he chose to claim it; to the son, if the father did not claim. In the *next* place, the father's reserved faculties could not be any objection to Archibald's right; for Archibald was the Crown's vassal; he had a property in terms of the act 1681; which property, though defeasible, being such as fathers usually give to their sons, yet could not be construed to be one of the redeemable rights which would fall under 12th Ann. The redeemable rights there mentioned, would seem to be only such where there is a proper right of reversion established in a third party, which is a real right transmissible to heirs and successors. But in this case, the faculties reserved to the father are merely personal, and, if not exercised, must die with him. The act 12th Ann. being a correctory law, should not be extended by interpretation. The right of Archibald was therefore good; if so, that of James, as his apparent heir, must be good too.

But, 2*do*, Supposing the right of Archibald to have been a redeemable right in terms of 12th Ann. yet the renunciation of the faculties in favour of James, removed that bar, and gives James an absolute property; for had the renunciation been made in favour of Archibald while he lived, there would have been no objection; what difference can there be, if it was made after his death in favour of James? Or, in another light, if the father's death would have completed James's right, why should not a renunciation in his favour do as much? Many similar instances may be given. Suppose a predecessor's right were an infeftment, upon an adjudication, whereof the legal did not expire till after his death; or, suppose a discharge of the power of redemption, granted within the legal to an adjudger's apparent heir; or suppose the right of the predecessor to be a base infeftment, and that a charter of confirmation is granted after his death in favour of the apparent heir; in all these cases, the defect in the predecessor's right would be as effectually removed after his death as it could have been in his lifetime, so as to entitle his apparent heir to have a vote; for this is not a conjunction of dissimilar titles, it is only a removal of a bar or defect. Besides, in many cases, the Lords are in use to conjoin dissimilar titles. Hamilton of Ardrie was allowed to join to the valuation of his own lands that of certain lands in which his wife was infeft 19th January 1745. No 11. p. 8572.

Replied for the pursuer upon the *first* point, That the father's reserved faculties were plainly such as made Archibald's right merely nominal, so that he could not be said to be infeft in property in terms of the act 1681, nor irre-

deemably in terms of 12th Ann. Could votes be made in this manner, every man might make as many as his valuation would admit of, without diminishing his estate; for he could revoke all his conveyances upon the day after the election. From hence it is evident, that Archibald's right alone could not avail his apparent heir. No 177.

Upon the *second* point; The right, as apparent heir, could not be aided by the renunciation of the faculties; for this reason, that the titles of an apparent heir as such, can only be those of his predecessor. Now, this renunciation was never a right in the predecessor; it was a new right granted to James himself. In proof of this, suppose Archibald had been in debt, and his creditors had charged James to enter heir to him; James, by renouncing to enter heir, and the father by a revocation of Archibald's right, could have disappointed Archibald's creditors. These creditors could not have pleaded, that the renunciation in favour of James augmented the right of Archibald.

With regard to the arguments, that the father's renunciation in favour of James should have the same effect as if he had died, it is obvious the cases are no way parallel; for, had the father died, James would have taken by succession; whereas, in the present case, he takes by purchase. The two acts of Parliament above-mentioned, make sundry rules touching the taking by succession and taking by purchase. If an heir takes by purchase, that is, if he founds upon a new right granted to himself, the law will consider him as a purchaser; and he must not only be infeft in pursuance of the act 1681, but must be year and day infeft, in pursuance of 12th Ann. If again he takes by succession, then, in case his predecessor's titles were sufficient to give such predecessor a vote, the heir, in terms of the act 1681, may rest upon his apparency alone; but if such predecessor's titles were not sufficient, in that case, the heir's apparency would not avail him. He must be infeft; though, indeed, in this last case, it does not appear there would be any necessity that this infeftment should have stood year and day; for, as he takes by succession, he does not fall under the proviso of 12. Ann. which seems only to regard those who take by purchase. From these rules it will appear, that in none of the cases put for the defender could an heir have a right to vote without being infeft.

As to the joining of dissimilar titles, the instance mentioned does not apply; for, although the valuations of different lands, held by different titles, may be joined to make up the *quantum* of extent, yet two insufficient titles cannot be joined to make one good title.

Upon the whole, the objection stands good, that Archibald's right was merely nominal, and the renunciation was a new right granted to James.

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

Act. *R. Craigie & A. Lockhart.* Alt. *Advocatus, James Ferguson.* Clerk, *Kirkpatrick.*

S. *Fol. Dic. v. 3. p. 425. Fac. Col. No 78. p. 116.*

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,