No 183. But the claimant's father having only a base infeftment, was not qualified, and the charter of confirmation, obtained after his death, cannot be considered as part of his titles; 3d July 1753, Abercromby against Gordon, No 177. p. 8801.

Answered, A charter of confirmation makes the base infeftment public from its date; Erskine, b. 2. tit. 7. § 15.; Stair, b. 2. tit. 3. § 28. The intermediate death of the party infeft does not hinder its operation; and to entitle an heir apparent to be enrolled, it is sufficient for him to produce titles in the person of his predecessor, which would have given him that privilege.

The Court, upon the grounds stated for the defender, dismissed the complaint.

Act. *George Fergusson.* Alt. *Cha. Hay.* Clerk, *Gordon.*

D. D. *Fol. Dic. v.* 3. *p.* 425. *Fac. Col. No* 14. *p.* 30.

1790. *December* 14. SPIERS *against* CAMPBELL.

No 184.

AN apparent heir of a person whose estate had been vested in trustees, was found entitled to vote.—*See* APPENDIX.

Fol. Dic. v. 3. *p.* 426.

1803. *February* 12. STEWART *against* BLAIR.

No 185.
A vote given on a title of apparency is good, altho' there was a possibility of a nearer heir being in existence at the time.

THE Honourable Montgomerie Granville John Stewart objected to the claim of enrolment of David Blair, Younger of Borgue, Esq; in the roll of freeholders of the stewartry of Kirkcudbright. He claimed to be enrolled as apparent heir of the late Lieutenant-Colonel John Blair, his elder brother, proprietor of the lands of High Borgue, and others. He produced a charter under the Great Seal, in favour of David Blair, Esq; his heirs and assignees whomsoever, and a disposition of the lands granted by the said David to John Blair, his eldest son, and the heirs-male of his body, containing an assignation to the charter and precept, with an instrument of sasine following thereon, in Colonel Blair's favour; in consequence of which titles, he had for many years voted as a freeholder in the stewartry. He died on the 13th July 1802, leaving a wife, but no children; and his brother claimed upon his apparency on the 23d July thereafter, at a meeting for the election of a Member of Parliament. His claim having been sustained by the freeholders, Stewart presented a petition and complaint against the enrolment; and

Pleaded, 1*mo*, The destination to John Blair, and the heirs-male of his body, limited his right to that particular species of heirs, upon the failure of which, the

superiorities then disponed must revert to the granter; Somerville against Tenant, 25th July 1688, No 11. p. 2949.; Sir George M'Kenzie, b. 3. tit. 10. § 1. No 185.

2*do*, There was not sufficient evidence produced to the meeting of freeholders, that Colonel Blair was actually dead, even supposing, by the terms of the destination, that the claimant had a title on apparency. It makes no difference that the report of his death, which was then stated, turned out afterwards to be true.

3*tio*, As Colonel Blair left a widow, it was not competent to enrol his brother, until it was known whether there was an heir *nasciturus*. He was alleged to have died suddenly, a few days before the meeting of freeholders. He was in the prime of life, and his wife was younger than himself. In determining this point, the Court must judge as if it had come before them when it came before the freeholders, a few days after Colonel Blair's death. It is now, indeed, discovered, that his wife was not pregnant; but that, as it could not have been known then, cannot make a difference now. In such circumstances, the freeholders did wrong in enrolling his brother; for a child *in utero* is presumed to be born in all things that concern its interest; *L.* 7. *D. De stat. hom.*; Bankton, vol. 1. p. 47.

Answered, 1*mo*, The doctrine that a feu to heirs-male reverts to the granter, upon the failure of these heirs, has been long obsolete. Had the grant been made simply to Colonel Blair, without any mention of heirs at all, there can be no doubt that it would have been liable to have been evicted for his debts, and would have descended after his death to his heirs whatsoever. The original nature of feus may, perhaps, give some countenance to the complainer's doctrine; but their constitution, in all the kingdoms of Europe, has been greatly changed; and they have been hereditary ever since the time of the Emperor Lotharius, *L.* 1. *Cons. Feud. tit.* 19. 20.; and, accordingly, it has often been decided, that a feudal investiture, taken to a person, and a particular series of heirs, passes, upon the failure of these, to his heirs whatsoever; Erskine, b. 3. tit. 10. § 1.; Johnstone against Marquis of Annandale, July 31st, 1759, No 39. p. 4356.

2*do*, The law does not require the evidence of a man's death to be established by the positive deposition of witnesses who saw him die. The evidence of Colonel Blair's death was perfectly sufficient, and all that can be required in such circumstances; and the fact of his death upon the 13th July is indisputable.

3*tio*, It is a general rule of law, that the nearest heir in existence is entitled to take up a succession; Mackinnon against Macdonald, February 14th, 1765, No 34. p. 5279.; Stair, b. 3. tit. 5. § 50. And although the Court, in some cases, may be led to interfere and postpone the service, when there is room for presuming the possibility of a nearer heir existing unborn at the time, there

No 185. is no ground for such a presumption in this case. Colonel Blair had been many years married, without having any children; and it is evident now, by the certificate of the Lady herself, which has been produced in process, that no nearer heir is to be expected. In fact, Mr David Blair has been served heir to his brother, which establishes a legal presumption, that there is none nearer.

The Court dismissed the complaint. Their Lordships, upon considering the two first grounds of complaint, expressed a decided opinion, that they were entirely without foundation. And, with regard to the possibility of Colonel Blair's widow being pregnant, it was observed, that the service now expeded was sufficient presumptive evidence of the contrary.

For Complainer, *Clerk, Ross, W. Erskine.* Agent, *A. Young, W. S.*
Alt. *Solicitor-General Blair, Hay, Williamson, Cathcart.* Agent, *A. Macwhinnie.*
Clerk, *Menzies.*

J. *Fac. Coll. No. 86. p. 190.*

SECT. VII.

Husband in Right of his Wife.

1745. *January* 19.

No 186. FREEHOLDERS of LANARK *against* HAMILTON.

A HUSBAND cannot be enrolled upon his wife's right of apparency; but must make up titles in her person.

Fol. Dic. v. 3. p. 426. D. Falconer.

*** This case is the second branch of No 11. p. 8572.

1781. *March* 7.

No 187. CHARLES DALRYMPLE and JAMES BREMNER *against* JAMES FARQUHAR GRAY.

It is not necessary for the husband to wait a

AT the meeting for electing a Member of Parliament for the county of Ayr, held in October 1780, Mr Farquhar Gray claimed to be enrolled upon the following titles: