May 23. 1821. 28. 1761, (8579, Rev.); Abercromby, June 17. 1777, (No. 3. Ap. M. P.); Pirie, July 1777, (No. 4. ib.); Sibbald, Dec. 18. 1790, (8857); Carnegy, Feb. 26. 1796, (8858); Wight, 222; Bell on Elect. 238.

Respondent's Authorities.—Burn, Feb. 17. 1779, (8852); Adam, July 4. 1809, (F. C.) Kibble, June 16. 1814, (F. C.)

J. CAMPBELL,—SPOTTISWOODE and ROBERTSON,—Solicitors.

(Ap. Ca. No. 22.)

No. 11. Sir WILLIAM FORBES, Appellant.—*Gifford—Warren—Walker.* J. GIBSON, Respondent.—*Wetherell—Thomson—Grant—Fullerton—Murray.*

Process—Title to Pursue.—1. Whether an action of reduction of the titles of a freeholder, in order to found an objection to his enrolment, is competent after the lapse of the period specified in the 16th Geo. II. c. 11.—2. Whether a freeholder, merely as such, has a title to insist for reduction of the titles of another freeholder. Held in the affirmative by the Court of Session, but remitted for reconsideration.

May 23. 1821.

2D DIVISION. Lord Pitmilly.

AFTER the petition and complaint mentioned in the preceding case had been dismissed as incompetent, and more than four months had elapsed from the period of the enrolment of Sir William Forbes as a freeholder of the county of Edinburgh, in virtue of the titles there specified, Mr. Gibson brought an action of reduction, the summons in which was at his instance, as 'one of 'the freeholders electors of a commissioner to represent and 'serve in Parliament for the county of Edinburgh or Mid 'Lothian, and as such standing upon the roll of the said free- 'holders, and so having a substantial interest to prevent all per- 'sons not possessing the qualifications required by law from 'being enrolled on the said roll of freeholders.' After calling for production of the charter in favour of Sir William, and the instrument of sasine thereon, and libelling various grounds of reduction, the principal of which was, that the holding had been unwarrantably altered from burgage to blench, he concluded, that 'Therefore, and for other reasons to be proponed at dis- 'cussing the said charter called for, with the signature and pre- 'cept on which the same proceeded, and infeftment thereon, with 'all that has followed or may follow upon the same, ought and 'should be reduced, rescinded, retreated, cassed, annulled, de- 'cerned and declared, by decree of our Lords of Council and 'Session, to have been from the beginning, to be now, and in all 'time coming, void and null, and of no avail, strength, or effect

'in judgment, and outwith the same, in time coming; and the 'said pursuer ought and should be reponed and restored there-'against in integrum.' In defence against this action, Sir William Forbes objected, 1. That as the period of four months allowed by the 16th Geo. II. c. 11. § 4, for bringing complaints against the enrolment of any freeholder, had expired,—as the avowed object of it was to prevent him from remaining on the roll, and as no alteration in his circumstances had occurred, the action was incompetent; and, 2. That as Mr. Gibson did not pretend that he had any right to the lands and others contained in the titles, and merely insisted in the character of a freeholder, he had no legitimate title or interest to pursue a reduction of the charter and infeftment, and still less to do so upon objections alleged to be deduced from the anterior progress of titles. To this it was answered, 1. That the statute limited merely the period within which it was competent to bring the judgment of the freeholders under the review of the Court in a summary form, but did not deprive a freeholder of his right at common law to obtain relief by an ordinary action, at any time, against the injury sustained by the undue admission of an unqualified person to the rolls; and, 2. That as every freeholder was intrusted by law with the guardianship of the purity of the roll, he was entitled to challenge and prevent every attempt to attach that right of admission (which the law limits to estates of a particular class and extent) to one defective in any requisite; that in one class of cases he had a right and title to do so in a summary form, but that there was another class, which, from demanding an investigation, could not be considered by the court of freeholders; that this, however, did not deprive any individual freeholder of his interest and title to obtain redress, and that it was of no importance that the effects of the reduction might be more extensive than his interest demanded. Lord Pitmilly 'having heard parties' procurators on the preliminary defence 'that the pursuer has no sufficient title to insist in the present 'action of reduction of the defender's charter and sasine, and 'having considered the process, and having seen the proceedings 'in the petition and complaint, and attended to the interlocutors 'of the Court by whom the complaint was dismissed as not 'competent, and having called the cause, repels the objection to 'the pursuer's title to insist in this action of reduction.' To this interlocutor he afterwards adhered, with this explanation, 'That 'the pursuer has a sufficient title to insist in the present action 'for reducing the defender's title, in so far as the pursuer is 'interested, as one of the freeholders standing on the roll of

May 23. 1821. ‘ freeholders of the county of Mid Lothian, as libelled, to reduce ‘ the defender's said titles.’ The Court, after a hearing in presence, adhered, on the 19th of May 1820, to these interlocutors.* Sir William Forbes having entered an appeal on the grounds above stated, the House of Lords ‘ Ordered that the cause be re- ‘ mitted back to the Court of Session to review the interlocutors ‘ appealed from generally, and especially having regard to the ‘ summons and the prayer thereof, and to what the Court, having ‘ such regard, can or cannot, according to law, further do in this ‘ cause.’

† After the appeal of Mr. Gibson against Sir William Forbes, under the summary application, had been debated and disposed of, the counter appeal of Sir William Forbes against Mr. Gibson, under the reduction, was proceeded in.

The *Attorney-General* (Gifford) began the opening for Sir William Forbes, the appellant.

The *Lord Chancellor* stated, that he saw that some of the Judges in the Court of Session lamented the extent of the conclusion of the summons: That it appeared to him that unless the respondent could, somehow or other, limit his conclusions to the enrolment of Sir William Forbes, he could never show that he had any interest to reduce the charter.

The *Attorney-General* urged, that if he could only have an interest to reduce the charter, so as to affect Sir William's enrolment, his objection ought to have been made within the four months; that, according to Erskine's account of the powers of the Court of Session, they did not appear, previous to the act 1681, to have had any jurisdiction in matters of this nature; and that therefore their power was derived from this and subsequent statutes only.

He then stated the terms of Mr. Gibson's summons of reduction.

Lord Chancellor.—You are perfectly right; the summons asks for a total reduction. The utmost that Mr. Gibson can get by this action, is, that the appellant shall be taken off the roll of freeholders. How he is to be taken off the roll by the Court of Session, does not yet appear. In these two cases between these parties, you have got us, as they say, into a clift stick. You have got a judgment in one cause, saying that the freeholders have no right to inquire; and, in the other cause, you say they ought to have inquired.

Attorney-General.—No; we say in the first cause, that we showed a primâ facie good title. In the second we say, that parties having an

---

* See Fac. Coll. of that year, No. 37. No opinions of the Judges are given.

† These notes were laid before the Court of Session, on applying the remit. See Shaw and Dunlop's Cases, Vol. III. No. 120.

interest to reduce that title may do so; but that the freeholders have no such interest, and so have no right to reduce it. May 23. 1821.

Lord Chancellor.—It seems to me that, consistently with this judgment, a freeholder might succeed in reducing the title. The Judges put it in another way;—they say, suppose neither the Crown nor the city choose to interfere, then a wrong may be done without a remedy. The respondent says the lands are not in the county of Edinburgh.

Attorney-General.—This was not contended in the freeholders' court. All the decisions tend to show, that where the real owner of a freehold does not dispute the title of another to it, the freeholders cannot interfere.

Lord Chancellor.—I think the Judges must hold that they could, if they hold the doctrine contained in the interlocutor in this case.

Lord Redesdale.—In those cases cited, the question was, Whether the property belonged to A or B?—Here the question is, Whether it belongs to any one, as entitling him to vote as a freeholder of the county?

Lord Chancellor.—You may take it to be pretty clear, that we are of opinion that the freeholders could not inquire into this beyond the immediate title.

Lord Redesdale.—The assessment primâ facie shows that the lands are in the county. There comes to be another question, Whether the lands were of the proper tenure? And the question, Whether the charter could alter the tenure? and whether an additional voter could thus be introduced upon the county?

Attorney-General.—The summons asks for reduction of the charter. In no part of the summons does the pursuer ask to get the freeholder off the roll, which is in reality the only thing in which he has any interest. If the Barons have been deceived, they may reduce. The burgesses of Edinburgh, if they are aggrieved, may reduce. In the cases of reduction of decrees of valuation, a freeholder has an interest as an heritor.

Lord Redesdale.—His interest there lies the other way, except as a freeholder.

Attorney-General.—For aught that appears in the summons, it does not appear that Sir William Forbes ever was enrolled. In the very next case, (that of Arbuthnot,) the Court of Session holds that they cannot reduce as against a freeholder not enrolled. In the summons, it does not appear that the pursuer has an interest as against an enrolled freeholder. Our argument in the Court of Session might have been, You may reduce as to our enrolment, but not as to the title itself.

Lord Chancellor.—All the Judges considered this as a case of difficulty, but that the party would be without a remedy if not entitled to pursue this action. Lord Robertson appears to have overlooked the

May 23. 1821.

form of the summons. You cannot, in a summons which does not state the grievances really to be complained of, give any remedy.

Attorney-General.—The Lord Justice-Clerk seems also to mistake one point. The complaint really meant to be made here is precisely of the same species as those in the act of Parliament. These two appeals must be considered separately.

Lord Chancellor.—The Court of Session having given leave to appeal before the conclusion of the cause, shows that they thought themselves competent to have given some final judgment in it. It has struck me strongly that this is a case which we must remit, as we are bound to suppose, that notwithstanding the form of the summons, some judgment can ultimately be given.

Mr. Grant.—We will show your Lordships what judgment might be given under this summons.

Lord Chancellor.—But then we should have to give an opinion as to what the final interlocutor of the Court of Session may be, before the Court itself shall have decided.

Attorney-General.—We asked leave to appeal, on the ground that under this summons no freeholder is, merely as such, entitled to pursue. I say that the prayer of the summons should have been, that the enrolment should be reduced.

Lord Chancellor.—I suppose they will say the charter should be reduced so far as it gives a right of voting, and that then, at the next Michaelmas Court, the appellant, from a change of circumstances, could be put off the roll.

Attorney-General.—But for this purpose they must reduce the tenure.

The Attorney-General then concluded.

Mr. Wetherell, for the appellant.—I will take notice of a fallacy on which the respondent argues. He holds the right of voting to be a part of the subject. The right to vote is a consequence of the tenure itself,—nothing entering into the corpus of the freehold—only growing out of it, and stands pari passu with a right to vote for a freehold in England. This is an action to destroy in toto the grant.

Lord Chancellor.—The inclination of the House is to remit to the Court of Session to consider the terms of the summons, and to find what remedy the Court of Session is entitled to give under it, supposing the judgment now appealed from to stand.

Mr. Grant.—A pursuer is entitled to limit the conclusions of his summons as much as he pleases, and the Court is also entitled to limit them for him.

Lord Chancellor.—Whether the pursuer restrict, or the Court restrict, we must, if we proceed, now decide what that restriction must be, without the Court of Session having decided for us.

Lord Redesdale.—Does not the competency or incompetency of the

action depend upon what the Court can do? If the Court can do nothing, the freeholder cannot sue. May 23. 1821.

Lord Chancellor.—We have not here in discussion what the Court can do.

Mr. Grant.—In the parallel case of a reduction of a decree of valuation, the question has always been, Whether the freeholder had a legal interest to pursue? This interest might be various—disturbing the mode of taxation, &c. There never was a question in such actions, that a person, as a freeholder merely, had no title to pursue.—Mr. Grant read the terms of the summons.

Lord Chancellor.—You are to restrict, then, the generality of the prayer by the specialty of a recital.

Lord Redesdale.—How can there be a competency to sue, if nothing can be done under the action?

Lord Chancellor.—I give no opinion as to whether any thing can be done or not under this summons, but we must use great caution in cases from Scotland, and particularly in cases like this, how we proceed in point of form. We should have first had from the Court itself its opinion what it could have done ultimately under the summons. I should have wished the final decree to be pronounced before the appeal came here.

Appellant's Authorities.—(1.)—1457, c. 75; 1503, c. 78; 1587, c. 114; 1681, c. 21; 16. Geo. II. c. 11; 1. Wight, 338.—(2.)—Lord Galloway, Feb. 10. 1681, (7835); Colt, &c., Jan. 9. 1756, (7782.)

Respondent's Authorities.—(1.)—Bell on Elect. p. 402, and cases there.—(2.)—Wight, 185; Earl of Fife, July 8. 1774, (8850.)

SPOTTISWOODE and ROBERTSON,—J. CAMPBELL,—Solicitors.

(*Ap. Ca. No. 23.*)

WILLIAM ARBUTHNOT, Appellant.—*Gifford—Cranstoun—L'Amy—Walker.*
JAMES GIBSON, Respondent.—*Thomson—Fullerton—Murray.*

No. 12.

See Note 37-F. 20 May 1820

Title to Pursue.—1. Whether it is competent for a freeholder, merely qua such, to insist in a reduction of the titles of a party who has not actually claimed to be enrolled, but has made up titles with that view? And, 2. Whether, if it is not, the objection to the title to insist in that action can be removed by the defender being enrolled pending the process? The Court of Session having found in the *negative* on the first point, and in the *affirmative* on the second, case remitted for reconsideration.

MR. ARBUTHNOT having acquired from the Magistrates of Edinburgh an assignation to a charter, under the Great Seal, of certain lands in a situation similar to those which had been con- May 23. 1821.

2D DIVISION.
Lord Pitmilly.