

No. 5. the Chancery records, and extracts from it afterwards to have the same effect as from the original.

The Court, adopting the argument of the trustees, held that there was sufficient evidence that the lands afforded a freehold-qualification. See 26th July 1753, Abercrombie against Baird, No. 32. p. 8605; 13th November 1755, Chalmer against Tytler, No. 34. p. 8615; and “found the defender Simon Fraser must pay for the superiority in question £400 Sterling, and twenty-five years purchase of the feu-duty, in case he chuse to accept thereof.”

Lord Ordinary, *Craig*.
Peter Grant.

Act. *Montgomery, Ar. Campbell*, junior.
Clerk, *Sinclair*.

Alt. *John*

Fac. Coll. No. 192. p. 440.

* * Mr. Fraser afterwards declared his acceptance; and the Court, on a petition from him, (25th Nov. 1800,) “ordained an extract of the retour in question, from the manuscript in the General Register House, to be delivered to the petitioner, to be made use of by him as accords.”

Mr. Fraser got an extract accordingly, which he deposited in Chancery.

D. D.

1803. November 26. SOUTER *against* FREEHOLDERS OF BANFF.

No. 6.
Nominal and
fictitious qua-
lification.

AT the Michaelmas head court for the county of Banff, David Souter claimed to be enrolled as a freeholder on a charter of resignation of the lands of Northfield, in favour of him and his heirs-male, by the Earl of Fife, with this provision, that, in the event of his selling this property, he shall give the first offer to the heir of entail of Braco; and that on the failure of lawful heirs-male of his body, the estate shall revert to the family of Fife. On this charter sasine had followed, the instrument of which was produced to the court of freeholders, along with a special retour of the lands in 1628, shewing that the lands were retoured at the sum of ten merks Scots of old extent.

Colonel Andrew Hay of Mountblairry objected, that this title was nominal and fictitious; and the freeholders sustained the objection.

The claimant complained to the Court. In support of the judgment of the freeholders, Colonel Hay

Pleaded: The criterion by which it is to be decided, whether a freehold qualification be nominal and fictitious, is thus pointed out by 7 Geo. II. that it be ‘a true and real estate’ in the person who claims, ‘for his own use and behoof, and for the use of no other person whatever,’ whether it be a liferent qualification merely, or whether the fee has been conveyed. It may be nominal and fictitious in the one case as well as in the other.

Now, the superiority of Northfield is held under a strict entail by the family of Fife; and when the heir of entail disposes a part of the subject, he exposes himself to an irritancy at the instance of the substitute heirs. It is inconceivable that he should incur the risk of forfeiting his estate, unless there was some understanding between him and the donee to provide for this event, and to enable the heir to meet this challenge with an effectual defence; and this understanding has been considered as making the right confidential; Madowall against Buchanan, 20th February 1787, No. 142. p. 8759; Campbell against Elphinstone, 20th February 1787, No. 143. p. 8764. It is not disputed that an infeftment, proceeding on a disposition from the heir of an estate strictly entailed, may afford a good title for enrolment; because the conduct of the heir can only be challenged by the substitute heirs, and the freeholders cannot plead in their right. While they are silent, a sufficient title is acquired. Still, though the freeholders cannot object to the validity of the right, because it is part of an entailed estate, they are entitled to avail themselves of this circumstance as evidence of its being nominal and of a confidential nature; and when the danger of forfeiture is considered in this case, along with the clause of return, and clause of pre-emption in favour of the family of Fife, the doubt as to the nominality of this freehold, from its being a fee to the donee and his heirs, must be entirely removed.

Answered: An heir of entail in possession of his estate, has the full right of property vested in him, unless in so far as he is restrained by the limitations. These, however, operate only personally in favour of subsequent heirs; and these heirs alone can quarrel any encroachment upon the rights which are reserved for them. Qualifications created by alienating the whole or part of an entailed estate, may be defeasible at the suit of a substitute; but till then, they are good; just as much as a sale of the estate to an onerous purchaser, unless challenged by the heir; Wight, p. 228. Campbell against Muir, 5th February 1760, No. 167. p. 8790; Dalrymple against Reid, 4th March 1755, No. 33. p. 8613. Houston against Ferrier, 23d January 1781, No. 173. p. 8794. A disposition on death-bed is liable to reduction, as well as one by a bankrupt to defraud his creditors; but, in the mean time, the freeholders must enrol the donee, and cannot place themselves in the room of the heir at law in the one case, or the creditors in the other, by objecting to the claim for enrolment. If, then, a valid title may be created by a disposition from an heir of entail, when it has been created, this cannot be held as evidence of the title being nominal and fictitious; as this in fact says that no valid title can be created in this way, because it indisputably proves itself to be nominal.

The present claim is made on a right of fee to the donee and his heirs-male, and no instance of such a right being considered as nominal can be found. This is expressly given as the ground of the decision, Scott against Millar, 20th February 1787, No. 41. p. 8625. The claim of pre-emption, which does not limit the price to be paid in the event of selling the property to the family

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. Stuart, 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 WOODHOUSELEB.

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