1807. *March* 11.

FARQUHARSON of INVERCAULD, *against* FERGUSON of PITFOUR.

No. 12.
Husband not entitled to vote in right of his wife, who was not apparent heiress by the former investitures, and whose titles under a new destination were only completed within the year.

JAMES FARQUHARSON of Invercauld, succeeded to his father under an investiture, which destined the estate to *heirs-male*.

Of this date (27th February 1788) Mr. Farquharson executed a deed of entail of his whole estates, with a destination 'to me the said James Farquharson, and the heirs-male to be lawfully procreated of my body successively, in 'the order of their senority, and the heirs-male respectively of their bodies 'successively; whom failing, to their nearest heirs whatsoever, without division, 'of the bodies of the said heirs-male successively, according to their seniority; 'whom failing, to Frances Farquharson, my eldest daughter by the deceased 'Mrs. Amelia Murray, formerly Lady Sinclair, my wife, and to the heirs whatsoever of her body; whom failing, to Katharine Farquharson, my second 'daughter of the former marriage, and to the heirs whatsoever of her body; 'whom failing, to my other daughters," &c.

Of this date (8th March 1806) Mrs. Katharine Farquharson was served heir in general of tailzie and provision to her father. Her titles were completed on 21st August, and her sasine recorded on the 28th.

On the 24th November 1806, the election of a member of Parliament for the county of Aberdeen took place, where James Ross Farquharson, Esq. claimed to be enrolled a freeholder, 'as spouse of Mrs. Katharine Farquharson, 'now only surviving child and heiress of the deceased James Farquharson, 'Esq. of Invercauld.'

An objection was stated by James Ferguson of Pitfour, 'that Mrs. Farquharson was truly a disponee and singular successor; that she did not accordingly take up the estate by legal succession, and as apparent heir; and 'that being the case, her husband, the claimant, had no right to be enrolled as 'a freeholder, it being admitted that his wife's infeftment had not been taken 'and recorded for a year prior to his claim.'

In answer to this objection, it was

Pleaded: The character of apparent heir points out the person who is to succeed to the ancestor's estate; and, in matters of election, all that the apparent heir has to do is, to shew, that his ancestor had a sufficient qualification to entitle him to vote; and wherever a male apparent heir would be successful in this claim, the husband of a female apparent heir must also be so. The claimant is the husband of the heiress of line, who has been served as only surviving child, and nearest and lawful heir of tailzie and provision in general to her father, and in that character is entitled to vote.

2. The statute 1681 gives authority to husbands to vote 'for the freehold 'of their wives,' without any restriction as to the date of their previous infeftment, being declaratory in this case of a right which had long before existed.

No. 12. The act 12th Anne, for the first time, provided that no person should be entitled to vote at an election, unless the infeftment was recorded for the space of one year from the *teste* of the writ for calling a new Parliament; but it expressly reserved to them, as formerly, "the right of husbands by their wives' in-"feftments," leaving *their* rights exactly as they stood before. The same statute provided, that no husbands shall vote by virtue of their wives' infeftment, who are not heiresses, that is, who had not substantial rights of property vested in them. Husbands, therefore, who claim in virtue of the property belonging to their wives, are entitled to be enrolled immediately after the infeftment of the wife, without waiting year and day, as in the case of male proprietors, against whom the limitation has been expressly introduced; Dalrymple against Farquhar Gray, 7th March 1781, No. 187. p. 8810; Skene against Sandilands, 25th January 1786, No. 188. p. 8814.

Answered: Apparent heirs are entitled, by statute 1681, C. 21. to vote in virtue of their predecessor's infeftment, and husbands, in right of the freeholds of their wives; and it was declared by 12th Anne, § 7. that no husbands shall vote at any election by virtue of their wives' infeftment, who are not *heiresses*, or have not right to the property of the lands on account of which such votes are claimed. The term *heiress*, in a legal sense, is not applied, as in common language, to every female who enjoys any estate, but simply to a person having the character of a female heir, and enjoying the same rights as a male heir. She must not take the estate by singular titles, but must succeed by descent. The object of the statute was to put men and women, who were in the same circumstances, upon an equal footing as to their political rights and privileges. Male heirs apparent were allowed to come forward and exercise the elective franchise, in virtue, not of their own, but of their predecessor's infeftment; and it was just and reasonable, that the husbands of female heirs, who enjoyed the same character of apparency, should have a similar privilege; but it never was intended to confer upon the husbands of females, who had no claim to the character of apparency, any right which did not belong to males who had the same pretensions which they had. Now, here, the claim was founded on singular titles, which connected the proprietor with the estate as heir of tailzie and provision. She was not heir of the former investiture, which contained a destination to heirs male.

2. The 12th of Queen Anne enacts, in the most positive terms, that *no* infeftment, which shall not be registered for a year, shall entitle any person to vote. The intention of the act was to give security to the freeholders against the risk of fraudulent intruders, by requiring, that the title of every claimant, whether in his own person or his wife's, should be subject to scrutiny for one year before enrolment. The proviso regarding apparent heirs in this act, and husbands voting on their wives' infeftments, place them in the same situation; and it is held, that the infeftment of the predecessor must be recorded a year before his heir apparent can vote; Wight, p. 247; so must the infeftment of

the wife, in her predecessor's person, if she be an heiress, or, in her own, if she be only a singular successor; and the right reserved, is the right of voting at elections, not that the infeftment does not require registration for a year. No. 12.

The case of Farquhar Gray was solely a case of apparency; and the judgement of the Court, supporting the enrolment, went entirely upon the admitted apparency of the wife, when it is not necessary for the husband to wait a year after her infeftment before he can be enrolled; (No. 188. p. 8814; Wight, p. 251.) The case of Sandilands referred to the same point. The wife's infeftment had been taken and recorded three years before the claim of enrolment, which therefore entitled her husband to be enrolled, whether she was an heiress or not. The case of Fraser against Lord Woodhouselee, (19th June 1804), was similar, No. 8. APPENDIX, *supra*.

The Court were a good deal divided in opinion in this case; but the complaint (27th February 1807) was dismissed. To which judgment, the Court (11th March) adhered, by refusing a reclaiming petition without answers.

For Complainer, *Mat. Ross, Jo. Clerk, J. Gordon, Geo. Ross.* Agent, *Jo. Tod*, W. S.
Alt. *Dean of Faculty Blair, Rolland, Hamilton, Fergusson.* Agent, *Jas. Dundas*, W. S.
Clerk, *Pringle.*

F. *Fac. Coll. No.* 277. *p.* 624.

1807. *June* 27. DUFF *against* GORDON.

No. 13.
In a charter by a father to his eldest son, the heir of the family, a clause of return to the granter, and his other heirs-male, does not render the vote nominal and fictitious.

AT Michaelmas 1806, John Gordon younger of Cluny, claimed to be enrolled among the freeholders of the county of Banff, upon a disposition by Charles Gordon, Esq. of Cluny, in favour of the claimant, and the heirs-male of his body; whom failing, to return to the said Charles Gordon, and his other heirs-male and assignees whatsoever.

Mr. Gordon was enrolled by the freeholders; against which Alexander Duff, Esq. of Mayne, complained, and

Pleaded: This vote is nominal and confidential; no price was paid for it; it is not conveyed to him absolutely; it is in a certain event to return to the granter and his heirs. These, together with the connection between the granter and the disponee, prove that this is a confidential vote, created solely with the view of increasing the political influence of the granter. Where a freehold has been created in favour of a stranger, with such a clause of return, the claim of enrolment has uniformly been rejected; Soutar, 26th November 1803, No. 6. APPENDIX, *supra*; Maxwell against Macdowall, 24th December 1803, No. 7. APPENDIX, *supra*. A son stands in a more confidential relation with a father, than any mere dependent can do.

Answered: It is just that the presumptive heir of a large estate should, when he attains majority, be enabled to discharge the political duties of a citizen;