

No 106. as bodies corporate standing on the roll of freeholders of any county, and so made no provision with regard to them. The directions of the statute, therefore, cannot apply to them; the remedy is left to the common law, by which every freeholder has a proper right and interest, to have every voter, not properly qualified, removed from among them. Besides, supposing the statute did apply, there seems to be much the same alteration, when one delegate is chosen from a borough in place of another, as when a predecessor dies, and the heir craves to be inrolled in his place.

“ THE LORDS sustained the objections to the vote of the Town of Paisley, and found, That the delegate of that borough had no right to stand upon the roll of freeholders of the shire of Renfrew, and ordained him to be expunged therefrom.”

Act. *Wa. Stewart, John Craigie, and Lockhart.* Alt. *Miller.* Clerk, *Tait.*

*J. C.* *Fol. Dic. v. 3. p. 422.* *Fac. Col. No 219. p. 399.*

1765. *December.* M'LEOD of Cadbole *against* GORDON of Newhall.

No 107.

WILLIAM GORDON of Newhall, a minor, but within a few months of twenty-one years of age, was enrolled by the freeholders of Cromarty, with a proviso, that he should not be entitled to vote till his majority. Upon a complaint, he was ordered to be expunged, though he had become of age before the complaint was determined.—See APPENDIX.

*Fol. Dic. v. 3. p. 422.*

1768. SKENE of Skene *against* GRAHAME of Flemington.

No 108.

A PROPRIETOR had given in excambion forty acres of land to his neighbouring heritor; but, as he had received another piece of land in exchange, it was held that the transaction made no variation on his valued rent.—See APPENDIX.

*Fol. Dic. v. 3. p. 415.*

1771. *February 14.*

Captain BASIL HERON *against* JOHN SYME of Meikle Culloch.

No 109.

Infestment taken in virtue of a clause of union and dispensation in a Crown charter.—See Skene *against* Ogilvie, and

AT the Michaelmas meeting for the stewartry of Kirkcudbright, in October 1770, Captain Heron claimed to be enrolled a freeholder upon titles, part of which consisted of a special retour, by which the lands of Drumnaught and Glengornane were retoured to a thirty shilling land, and the lands of Torquinoch to a ten shilling land, making together a forty shilling land of old extent.

To these titles, it was *objected* by Mr Syme, that though the charter founded on by Captain Heron contained a clause of dispensation to Mr Home, in whose favour it was granted, for taking infeftment upon the lands of Little Park, or upon any other part of the lands thereby disposed, yet that privilege was personal to Mr Home, or at least could only go alongst with the whole lands, if he had disposed them to one person. By parcelling them out to different persons, he had broken the union created by the charter; so that he could not convey the benefit of the dispensation to apply to every person to whom he might dispose; and as the disposition from Mr Home to Captain Heron did not convey that benefit, and as it appeared that infeftment had been taken only upon the lands of Torquinnoch, he was not infeft in the whole lands upon which he claimed to be enrolled.

The freeholders having refused to enrol, Captain Heron, in a reclaiming petition, *maintained*,

It was an adjudged point, as to lands in a Crown charter, containing a clause of union, and declaring infeftment to be taken at a principal messuage, or upon any other part of the lands, that infeftment thereof, provided it was taken in virtue of the precept contained in the charter, was good for the whole, however discontinuous, and notwithstanding they had been conveyed to different persons. This point was decided in a question from the county of Forfar in 1768, Spence *contra* Skene, where the Court had sustained the objection, but the House of Lords had reversed the judgment. Thirteen cases from the county of Forfar, besides several from the county of Linlithgow, had been decided the same way; so that the question was at rest.—(See Sect. 5. of this Division.)

The principle upon which this doctrine rested was unquestionable. It could not be denied that the Crown had full powers to unite tenements lying discontinuous; so that infeftment taken upon one should be sufficient for the other, though at any distance. Upon the same principle could the Crown authorise an infeftment to be taken upon any part of the Crown's property, the whole falling to be considered as an united tenement in the Crown, who authorised it; and infeftments so taken occurred frequently in practice. There was no distinction betwixt the case from Forfar and the present. The clause of dispensation evidently gave a power of taking more than one sasine; it gave authority to take '*unica sasina nunc et in omni tempore futuro*;' and it gave this power not only to the person in whose favour the charter was granted, but '*ejusq. prædict.*' that is to say, *hæredibus et assignatis*; and hence, though infeftment had actually been taken by the grantee, his heirs would have been entitled, without any new charter, but upon a special service, to take another sasine by virtue of the clause of dispensation.

Mr Syme *answered*;

The general rule as to the feudal investiture was, that there must be real or symbolical delivery of the lands *super fundum terrarum*; and where lands were discontinuous, the infeftment must be taken upon the several tenements. As

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No 109. this general rule might be dispensed with by the royal prerogative, such dispensation might be more or less comprehensive, according as the Sovereign or the Barons of the Exchequer should see cause. It might be so limited as to be personal to the granter; it might be allowed to be taken at one particular place only, or upon any part of the lands; or it might authorize one general infeftment only, in either of the ways mentioned, for the whole lands.

In every case of this nature, the tenor of the dispensation and precept of sasine must be carefully attended to as the rule of judgment. By the tenor of the dispensing clause, in the present instance, bearing, '*Quod unica sasina per pre-fat. G. Home, ejusque prædict.*' no more was authorized than one infeftment on any part of the lands for the whole, in favour of George Home himself, or of any other person to whom he might dispoise the lands, with the benefit of the dispensation; but a dispensation so qualified did not authorize twenty different infeftments upon as many different fractions of the lands dispoised. The precept, in this case, authorized delivery of sasine '*Præfato G. Home vel suo cer-to auctonato, latori presentium tot. et integ. et secundum formam et tenorem antedictæ cartæ,*' precisely corresponding to the limited construction contended for; so that this infeftment, not having been taken in the form and manner prescribed by, but disconform to the warrant, was on that account null and void.

The decision from the county of Forfar could not be regarded as fixing any rule applicable to the present case. The clause of union and dispensation was very different. In the Forfar case, the dispensation granted was not limited to the infeftment to be taken in execution of the precept in the charter, but was to continue in force, and operate *omni tempore futuro*. It differed from the clause of union and dispensation in George Home's charter in this other respect, that as the one authorised one infeftment only to be taken for the whole upon any part of the lands, the other authorised the renewal of the infeftment *omni tempore futuro*, by taking it upon any part; and declared it sufficient, not only for the whole lands, but for any part of them. In the Forfar case also, there was no absolute alienation of the united lands, but grants of liferent merely, which were but temporary burdens upon the property.

It was observed upon the Bench, That, in questions of this nature, they were tied down by the judgment of the House of Lords in the cases from Forfar referred to; and hence it was found, that the freeholders had done wrong in refusing to admit Captain Heron upon the roll, and he was ordained to be enrolled accordingly.

The same judgment was given in the complaint of Edward Maxwell *contra* Syme.

For Heron, *A. Fergusson, Crosbie.*

For Syme, *Lockhart.*

The same day the Court decided a complaint brought by Copland of Collieston *contra* John Busby, who, at the Michaelmas meeting, had stated as an ob-

jection to Copland's titles, that the pages of his sasine were not numbered in terms of the act of sederunt 1756, the first page being omitted. The freeholders had sustained the objection, but the Court overruled it, and ordained the complainer to be added to the roll.

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For Copland, *Crosbie*.For Busby, *Wight*.

R. H.

*Fac. Col. No 76. p. 219.*1777. June 17. SIR ROBERT ABERCROMBY *against* ALEWOOD.

No 110.

It is not uncommon for royal burghs to alienate parts of their burghage lands, to be held of themselves. But even although, after doing so, they were, by connivance, to convey the superiority to a purchaser, so as to make way for his obtaining a charter from the Crown, that would not confer upon him a right to vote, or entitle him to be enrolled as a freeholder. The lands still remain truly burghage, and their owners are represented by the member for the burgh.—See APPENDIX.

*Fol. Dic. v. 3. p. 414.*1780. EARL FIFE and SIR JAMES DUFF *against* SIR JOHN SINCLAIR.

No 111.

ALEXANDER BRODIE of Brodie, superior of Wester Brims, belonging in property to the Earl of Caithness, having died in 1759, his heir finding the estate encumbered, declined making up titles till 1773, when he obtained a Crown charter, and conveyed the superiority to Earl Fife, who transferred it to Sir James Duff, in liferent, and to the Earl himself, in fee. In the mean time, Sir John Sinclair of Murkle, to whom the property devolved on the Earl of Caithness's death, obtained a decree of declarator of tinsel of the superiority against the heirs of Alexander Brodie, and had in consequence thereof procured a charter from the Crown, *supplendo vices* of the immediate superior; and Earl Fife and Sir James Duff having claimed to be enrolled on these lands, at Michaelmas 1779, Sir John Sinclair objected that he was the immediate vassal of the Crown, and that the heirs of Alexander Brodie had lost the superiority during their lives, by act 1474, cap. 57, and, in consequence of the decree of declarator he had obtained against them. The freeholders sustained the objection; but it being the opinion of the Court, that a superior, by lying out unentered, and by the vassal's obtaining a charter *supplendo vices*, did not lose his character of superior, or his right to the feu duties or other casualties, but only to the nonentry duties during his life, they found that the freeholders had done wrong, and ordered the claimants to be added to the roll. See APPENDIX.

Effect where the superior unentered.

*Fol. Dic. v. 3. p. 413.*