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v.
GIBSON.

SCOTLAND.

(COURT OF SESSION.)

SIR WILLIAM FORBES, of *Pitsligo*, baronet - - - - - - - - - } *Appellant*;

JAMES GIBSON, of *Inglistone*, esq. - *Respondent.*

A SUMMONS in an action at the suit of a freeholder, praying that a charter and infeftment may be reduced (absolutely), on the ground that the tenure has been unwarrantably charged from burgage to blench, for the purpose of giving persons qualification, cannot without limitation be sustained. *Semb.* that such freeholder has no title to sue unless the conclusion of the summons can be limited to the question of enrolment.

Whether the Court of Session has power to qualify the conclusion of the summons, and limit the reduction of the charter, &c. to the effect of excluding the party claiming under it from the roll of freeholders. *Quære.*

Supposing the reduction to be capable of being, and to be in fact so limited, whether the case does not fall under the provisions of the statute 16 Geo. 2, c. 11, s. 4, by which the period of bringing complaints is limited to four months. *Quære.*

Whether an action at common law to reduce the charter generally, or as conferring a freehold qualification, is competent after the lapse of four months from the time of enrolment. *Quære.*

AS soon as the interlocutors, dismissing the summary complaint mentioned in the preceding case, had become final in the Court of Session, the Respondent raised two actions of reduction against the Appellant, for the purpose of setting aside his charter and infeftment. In one of these actions, Mr. Gibson, with certain other persons, pursue, in the character of a burgess of the City of Edinburgh, and as thus having a title and an inte-

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rest to prevent an alienation of property belonging to the burgh.

The other action was brought by Mr. Gibson in the character of a freeholder of the county.

The summons in this action, which is dated December 18, 1817, purports to be brought at the instance of "James Gibson of Inglistown, esq. 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 freeholders, and so having "a substantial interest to prevent all persons not possessing the qualifications required by law, from "being enrolled on the said roll of freeholders, to "whose great hurt and prejudice the writings herein-"after called for to be reduced, are made, granted, "and expede; and, therefore, having good and un-"doubted right and title to raise, intent, follow "forth, and pursue the action of reduction under-"written." The summons then calls for production of the Crown charter in favour of the Appellant, dated 20th December 1814, and the instrument of sasine following thereon; and then sets forth the grounds and reasons of reduction.

The first reason of reduction sets forth in general terms, that the deeds sought to be reduced are false, improbative, and invalid. The second ground of reduction is, that although the lands of Greenhill are described in the charter and instrument of sasine as lying within the county of Edinburgh, they are truly situated within and are a part of the royal burgh of Edinburgh; and in support of this assertion, reference is made to the

charter granted by Charles I. dated 23d of October 1636. The third ground of reduction is, that the holding in the charter and sasine sought to be reduced has been unwarrantably altered from burgage to blench. And the fourth ground is, "that "such an alteration of the holding is contrary to "the Act 6th of Queen Ann. chap. 26, intituled, "'An Act for settling and establishing a Court of "'Exchequer in the north part of Great Britain, "'called Scotland,' and by the former commis-"sions, and former law and practice therein re-"ferred to and recognized, it is not lawful or "warrantable for the Barons of our Exchequer to "receive resignations, or to pass signatures, unless "according to the form and tenor of the former "infeftments, and for payment to us and our royal "successors of the rents and services therein ex-"pressed; as the said Act of Parliament, and said "commissions therein referred to, more fully pur-"port. Whereas the said charter, and the signa-"ture whereon it appears to have been expede, are "altogether and essentially disconform to the tenor "of the former infeftments, whereon the pretended "resignation of the said lands of Greenhill pro-"ceeded, and the same must have been obtained by "the defender *per obreptionem*, of us and our said "barons, contrary to and in express violation of the "powers and instructions under which alone they "act in the discharge of that branch of their "official trust and duty."

The conclusion of the summons is in the following terms: "And therefore, and for other reasons to be "proponed at discussing, the said charter called for,

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" with the signature and precept 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, decerned, and declared by decreet 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,* " *force, or effect in judgment,* or outwith the same " in time coming.

By the statute 16 Geo. II. chap. 11, sect. 4, the term for bringing complaints against the enrolment of freeholders is limited to four months. And the same statute farther provides, " that if no such " complaint shall be exhibited within the time " aforesaid, the freeholder enrolled shall stand and " continue upon the roll until an alteration of his " circumstances shall be allowed by the freeholders " at a subsequent Michaelmas meeting, or meeting " for election, as a sufficient cause for striking or " leaving him out of the roll." The Appellant contended, that as it was the object of this action to defeat his right of enrolment, it was not competent, as not having been brought within the four months prescribed by the statute, and farther, that, independently of this objection, the pursuer, as one of the freeholders standing upon the roll, had no proper title and interest to insist in an action for reducing and setting aside the charter and infeftment called for; that such an action, at the instance merely of a freeholder, was unprecedented; and, were a precedent for it to be now established, every freeholder would be exposed to be called upon to

produce the whole progress of his title deeds, and to lay open his charter-chest, at the pleasure of any other freeholder who might choose to institute an action of reduction. He farther maintained that the action was groundless upon the merits.

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The Lord Ordinary 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 seen the proceedings in the former petition and complaint, and attended to the interlocutors of the court, by whom the complaint was dismissed as not competent on the 29th of May 1818, repelled the objection to the pursuer's title to insist in this action of reduction.

Against this interlocutor the Appellant gave in a short representation which the Lord Ordinary refused, and adhered to the interlocutors represented against.

The Appellant then presented a full representation; and, upon advising the same with answers, the Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary having considered "this representation, with the answers thereto, and "whole process, finds that the pursuer has a suffi- "cient 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 freeholders of the county "of Mid Lothian as libelled, to reduce the de- "fender's said titles; and with this explanation "refuses the desire of the representation and adheres "to the interlocutor represented against."

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Against these interlocutors of the Lord Ordinary the Appellant presented a reclaiming petition to the second division of the court. When the petition came to be advised, with answers, the Judges being unanimously of opinion, that the question of title was one of great importance, appointed a hearing of counsel to take place in their presence.

May 19, 1820. After this hearing had taken place, the Judges of the second division of the court delivered opinions to the effect of sustaining the title to pursue, and accordingly pronounced an interlocutor, refusing the petition, and adhered to the interlocutors complained of, reserving all questions as to expenses.

These judgments being supposed to be interlocutory in their nature, the Appellant obtained leave * to appeal; and accordingly appealed against them.

For the Appellant:

The action is in substance to remove the Respondent from the roll of freeholders, and not having been commenced within four months from the enrolment, it is by the provisions of the 15 Geo. II. c. 11, s. 4, rendered incompetent; and

* By the Act 43d Geo. III. c. 151, intituled, "An Act concerning the administration of justice in Scotland, and concerning appeals to the House of Lords," it is, *inter alia*, enacted, (sect. 15.) "that hereafter no appeal shall be allowed to the "House of Lords from interlocutory judgments, but such appeals "shall be allowed only from judgments or decrees on the whole "merits of the cause, except with the leave of the division of "the Judges pronouncing such interlocutory judgments; or "except in cases where there is difference of opinion among the "Judges of the said division."

the Court of Session has no ordinary or common-law jurisdiction upon the subject.

On this first defence there is no express finding in the interlocutors. But as no party can have a title to insist in an incompetent action, the interlocutors sustaining the title to pursue, do in effect overrule the objection to the competency.

The statute 16 Geo. II. c. 11, s. 4, while it confers upon any freeholder standing on the roll the right of complaining against any enrolment "within four calendar months" after it takes place, provides, on the other hand, "that if no such com-"plaint shall be exhibited within the time aforesaid, "the freeholder enrolled shall stand and continue "upon the roll, until an alteration of his circum-"stances be allowed by the freeholders at a subse-"quent Michaelmas meeting," &c. Supposing the action to be directed (as it has been represented by the Respondent, and regarded in the interlocutor of the Lord Ordinary) merely against the Appellant's enrolment, or his right to continue upon the roll, the question is, whether such action can be competently brought, after the statutory period for agitating complaints relative to enrolment has expired.

The statutory period had elapsed before the present action was brought. The Appellant's enrolment took place on the 1st of October 1816. But the present action was not raised until December, 1817.

The Court of Session has no original jurisdiction in questions of enrolment. When the right or duty of freeholders was that of attending parlia-

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ment in person, it does not appear that there was any ordinary or original jurisdiction in any court, excepting parliament itself, by which any person could be compelled to exercise, or be restrained from exercising, that right or duty.

The statute declares, "that no other objection "shall be competent in parliament or convention, "but what shall be contained in the instruments "taken as thereby provided. And in case objec- "tions be made when a parliament or convention is "not called, a particular diet shall be appointed by "the meeting, and intimate to the parties contro- "verting, to attend the Lords of Session for their "determination; who shall determine the same at "the said diet summarily according to law, upon "supplication, without further citation."

This statute, then, so far from recognizing any ordinary jurisdiction in the Court of Session as to the political right of voting for a representative in Parliament, constitutes only a very special and limited authority in that court—an authority meant to be exercised only "in case objections be made when a "parliament or convention is not called."

The act 16 Geo. II. chap. 11, makes no allusion to any such ordinary jurisdiction. The only check which it provides against improper enrolments, is the summary complaint to be brought within four months after the date thereof; and the same statute declares that in the event of no complaint being brought within that period, the freeholder enrolled shall have a right to remain upon the roll, until an alteration of his circumstances shall take place.

The avowed object of the action is to obtain a

judgment that the appellant ought not to stand upon the roll: or, in other words, to obtain a warrant for expunging his name from the roll. But no alteration whatever has taken place in the circumstances of the Appellant; and, therefore, no proceeding can be competent, of which the sole purpose is to prevent the Appellant from continuing on the roll. Such a proceeding as the present is incompetent, not only because there is no authority for an action of this sort in the Court of Session at all, *i. e.* an original ordinary action of reduction or declarator relative directly to the right of a freeholder continuing on the roll; but because, at any rate, if it be supposed that, by equitable interpretation, an action might be admitted in a form not precisely warranted by the statutes, this at least must not be so done, as to defeat so important a regulation as the limitation of four months, and the security given to persons who have remained on the roll without challenge during that period.

This limitation would be altogether nugatory, were it found competent to institute after the lapse of the four months, a summons of reduction instead of a summary complaint. Were such actions found competent, all those parties who in times past have neglected to complain within the four months, would be empowered to bring forward their challenge in the form of an action of reduction.

As this is the first attempt to challenge directly the right of a freeholder to remain upon the roll through the medium of an ordinary action, the Appellant cannot refer to any previous judgment pronounced in such an action. But the decision in

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the case of *Anstruther Easter* *, though it related to burgh politics, strongly supports the principle that a statutory limitation with regard to the time within which the challenge of a vote is competent, cannot be evaded by the device of bringing that challenge in the form of an action of reduction.

Assuming that the decision of the Court of Session in the summary question is well founded, the effect must be that the Appellant has a right to continue upon the roll until there shall occur such an "alteration of his circumstances," as the law holds sufficient for striking him off.

The question is, whether such alteration of circumstances can be effected in the manner here attempted by the Respondent. If the Appellant had conveyed away so much of the lands upon which he is enrolled as to reduce the valuation of the remainder below the legal standard, or the officers of the Crown had reduced the charter and infeftment thereon, on the ground that the Crown had been illegally deprived of its just rights by an improper change of the holding, or otherwise, an alteration of circumstances would have occurred, entitling the respondent, or any other freeholder, to insist that the Appellant should be struck off the roll. In like manner, if a reduction had been successfully brought by the corporation of the city of Edinburgh, on the ground of the conveyance in the Appellant's favour having been fraudulently obtained; or even at the instance of any individual who considered his own right to the subjects conveyed preferable to that of the Appellant; any freeholder upon the roll would

* D. P. 1767. Wight on Election, vol. 1, p. 338, *et seq.*

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be at liberty to produce the decree in such reduction as a warrant for striking the Appellant off the roll, in respect of an alteration in his circumstances. Such alteration cannot be produced by an action of reduction, the purpose of which is to investigate the anterior titles of the freeholder, who has produced at the freeholders court an investiture *ex facie* valid.

The Respondent's present attempt is unprecedented, and repugnant to those principles which have always hitherto been held to regulate the title to pursue reductions of a feudal investiture, and beyond those limits within which the power of investigation as to disputed enrolments is by law confined.

It is impossible to interpret the expressions of the summons as concluding for any thing short of a total reduction of the feudal investiture by which the Appellant holds his estate. It does not very clearly appear what is meant to be the effect of the qualified judgment of the Lord Ordinary. But it is impossible to find the charter and infeftment partly null and partly valid. So long as the charter subsists to the effect of enabling the Appellant to hold the lands therein contained, it must also enable him to maintain his place upon the roll. So long as the charter remains, the tenure in that charter must remain also. It is in vain to contend that the tenure ought to have been different from that which the charter contains. The charter does not merely afford evidence as to the nature of the holding. It in fact constitutes that holding; and it is impossible to find that the tenure is different from that which the charter sets forth. So long, therefore, as the charter remains

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unreduced, the lands in question must be held blench of the Crown; and, while that holding continues, it is in vain to contend that the Appellant, who has in all other respects the qualification required by law, shall be expunged from the roll. So long as the charter and infeftment subsist, the Appellant has the qualifications required by the statute 1681, chap. 21. He in particular has the qualification of a public infeftment in lands, "holding feu, ward, or "blench of His Majesty;" and to ordain him to be turned off the roll, while that qualification continues, would be to act directly in the face of the provisions of that statute.

Even supposing that the conclusions of the present action could be modified, it cannot be proceeded in without laying open the whole progress of the title-deeds, at least so far back as the charter 1603. Supposing the investigation demanded by the Respondent to take place, it is only by a laborious search into the titles, so far back as they can be traced, that there is any chance of ascertaining what has all along been the holding of the lands in question. But the law does not on slight grounds allow a charter-chest to be laid open. A party who challenges the subsisting investiture of an estate, is bound to show that the effect of setting aside that investiture will be to vest the estate in himself, or in those for whom he acts. A reduction on the head of death-bed can proceed only at the instance of the heir at law, because he would succeed in the event of the death-bed deed being set aside. If a conveyance has been granted on the eve of bankruptcy to the prejudice of the creditors on a sequestrated

estate, the trustee on that estate can alone challenge it by reduction; because he alone, in the event of obtaining decree of reduction, has the title to recover the subject fraudulently conveyed away, and to make it available as a fund of division among the creditors. In like manner, in almost every other case where a challenge is brought, the title to pursue must be founded on a service general or special, according to the situation of the subject in dispute, or upon the right of apparency; so as to satisfy the Court, in the first instance, that the effect of the reduction being successful will be to vest the subject of it in the pursuer. Even where a challenge is brought by a remote substitute in an entail, the same principle is not lost sight of. If the object of the action is to recover lands alienated in defraudation of the entail, the effect of it is to vest these lands in the heirs of entail, of whom the pursuer is one, and whose interests, therefore, he is entitled to protect; and if the action infers an irritancy, so as to put the estate past the present possessor, the effect of the challenge clearly is to bring the succession nearer to the pursuer than it would otherwise be.

But no freeholder is entitled, merely in that capacity, to demand inspection of the warrants on which a charter proceeds. In all the statutes, from 1427, c. 101. downwards, the qualification of persons claiming enrolment is made to depend on the present possession and investiture of the feudal estate. The act 1681 confers the privilege particularly on those "who at that time shall be publicly infeft" in lands "holding feu, ward, or blench of his

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"Majesty." Every freeholder is entitled to require that the actual investiture shall be ascertained; but (that investiture being constituted by charter and infeftment) the production of these, and the mid-couples, if any, necessary to show the claimant's connection with them, are all that any freeholder can require.

If it be admitted, that a freeholder cannot interfere so far as relates to the dispositive clause in a charter, on what principle can he be entitled to interfere with regard to the clause *tenendas*, or the clause *reddendo*? These clauses are just as essential to the charter and infeftment as the dispositive clause.

There is no foundation for the distinction taken by the Respondent between the power to investigate the titles of individuals upon a competition or adverse claim, and the power to investigate the nature of the tenure. In either case the freeholders cannot look beyond the subsisting investiture.

If it were so, burgage holding does not, or at least did not, constitute a separate manner of holding, but was a species of ward holding; with this only difference, that in a proper ward holding, the vassal is a single person, whereas in a burgage tenure it is a community*. The objection therefore is, not against the quality of the estate itself; for lands held ward of the Crown are of the tenure required by the act 1681; but the objection is, that the real vassal is disqualified from voting in county elections, and that the estate claimed on is represented by the member for the burgh. It is an

* Craig, lib. 1, dieg. 10, s. 31 & 36. Erskine, book 2, tit. 4, s. 8.

objection precisely of the same kind, as the objection that the estate claimed on truly belongs to a peer, and therefore cannot be made the basis of county representation. But in both cases the answer is insuperable, that the freeholders are entitled to look only to the actual investiture, and have no right to attempt to penetrate into the anterior titles.

Nor is the case without remedy, for supposing the *tenendas* and *reddendo* in the charter to have been improperly altered, the Crown would have a title and interest to institute a reduction. The Commissions of Exchequer prior to the union contain instructions under which the Barons of the Exchequer are still bound to act, in granting new donations and dispositions. One clause in the commissions directs that lands, to be given out from the Crown in future, should continue to be held "secundum formam et tenorem antiquorum infeofa-"mentorum, *ac solvendo census et præstando alias* "*conditiones inibi expressas.*" So if the corporation has been illegally deprived of an estate formerly belonging to it, the corporation may bring a reduction, in order to set aside the conveyance, by which it has been aggrieved; or it is even possible that an individual burgess may be entitled to complain, provided he can show that his interests have been affected by means of an illegal act.

As to the argument that this is a question of public law which requires that the holding in a charter shall not be changed, how is it more a matter of public law, than that an estate held under a strict entail shall not be alienated, or that

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property belonging to a peer shall not confer a right to vote in county elections?

It has been alleged, that those laws which prohibit salmon-fishing at certain times of the year, or with machinery of a certain description, were intended for the benefit of the community; and it was further said, that upon the same principle on which an upper heritor in a river may challenge such illegal modes of fishing, the Respondent may institute a reduction of the Appellant's charter and infeftment. But the principle on which an upper heritor in a river is allowed to interfere, is, that his own private rights in the salmon of that river are directly invaded, and that he would thus have a title and interest to pursue, even although the public interest was not at all affected.

There is no authority for holding, that where the title to pursue is called in question, it can derive the smallest support from the circumstance that the act challenged is alleged to have been done in violation of the public law. No party, not having otherwise a proper title and interest to state the objection, can proceed on the ground that the public law has been violated*.

The case supposed, that by a false description in the charter, a person, whose estate is situated in one county, might claim enrolment in another, is different. The freeholders have always the means, by

* *Lord Galloway* v. *Burgesses of Wigton*, Feb. 10, 1631. Dict. 7835. *Coli and others* v. *Town of Musselburgh*, 9th Jan. 1756. Dict. 7782.

reference to the valuation-roll, of ascertaining whether or not the lands are within the county. It is incumbent on the claimant to show that the lands claimed upon are rated in the valuation and cess-books of the county to which the claim applies. Unless the claimant can point out the lands claimed on in the valuation-books of the county, the freeholders are entitled to refuse enrolment, or to apply by petition and complaint to the Court of Session, in order that the claimant, who may have been admitted under such circumstances, may be struck off the roll. Accordingly, in the case of *Abercromby* v. *Alewood* *, the Court of Session, upon a summary complaint, ordered the claimant's name to be expunged, upon this ground, *inter alia*, that the lands claimed upon had always paid cess to the burgh of Banff, and did not appear at all in the valuation or cess books of the county.

It is true, that where a claim of enrolment is founded upon the old extent as ascertained by a retour prior to 1681, the freeholders are entitled to look into the anterior progress. But in that case the anterior titles may be examined, not for the purpose of cutting down the subsisting investiture, but merely in order to ascertain whether the lands vested in the claimant are truly the lands to which the retour applies. By the act 16 Geo. 2, c. 11, the only evidence of the old extent which can be admitted is a retour dated prior to the 16th of September 1681. It is incumbent on the claimant to establish the identity of the lands contained in his charter with those contained in the

* June 17, 1777.

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retour. The identity of the description will in general be sufficient for that purpose; but if any objecting freeholder is able to trace from the record any part of the lands in the retour into the possession of other parties than those through whom the claimant has received his right, it will then be necessary for the claimant to obviate that objection, by tracing that part of the lands back again into his own person or that of his authors.

The latitude which has been allowed to freeholders in challenging decrees of commissioners of supply in dividing *cumulo* valuations, has no connection with the question of feudal investiture.

If the title of the Respondent to insist in this action were to be ultimately sustained, there is scarcely any estate in Scotland of which the title deeds may not be laid open, upon pretences similar to those upon which the present action proceeds.

For the Respondent:—The single point under discussion is the title of the Respondent to reduce, by an ordinary action at law, the deeds by which the Appellant has obtained admission to the roll of freeholders for the county of Edinburgh.

Lands held burgage afford no qualification for a vote in the election of a member for a Scottish county. According to the statute 1681, none can vote at such elections but those who are infeft in property and superiority, and in possession of a forty-shilling land of old extent, or infeft in and "liable in public burdens for his Majesty's supplies, "for 400*l.* of valued rent, whether kirk-lands now "holden of the King, or other lands holden feu,

"ward or blench of his Majesty, as King or Prince "of Scotland."

The Respondent undertakes to establish in the action of reduction, 1st, That the lands in question were burgage-lands; 2d, That the tenure was changed from burgage to blench, by the charter of resignation forming part of the Appellant's titles; and, *lastly*, That such change was incompetent and unlawful; so that the lands are still in every question regarding elective franchise, to be considered as burgage, and as forming no part of the property in the county of Edinburgh entitled to vote at county elections.

According to Wight * "It has become a "pretty common practice for the royal burghs to "allow part of their burgage-lands to be held feu "of themselves. But even although, after doing "so, they were, by connivance, to convey the supe-"riority 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 burgage, and their owners are "represented by the member for the burgh."

According to Bell, * "Where a burgh has "feued out part of the common property of the "burgh, to be held of the burgh in feu; and where, "afterwards, in order to give a freehold qualifica-"tion to the feuar, the steps necessary for acquiring "a Crown holding have been connived at, still the "right thus constituted over burgage property is "incapable of holding a freehold qualification; for

* Law of Elect. p. 209. † Law of Elect. p. 72.

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"this plain reason that the subject is truly burgage, "and is already represented in Parliament."

According to these opinions, the measure by which the tenure of the lands in question has been apparently changed from burgage to blench, constitute a fraud, by which lands, incapable of affording a freehold qualification, have been converted into property *ex facie* conferring that franchise; and by which, as affording such apparent title, a person has been admitted to the roll who is as destitute of qualification as if his property were situate in another country.

The title of a freeholder to reduce these deeds is unquestionable. The requisites for sustaining a legal and complete qualification may be classed under two general heads; 1st, Titles of property *ex facie* valid, that is an unobjectionable charter and sasine; and, 2d, That the lands contained in the charter and sasine are of the value, situation, and character capable of legally conferring the elective franchise. Thus, although a person is vested with certain lands, by an unobjectionable charter and sasine, it is absolutely necessary, in addition, that the lands so vested should be of the valuation required by law, and should be situate within the county. Now, under the last head of requisites, the Respondent maintains, and indeed the Appellant seems to admit, must be included the tenure under which the lands are held, as being feu, ward, or blench of the King. And it seems to follow, by necessary consequence, that a freeholder must have a title to set aside deeds, by which this last-men-

tioned requisite, the proper tenure has been attached to lands which he undertakes to prove are incapable of receiving it: by which, lands held burgage have been converted into blench or feu, contrary, as he maintains, to their inherent and legal incapacity of admitting such a change of character. Every freeholder is intrusted by law with the guardianship of the purity of the roll, and is, of course, entitled to challenge and prevent every attempt to attach that right of admission, which the law exclusively limits to estates of a particular class and extent, to one defective in either requisite. In a certain class of cases, where the matter falls strictly within the cognizance of the court of freeholders, and where the injury arises from the erroneous decision of that court upon points properly within their cognizance, the interest is protected, and the freeholder's title exercised in the form of a summary petition and complaint to the Court of Session. But it is perfectly well known, that, from the most obvious considerations of expediency, the court of freeholders is only vested with a limited jurisdiction, or rather with a limited power of inquiry; and, where the wrong done either lies beyond their jurisdiction, or demands an investigation, which their power of taking proof does not reach, any freeholder has an interest, and a legal title, to obtain redress, by instituting an action at common law, in the form proper for that purpose. Accordingly, the title of a freeholder to institute such actions has been frequently recognized in cases exactly analogous to the present. It has been already mentioned, as one of the

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requisites for sustaining the freehold qualification, that the lands should be of the valuation fixed by law. In the court of freeholders, the only evidence which can be demanded, and which they are bound to receive, is that afforded by the cess-books of the county, and the decreets of division pronounced by the commissioners of supply, in cases where the division of property has rendered necessary a new apportionment of the valued rent. It is quite undeniable, that, in the court of freeholders, and in the Court of Session, sitting in review of their judgments, by petition and complaint, decreets of division by the commissioners of supply are held *probatio probata* of valuation, against which no objection can be received. But although this evidence is beyond the reach of challenge of the court of freeholders, it is now fixed law, that any individual freeholder may bring an ordinary action at law for setting aside those decreets, and may, by thus establishing the defects of the evidence of valuation, ultimately procure the expulsion of the claimant from the roll. This point was decided in the cases of *Ross* v. *Mackenzie*,* and *Earl of Fife* v. *Duke of Gordon*;† which decisions have generally been understood as removing all doubts as to the freeholder's title to reduce. According to Wight‡. It has, been doubted, whether an action of this sort be "competent to a freeholder who has no interest "in challenging a decision but to support objections "to the enrolment of others. But when that "point came to be warmly debated, and deliberately

* March 10, 1774. † June 16, 1774.

‡ Wight, p. 185.

" considered, in a question from the county of In-
" verness, the Court of Session sustained the title,
" and repelled the objection. A similar judgment
" was pronounced in a question between the Duke
" of Gordon and the Earl of Fife. It is true, that,
" in that case, one of the pursuers had an undoubted
" right to challenge the decision, being himself
" immediately affected by it." But the court sustained the title of the pursuers in general, although the rest had no such interest. And, since that period, reductions of decreets of division of valuation, at the instance of a freeholder, having no other interest, have become common, and the title is now universally allowed to be unchallengeable.

The same inference may be drawn from another decision in the case of the *Earl of Fife* v. *Gordon*,* where the title of an individual freeholder was sustained, to establish, in an ordinary action at law, an objection against a freehold qualification, which did not fall within the jurisdiction of the court of freeholders.

The judgment in that case is decisive of the present question. The sasines there in dispute were *ex facie* complete and valid; and the date of registration appearing upon them was as much beyond challenge in the court of freeholders as the description of the tenure in the present case; yet there the title of a freeholder to insist in an action of declarator, that the apparent date was not the true date, was sustained; and was sustained, although the claimants had been rejected, for the

* Morison, 8850. July 8, 1774.

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purpose of enabling the opposing freeholder to support what would otherwise have been untenable, the rejection of those claims of enrolment.

From these numerous cases, the Respondent is entitled to assume, that the legal title of a freeholder is not limited to that which he may exercise by petition and complaint; but that, on the contrary, he has, at common law, a legal title and interest to maintain and prosecute actions for obtaining redress against invasions of the purity of the roll, which neither the freeholders sitting as a court, nor the Court of Session, sitting in review of their proceedings, could possibly take cognizance of. Indeed so far from this latter circumstance excluding his interest, it is precisely the incompetency of applying for redress by petition and complaint, which, in the case of decreet of revision, and others of the same kind, establishes his undoubted legal interest to insist at common law in actions of reduction. When a freeholder may legally state an objection either to the title or valuation of a claimant in the court of freeholders, or in a petition and complaint to the Court of Session, it might be maintained that he had no legal interest to insist in actions of reduction, which were not necessary to defend the purity of the roll, and which might affect the interest of his adversary in matters totally unconnected with his claim of enrolment. But when an objection lies beyond the reach of the court of freeholders, when they, sitting as a court, are bound to receive as evidence, either of tenure or valuation, documents which however *ex facie* satisfactory, are really and substantially defective, it

seems quite clear that the title of a freeholder must be sufficient to entitle him to establish those defects in the ordinary course of law.

That the court of freeholders, and every individual freeholder appealing from their judgment, by petition and complaint, is limited to the actual existing investiture, and cannot inquire into the preceding titles, may be admitted. But that limitation cannot apply to cases where the object of the freeholder is to ascertain, by an action at common law, that the actual existing investiture, though apparently conferring a qualification, is not really entitled to that effect. Although the court of freeholders may be bound to hold the charter and sasine presented to them, as *probatio probata* of the tenure, just as they were bound to admit a decreet of division as *probatio probata* of valuation; and they may no more be entitled to investigate the anterior titles in the one case than they are entitled to investigate the anterior rates or valuations of the different portions of land upon which the decreet of division rests, yet if, in the latter case, there is a power in an action of reduction at common law to reach these anterior calculations, and to rectify the error thus proved to exist, the Respondent, holding precisely the same interest, must have a title to correct an error equally fatal, being the substitution of a tenure which the lands were incapable of receiving; and to prove the existence of that error, from the anterior titles, just as the error of the decreet of division is proved, by the reference to what was equally beyond the cognizance of the freeholders;

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the apportionment of the valuations and calculations upon which the decreet of division rested.

Where attempts have been made to challenge titles of enrolment, on the ground that they were acquired from persons holding under entails, or otherwise under inability to convey, the plea of *jus tertii* has been sustained.

But the objection here is totally irrelevant; and the subject of reduction does not at all fall within the class of cases where *jus tertii* can be pleaded. The Respondent does not deny the Appellant's right to the lands, or the efficacy of the conveyance by which he acquired it. But, to warrant enrolment, evidence is necessary, not only of the claimant's right, but proof that the lands are of the situation, value and legal character required by law. It is their defect in this last quality, which it is the object of the present reduction to establish. The Respondent does not deny the right of the Appellant to those lands; but he maintains that their tenure is *burgage*, and the object of the reduction is to set aside the deeds by which they appear to be held *blench*. Here, then, the injury which it is the object of the action to redress, is, that, by the deeds sought to be reduced, a freehold qualification has been attached to lands, which, from their nature, are incapable of affording it; and it seems in vain to maintain, that such an objection as this comes under the objection of *jus tertii*, any more than an objection founded on the lands being beyond the county, or not possessing the valuation required by law. In all these cases, the objector challenges not the right of the

claimant to the lands, but the capacity of the lands to afford a vote; and, accordingly, where such cases have occurred, the title of the objector to reduce the deeds by which an apparent qualification has been attached to the lands, has been uniformly sustained.

If it be true, as contended by the Appellant, that lands held burgage are under no inherent disability of being changed into feu or blench holding; and that their incapacity of affording a vote arises only from the disqualification of the burgh that holds them, and ceases upon their transference to persons not so disqualified, as in the illustration offered by the Appellant; the Respondent might have no interest to prosecute the action, because these suppositions tend to prove that the action itself is unfounded. But, in trying the question of title, the Respondent undertakes to make out that these propositions are false. He maintains, that lands held burgage are legally disqualified from affording a freehold qualification. That this does not arise merely from the disqualification of the burgh; but, to use the words of Mr. Wight, that 'though royal burghs '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 burgage, and their owners are represented by 'the member for the burgh.' In trying the question of title, then, it must be assumed that the grounds of the action may be established; and it is a violation of the rule of pleading to attempt to question the

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title by denying the grounds of the action. The objections thus urged by the Appellant, may, if ultimately ascertained to be well founded, sustain the Appellant's defence; but he cannot now plead them in bar of the Respondent's title. To render the case of the lands held by a Peer, or lands held under an entail analogous to the present, the supposition ought to be made, that lands once held by a Peer, or once subjected to the fetters of an entail, should, by public law, be rendered incapable of ever affording a freehold qualification: on which supposition there cannot be a doubt, that any freeholder would have a legal title to reduce the deeds, by which their inherent disability was disguised, and by which they received the semblance of lands capable of affording the elective franchise.

The supposed danger of disclosing a title is imaginary. Such cases must necessarily be few, where any attempt is made to convert lands, properly burgage, into lands held feu of the Crown. Such a change can only be attempted to serve political purposes; and when it is attempted, its detection cannot justly be made the subject of complaint. As to the alleged hardship of extinguishing the rights of property held by the Appellant, upon a mere objection urged by a freeholder to its sufficiency as affording a vote, it seems to be guarded against by the qualification contained in the Lord Ordinary's interlocutor, '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 freeholders 'of the county of Mid-Lothian, as libelled, to re-

'duce the Defender's said title.' But even if this qualification were ineffectual, and if the consequence of the reduction were the extinction of the Appellant's feudal title, it could afford no objection to the Respondent's legal interest to prosecute this reduction. As the Appellant has chosen to make these rights the ground of a claim of enrolment, they must be exposed to the risk of challenge, upon any ground competently urged by a freeholder against their effect; and the right of such freeholder cannot be impaired or excluded by the consideration, that his reduction may operate more extensively than his interest to reduce. It is obvious, that as the amount of a proprietor's valued rent ascertains a great many important rights, besides that of admission to the freeholders roll, the reduction of decrees of division of valuation, may lead to much more extensive consequences than mere expulsion from that roll; yet the title of a freeholder to reduce such decrees is undoubted. Again, it is obvious, that in the case of the *Earl of Fife* v. *Gordon*, the declarator, brought for the purpose of ascertaining that certain sasines were not registered on the day on which they bore to be registered, led to various important consequences, and might have extinguished the completed feudal title of the parties holding them; but that possibility was not held to exclude the Pursuer from urging the point, in prosecution of the object which, in the character of freeholder, he had in view.

As to the objection founded on the lapse of four months from this enrolment, the procedure at common law is not only independent of the statute, but

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its object is one which could not competently have been attained by the statutory procedure by petition and complaint. The Respondent objected to the enrolment of the Appellant, on the ground that his titles contained lands which were held burgage, and which were therefore inherently incapable of affording a freehold qualification. This objection the Appellant maintained to be, and the Court of Session held to be, incompetent, as urged either in the court of freeholders, or before them, as sitting in review of the judgment of the freeholders. If this be the law, upon what reasonable grounds can it be maintained, that the Respondent is bound by the limitations of a statute of which he has been found not to have the benefit? If he shall be found to have a legal title and interest to prosecute the action of reduction, there is no authority for maintaining the incompetency of prosecuting it, after the expiry of the period fixed only for procedure, which by the argument of the other party, and by the judgment of the Court of Session, cannot possibly apply to his case?

Neither will it be found that this view can lead to any evasion of the statute. The statute might possibly be evaded, if, after the expiry of four months, actions of reduction or declarator were sustained for making good objections, which might competently have been urged in the form of petition and complaint. But there can be no evasion of the act, in disregarding the limitation of the four months, in actions for substantiating objections, which, like the present, have been held not to form a competent subject of petition and complaint; and to which, there-

fore, by the conditions of the argument, the act does not apply at all. Besides, it will be found, that the effect of the present action upon the rights of the Appellant as a freeholder admitted to the roll, is perfectly authorized by the terms of the statute alluded to. The statute merely provides, that if no petition and complaint shall be lodged within four months, "the freeholder enrolled shall stand and continue "upon the roll until an alteration in his circum-"stances be allowed by the freeholders, at a subse-"quent Michaelmas meeting, or meeting for election, "as a sufficient cause for striking or leaving him out "of the roll." When the claim of any party to be enrolled is complete in all those points, to which exclusively the jurisdiction of the court of freeholders and the Court of Session, judging on petition and complaint, is limited, these points form the circumstances of the freeholder upon which he obtains an enrolment. If he has a charter and sasine *ex facie* good, and the evidence of valuation attested by a decree of the Commissioners of Supply, he possesses those requisites which the freeholders and the Court of Session, in the procedure by petition and complaint, must admit as the constituent parts of a freehold qualification. But if there exists in any of those constituent parts an error, which a freeholder is found to have a legal interest to correct, it is quite clear that the freeholder who corrects that error effects an alteration of circumstances, which may at any period extinguish the freehold qualification, even after the lapse of the four months. In short, such action is not a complaint against an en-

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rolment, but is an action to alter those circumstances which the freeholders were originally bound to receive as sufficient.

This principle * has been repeatedly recognised in the analogous case of reduction of divisions of valuation, which reduction it has been found competent to bring after the lapse of the four months. In a question betwixt the Earl of Fife and the Duke of Gordon, a reduction of the valuation of certain freeholders was opposed, on the ground that these freeholders had stood for more than four months on the roll, and " as, therefore no effect could be pro-
" duced on these freeholds by such reduction, the
" reduction was incompetent. The Court (August
" 1774,) repelled the objections to the Pursuer's
" title, and found him entitled to carry on the
" action." " This is a judgment on the relevancy,
" and, consequently, proves that a decree of valua-
" tion being reduced, the reduction would be held
" to be a change of circumstances, which, after the
" four months, would entitle the freeholders to turn
" the person off the roll whose valuation had been
" by such means thrown loose." Upon this there is the following note: " In this question the fol-
" lowing cases were referred to as precedents. A case
" where Mr. Pulteney having purchased the estate
" of Cromarty, disponed certain parcels of supe-
" riority to Mr. Rose and others, who were enrolled,
" and a reduction of the decree of valuation being
" raised after the expiry of the four months from
" these enrolments, it came to be argued, whether

* Bell on Election Law, p. 402.

"such an action was competent, in respect of the "lapse of four months, the pursuers having no in- "terest in the action, but in the character of free- "holders, the Court (5th July 1768,) found the "action competent for reducing the decree of valua- "tion, and sustained the Pursuer's title to insist in "the action."

In another case from Linlithgowshire, a similar "judgment was given. Mr. Bruce applied to be en- "rolled, and no objection was stated to the decree "of valuation on which he claimed: but as the Court "was of opinion that the objection did not appear "*ex facie* of the decree, the objection to his enrol- "ment was repelled. After Mr. Bruce had stood "more than four months on the Roll, a reduction "of the decree of division was brought, and the de- "cree reduced; and on this an objection was lodged "to his remaining on the Roll, when the freeholders "struck him off."

Even if a reduction were not in general competent after the lapse of four months, its competency in the present case is protected, by the dependence of the original petition and complaint, which was brought within four months. For though that application was rejected, on the ground of its incompetency by the Court of Session, their judgment is the subject of an appeal. But as the procedure raised within the statutory period is therefore, in one sense, in dependence, there can be no doubt of the competency of the present action, raised for the subsidiary purpose of established directly certain points, bearing upon the point at issue in that petition and

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complaint. The Appellant will hardly deny that the present action would have been quite competent if raised during the dependence before the Court of Session of the proceedings in the petition and complaint; and that the complaint once instituted within the statutory period, of course warranted the raising of any action necessary or expedient for ascertaining any of the points involved in it. But there is no distinction between that and the present case, where the proceedings by petition and complaint are still in dependence before the House; and where, consequently, the Respondent must have, upon the very same grounds, a right to institute actions of a subsidiary nature, in support of the pleas which may ultimately warrant a judgment on the petition and complaint, ordering the Appellant to be expunged from the Roll.

The statute only limited 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 an undue admission of an unqualified person to the rolls. 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. There is one class of cases in which he has a right so to do in a summary form. There is another class which demands investigation, and cannot be considered by

the court of freeholders; but this does not deprive a freeholder of his interest, and title to obtain retain redress. It is of no importance that the effect of reduction may be more extensive than his interest demands.

In the course of the argument the *Lord Chancellor* observed, that unless the Respondent could limit the conclusions of his summons to the enrolment of the Appellant he had no interest to reduce the charter; that the summons asked for a total reduction; and the utmost the Respondent could obtain by the action was, that the Appellant should be taken off the roll of freeholders; how that was to be done, by the Court of Session, did not appear:—That the judgment in the former cause was, that the freeholders had no right to inquire; and now the Appellant, who had obtained that judgment, contended that they ought to have inquired:—That the freeholders, at all events, could not inquire beyond the immediate title:—That, consistently with the judgment, a freeholder might proceed in reducing the title:—That the Judges in the court below were of opinion, that if neither the Crown nor the city interfere, a wrong may be done without a remedy; but that no remedy could be given upon a summons not stating the grievances really intended to be complained of:—That as the Court of Session had given leave to appeal before the conclusion of the cause, it must be supposed that, in their opinion, notwithstanding the form of the summons, some final judgment might be given:—

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That the Respondent probably would contend, that the charter should be reduced so far as it gives a right of voting; and that at the next Michaelmas Court, on the ground of a change of circumstances, the Appellant should be put off the roll:—That he gave no opinion on the question, whether any thing could be done under the summons in its present form, or whether it could be restricted by the Court; but that the House could do nothing on those questions until they had been decided by the Court of Session:—That the cause ought to be remitted to the Court of Session to consider the terms of the summons, and to find what remedy they are entitled to give under it, supposing the judgment under appeal to stand.

Lord Redesdale observed, that in the ordinary cases of title, the question was, to which of two individuals the property belonged:—That in the case under appeal the doubt was, whether it belonged to any one, as giving a title to vote in respect of a freehold in the county:—That the assessment showed, *primâ facie*, that the lands were in the county; but that there were further questions, whether the lands were of the proper tenure? whether the charter could alter the tenure? and whether an additional voter could thus be introduced upon the county:—That the competency or incompetency of the action depended upon what the Court could do; if the Court could do nothing, the freeholder could not sue to the effect of the prayer of the bill.

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"Ordered, that the cause be remitted to the Court of "Session to review the interlocutors generally and espe- "cially, 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."