

1821.

ARBUTHNOTT

v.

GIBSON.

WILLIAM ARBUTHNOTT, Esq. - *Appellant.*  
 JAMES GIBSON, Esq. of Ingliston, *Respondent.*

Whether a summons at the suit of a freeholder, praying an unlimited reduction of a charter, &c. can be limited by the Court to a partial reduction, so far as they constitute a freehold qualification.—*Quære.*

Whether upon such a summons (if it may be so limited) judgment can be given in a case where no application had been made to be put on the roll of freeholders, at the time when the action was commenced; but where the party became a freeholder pending the action.—*Quære.*

THE question in this case was similar, in all essential particulars, to that depending between the Respondent and Sir William Forbes, the Appellant in the preceding case.

The lands contained in the deeds forming the title of the Appellant were part of the common muir or burgh muir of Edinburgh. The *reddendo* in the charter was the sum of fifty-two merks sterling, ‘*tanquam pro antiquo censu burgali,*’ &c. ‘*cum servitio burgi, solito et consueto.*’

In the year 1816 a signature was passed in the Exchequer, and a new charter granted, of certain parts of the common muir of Edinburgh, there specially described. In this charter the *reddendo* was the sum of 6s. Scots of *feu-duty*.

The parts of the burgh muir contained in this charter were conveyed away in five different portions, each sufficient to afford a freehold qualification. Of these one was granted, at the price of

960*l.* to the Appellant, being then the Lord Provost of Edinburgh. The lands contained in this disposition are thus described in the charter: ‘Totas et integras illas terras et acras de lie burgh muir de Edinburgh, acquisit per demortuum Archibaldum Brown de Greenbank, &c.: Item, Totas et integras terras de Mayfield alias Newlands, cum domibus, &c.: Item, Totas et integras illas terras partes communis moræ de Edinburgh, communiter vocat. lie common vel Cameron Myre, cum pertinent. earund. extenden. in tota ad quinquaginta duas acras terræ,’ &c. And the disposition was granted by the Appellant to the Appellant himself, as Lord Provost aforesaid, Kincaid Mackenzie, John Young, Alexander Smellie, and John Manderston, esquires, bailies; Robert Johnston, esquire, deán of guild; and John Waugh, esquire, treasurer of the said city, all for the time being; and also the then remanent members of council, for themselves, and as representing the community of the same.’ Upon the precept of sasine contained in this charter, which was assigned in this disposition, infestment was taken by the Appellant on the 24th July 1816, who thus obtained an apparent title to claim enrolment as a freeholder in the county of Edinburgh.

Before the Appellant’s claim for enrolment was made, the Court of Session had decided in the case of Sir William Forbes, that the objection of the change of tenure could not be stated with effect in the Court of Freeholders, or in a petition and complaint against their decision. The Respondent, therefore, commenced an action of reduction against

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the Appellant, for setting aside the titles by which these lands were made to afford a freehold qualification. . . .

Against this action the Appellant gave in defences, denying the petitioner's title or interest to insist, and the Lord Ordinary, by interlocutor dated February 6, 1818, sustained the objection stated by the defender to the pursuer's title to insist in the present action\*.

In pronouncing this interlocutor, rejecting the title of the Respondent, the Lord Ordinary was influenced by the specialty, that the Appellant had not claimed enrolment on the titles sought to be reduced. The Respondent presented two short representations against the interlocutor pronounced by the Lord Ordinary in the present action, which were refused without answers.

The Respondent then presented a petition to the Second Division of the Court, which was remitted to the Lord Ordinary, in respect that no full representation had been laid before him, with power to do as he should see cause.

In consequence of this remit, answers to the petition were ordered; upon considering which, the Lord Ordinary refused the desire of the petition, and adhered to the interlocutor reclaimed against.

\* In a note subjoined to this interlocutor the Lord Ordinary observed, that " a difficulty occurred from the decisions sustaining the title of freeholders to reduce a division of valuation, when the party has not been admitted on the roll, &c. ' But still the Lord Ordinary thinks that the decision in the case of the *Earl of Fife v. Gordon*, 8th July 1774, and the principle upon which that case was decided, ought to regulate the present case. The point now under discussion does not appear to have been argued in the cases referred to, in which the title to reduce divisions of valuation was sustained."



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the interlocutor complained of, reserving all questions as to expenses.

Against these interlocutors, which had been pronounced since the enrolment of the Appellant, the appeal was presented.

For the Appellant, *The Attorney General*.

For the Respondent, *Mr. J. P. Grant* and *Mr. W. Adam*.

The case was argued on grounds similar to those stated in the two preceding cases\*.

At the conclusion of the three preceding cases, the *Lord Chancellor* observed, that the House could not decide upon the competency or incompetency of the action, as it confessedly could not go to the extent prayed for in the summons, viz. the reduction of the charter and sasine *in toto*; and as the Court of Session had given no opinion on the question, whether they could restrict the summons, and how, so as to give relief at all, the House could not decide, in the first instance, what that relief should be. If it should appear that nothing could be done under the terms of the summons, there could be no competency to sue.

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Ordered and adjudged, That the cause be remitted to the Court of Session to review the interlocutors appealed

\* There was in this case the additional circumstance, that the judgment was pronounced upon an event which happened after the commencement of the action.

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; and having also especial regard to the period at which the Appellant was enrolled in the roll of freeholders.

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UPON the order above reported, the Respondent having petitioned the Court of Session to carry it into effect, after various proceedings the Lords of the Second Division, on the 18th of May 1824, by a very small majority, pronounced an interlocutor; remitted the cause to the Lord Ordinary that he might assign a day to the defender (Forbes) to satisfy the production; and, after such production satisfied, to make great avizandum therewith to the Court, reserving all objections to the pursuer's title, &c. The Appellant thereupon intimated his intention to appeal against the interlocutor enjoining production; but the Lord Ordinary, notwithstanding this intimation, by interlocutor dated the 29th of June 1824, assigned the 9th of July then next "for satisfying the production in the reduction libelled, with certification;" and by interlocutor dated the 10th of July, reciting that the defender (Appellant) had failed to satisfy the production, "grants certification *contra non producta*, and reduces and decerns "and declares conform to the conclusions of the libel, &c." In consequence of this interlocutor the Appellant produced the charter and sasine called for in the summons of reduction, and at the same time presented a petition against the interlocutor of the Lord Ordinary above stated, praying that further procedure in the cause might be stayed until after the meeting of Parliament. Upon this petition the Lords of the Second Division, by interlocutor of the 12th of November 1824, reciting that the production had been satisfied, recalled the interlocutor, and allowed the cause to proceed. Against these interlocutors of the Lord Ordinary and the Court, Sir W. Forbes appealed to the House of Lords, and the appeal was pending until it came in its course to be near the hearing, when the matter was compromised and the appeal withdrawn.

In the other action a similar course was pursued, and, upon considering the order of remit, the Lords of Session (Second Division)

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by interlocutor of the 18th May 1824, reciting the proceedings and the order of remit, "repelled the preliminary defence that the action was instituted prior to the period of the defender (Arbuthnott) being put on the roll of freeholders; remit, &c. to the Lord Ordinary to assign a day for satisfying the production," &c. After the pronouncing of this interlocutor the same proceedings took place (*mutatis mutandis*) as in the action against Forbes, and a similar appeal was entered, and pending until it was nearly in course of hearing, when the matter was compromised, and that appeal also withdrawn.