No 121.

'and accommodation.' In giving off a small angle of two acres, for the express purpose of accommodating himself and his neighbour, it never was imagined that this could affect the right to vote upon a ten pound land. The object of the statute 1681 was plainly to prevent the multiplication of votes, by dividing the old extent of lands, but cannot affect this operation, when a small angle has been given off, which is at the same time declared to have no valued rent annexed to it, and to be free of all public burdens; so that there is in reality no division of the old extent, but the extent of the land is instructed by a retour prior to 1681. In former cases, an excambion was never held to diminish the evidence of the retour; Skene against Graham, No 108. p. 8684.; Hamilton against Bogle, No. 113. p. 8688.; Dunbar against Brodie, (1795, *See* APPENDIX;) Cunningham against Glen, (1797, *See* APPENDIX.) Retours are always interpreted liberally, so that a person is not deprived of his elective franchise, although there should happen to be a discrepancy between the values affixed to the separate parcels in the descriptive clause, and the *cumulo* value in the *valent*; and it is a matter of little consequence, whether there is an inaccuracy in framing the retour, or whether a trifling part of the lands has been given off. There is still sufficient evidence arising from the retour, that the lands are of a requisite valuation.

This was looked upon entirely as the common case of a straighting of marches, which, owing to the new road, the necessity of the case authorised. It could even have been compelled in an action for that purpose before the Sheriff. A canal might have the same effect of disjoining a small angle from one property, and laying it to another.

THE COURT found, (11th February 1803,) "That the freeholders did right in admitting the respondent on the roll."

To which judgment the COURT adhered, (1st March) by refusing a reclaiming petition, without answers.

For Stewart, *H. Erskine, J. Clerk, Ferguson, W. Erskine.* Agent, *A. Young, W. S.*
For Gordon, *Solicitor-General Blair, Hay, Cathcart.* Agent, *And. Macwhinnie.*
Clerk, *Menzies.*

F. *Fac. Col. No* 85. *p.* 188.

1803. *February* 17. FERGUSSON *against* GLENDONWYNE.

No 122.
A Roman Catholic found not entitled to stand on the roll of electors, though he had been admitted by the freeholders,

ON 13th October 1801, a claim to be enrolled among the freeholders of Kirkcudbright was entered by William Glendonwyne of Glendonwyne, on the five merk land of Crogo. He was enrolled accordingly, and appeared at the meeting for electing their representative on 23d July. To his vote it was *objected* by James Fergusson of Crosshill, that Glendonwyne professed the Roman Catholic religion, and, having tendered the formula of the 8th Parliament

No 122. and no complaint entered within four months.

of King William, which was refused, he moved that his vote should be excluded.

The freeholders repelled the objection, upon which Mr Fergusson complained, and

Pleaded; The act 1707, c. 8, which was declared to be a part of the treaty of Union, provides, 'That none shall be capable to elect, or to be elected, but 'such as are 21 years complete, and Protestant, excluding all Papists, or who 'being suspected as such, being required, refuse to swear and subscribe the 'formula contained in the 3d act made in the 8th and 9th sessions of King 'William's Parliament;' the meaning of which is, that none can be enrolled in the situations above described; not merely that he cannot vote nor be elected, for it is a roll of electors, established for the purpose of ascertaining who the electors are; and being incapable of electing is the same thing as being incapable of being enrolled. It was so interpreted in the case of disqualification by minority; M'Leod against Gordon, No 107. p. 8684., Wight, p. 268. If a Papist has no right to be put upon the roll, and has been admitted through inadvertency, he may be struck off when the error is discovered.

The act 1707 remains in full force to prevent Roman Catholics possessed of sufficient property from voting at elections; for they lay under no disability to hold property, but only the next Protestant heir was entitled to claim it if he was so inclined; and they were disabled from acquiring property by purchase. It was to relieve them from these disabilities, and not to convey to them the right of elective franchise, that the 33d George III. c. 44, was enacted, assimilating the condition of Roman Catholics in this country to their situation in England. There it never was pretended that they had a title either to elect or be elected, and this is the first instance where this privilege has been claimed in this country. By this act they are relieved expressly from the disabilities of 1700; but it has no reference to the subsequent statute, which forming a part of the treaty of Union remains entire; and the right of a Papist to elect or be elected, or, which is the same, to be upon the roll of freeholders, stands exactly upon the same foundation, that of subscribing the formula of King William.

Though the enrolment took place in October 1801, and no complaint was made within four kalendar months, it is still competent; for a personal disqualification cannot be got the better of by any title whatever. He should never have been admitted to the roll, and may at any time be struck off, upon refusing the formula. The act 16th George II. does not apply to personal disqualifications, as these may not exist, or be known within the statutory period for complaining. Thus, a person succeeding to a peerage, or becoming the eldest son of a Scots peer, may be struck off the roll though he has stood there for years. But there has here been an alteration of circumstances, in respect of the right and title on which the enrolment took place. On the titles produced, Glendonwyne was entitled to be enrolled. No opportunity occurred of tendering the formula till 23d July, when he refused it. Within four months a com-

plaint has been presented. The refusal of the formula, stamped upon him the personal disqualification. No 122.

Answered; Every disqualification by which a man is prevented from enjoying the right of elective franchise, is unfavourable in its nature, and therefore to be strictly interpreted. The words of the act 1707, supposing it to regulate the present question, and not to be repealed, does not call in question a Roman Catholic's right to be enrolled, but only imposes on him, as a necessary preparatory to the exercise of his right of election, the duty of taking a certain formula if required. The terms of the statute are precise, and, like every penal statute, must be interpreted strictly. Fatuous persons and lunatics cannot vote as electors; but such persons being on the roll, cannot be turned off, unless when tried and cognosced by a jury. A roll of freeholders, and a roll of electors, are thus essentially different; the one comprehending all holding estate of a certain value under the Crown, and the other embracing all who are not otherwise disqualified. Wight, p. 269, gives it as his opinion, that the freeholders cannot turn a person off the roll who refuses to take the formula, it being sufficient to tender to him this test of his religious principles, as often as he claims to vote, in the same way as one refusing to take the oath of abjuration cannot be struck off the roll. It was necessary to enact 37th Geo. III. c. 138, to prevent revenue-officers from voting for preses and clerk, which they had formerly done, notwithstanding 22d Geo. III. c. 41, disabled them from electing or being elected. This disability is similar to that of being a Roman Catholic. They are both personal, temporary and removeable at any time. Scots peers' eldest sons, minors and women, labour under a natural defect of title, and therefore are excluded from the roll altogether.

But the formula of King William is repealed expressly, along with the act itself, by 33d Geo. III. c. 44, and any reference, therefore, made to it by 1707, c. 8, is also at an end. The new formula is substituted in its place, and the Roman Catholic who takes it is to be relieved from all pains, penalties and disabilities, &c. 'as fully and effectually, to all intents and purposes whatsoever, 'as if such person had actually made the renunciation of Popery thereby or-'dained.' None of the least of these disabilities is the incapacity to elect and be elected.

Having stood more than four months upon the roll, a complaint is not competent. No objection has been made to the valuation of his lands. Here his title is complete; and having enjoyed, in consequence of it, the right of being enrolled longer than the statutory period, nothing but an objection arising from the alteration of that right or title in respect of which he was enrolled, can be sustained to take it away. No such alteration is alleged, so that the right of challenge is long ago prescribed; for, a freeholder may refuse to take all the oaths tendered to him, except the trust-oath, and yet he is entitled to stand upon the roll.

No 122.

The Court were unanimously of opinion, that the formula prescribed by 1707 was still in force, and that it might be put to a person suspected of being a papist, previous to his enrolment. This had not been the course followed here, but it had been tendered, and refused, the first time he came to exercise the privilege of election. Consequently, he had no right to continue on the roll, although he had stood in it for more than four months, as a great distinction occurs between objections arising from the title of his lands, and from a personal disqualification, which cannot be known till an opportunity arises for investigating it. An objection to a title appears *ex facie*, and must therefore be challenged within four months from the enrolment; but a personal disability can only be objected to when it is discovered. A Protestant may become a Roman catholic; he may be required to take the formula, and if he refuse he can have no right to continue on the roll, although he may have been enrolled for years.

The Court (17th February 1803) sustained the objection to the respondent's standing upon the roll of freeholders.

To which judgment they adhered, by refusing a reclaiming petition, without answers, (10th March 1803).

For Ferguson, *H. Erskine, M. Ross, W. Erskine, Campbell, jun.* Agent, *Alex. Young, W. S.*
For Glendonwyne, *Solicitor-General Blair, Hay, Cathcart, Walker.* Agent, *W. Walker.*
Clerk, *Menzies.*

F. *Fac. Col. No 89. p. 194.*

No 123.
A subdistributor of stamps not disqualified from voting at elections.

1803. *February 25.* GOODSIR *against* HUTTON.

THE statute 22d Geo. III. c. 41. was enacted for the better securing the freedom of elections of Members to serve in Parliament, by disabling certain officers employed in the collection or management of his Majesty's revenue from giving their votes at such elections. This enactment was not held to apply to the case of John Hutton, writer in Kinghorn, who received a quantity of stamps from the head distributor at Cupar, with which he afterwards supplied the neighbourhood; for he had no connection with, and was not under the controul of the Commissioners of the Stamp-office; he was not appointed by them; nor was he an immediate servant of government; the design of the statute being no other than to diminish the influence of government in elections. It was also interpreted in this way in England; Luders on Elections, vol. 2. p. 552, 601.; Fraser's Election Cases, vol. 1. p. 164.

Act. *Gillies.* Agent, *Jo. Syme, W. S.* Alt. *W. Erskine.*
Agent, *Cha. Anderson.* Clerk, *Pringle.*

F. *Fac. Col. No 89. p. 197.*