

1774. July 8.

JAMES, EARL FIFE, MR ARTHUR DUFF of Orton, Advocate, and Captain DUNCAN URQUHART of Burdsyards, *against* MR COSMO GORDON, Advocate, LIEUTENANT FRANCIS SKELLY, ALEXANDER GORDON of Aberdour, and JOHN GORDON, Sheriff-substitute of Elgin.

No 228.

Freeholders have no title nor interest to insist in an action of declarator, that certain sasines taken in favour of others, in the view of being claimed upon as freehold rights, were not properly registered, before actual enrolment thereon; but their title to challenge such registration is competent after enrolment.

THE Earl Fife, &c. standing upon the roll of freeholders for the county of Elgin, in consequence of an investigation they had caused be made at the sasine-office of that county, brought an action of declarator before this Court, in which they called as defenders the four gentlemen above named, to whom the Duke of Gordon had granted freehold qualifications in that county, as also the keeper of the register of sasines of the said county, concluding to have it found and declared, that certain sasines in favour of the defenders, whereof the keeper of the register had given out extracts, as recorded upon the 30th September 1772, in the roll of freeholders for the county of Elgin, were not presented for registration, nor recorded in the particular register of sasines kept for this county, upon the 30th September 1772, in manner required by law; and that they should only be held as registered from the 3d October 1772.

The defence made against this action was an objection to the title, viz. that the pursuers, *qua* freeholders of the county, have no right to inquire into the date of registration of any sasine which might happen to be taken within the county, nor title or interest to challenge the registration of these sasines, before any claim for enrolment was founded upon it. The present action was therefore premature; it was also unprecedented; and were this to be allowed in politics, it could not be refused in any other question of civil right, whereby doubtful and speculative points, which possibly would never exist, might be made the foundation of so many declaratory actions. And accordingly the Court dismissed the action, in respect the pursuers did not appear to have any title to insist *hoc statu*, by an interlocutor July 13. 1773.

The pursuers preferred a *second* petition, praying the Court either to alter their former interlocutor, to sustain the titles of the pursuers, and to find and declare in terms of the libel; or to ordain the defenders to confess or deny, whether they have not already signed claims, and given orders for lodging the same, and, in case of their silence, to hold them as confessed; or, in case of their denying, to allow the pursuers to prove it; and, if the fact shall be proved, to sustain the title, and decern in the conclusions of the libel; and, at any rate, in order to prevent a wrong without a remedy, to supersede advising this petition till the 4th of August next, when the fact will be undoubtedly ascertained one way or other.

This petition being moved 30th July, was refused without answers.

Next day, a *third* petition was moved, stating that matters were not *in statu quo*; for that the defenders have actually lodged claims with the sheriff-clerk upon these very sasines, for an enrolment at Michaelmas next, as is instructed by extracts of said claims, therewith produced; and, therefore, praying a remit to the Lord Ordinary, to call the cause this session, and to hear counsel upon the aforesaid objections to the defenders' infestments. This petition was ordered to be answered.

*Answered*; The lodging of the claims cannot influence the question in the smallest degree.

When the action was brought, the pursuers had neither title nor interest, and so the Court has found. Nothing that was afterwards done, on the part of the respondents, can revive an action from which they stood already absolved by so many consecutive final interlocutors: Therefore this petition is incompetent.

But, allowing it were competent, the case stands precisely where it did. Parties ought not to be dragged into process to dispute speculative questions, which, for any thing known, may never exist. It is true the respondents have lodged claims, to be insisted in or not, as they shall afterwards be advised. When the former interlocutors were pronounced, the pursuers were equally uncertain, whether claims upon these sasines would be lodged with the sheriff-clerk, or, supposing them to be lodged, whether they would be prosecuted. They are now lodged; but it is still uncertain whether they will ever be prosecuted; whereas the pursuers insist, that they shall now litigate and dispute this matter, to prevent the possibility of any enrolment upon these sasines.

Were this to be allowed, it would be a precedent for as many declarators respecting future contingencies, upon the bare possibility that, if such and such things shall happen, such and such questions may thereupon arise, which, therefore, ought to be now judged and determined, in order to prevent after disputes. Every fact and every point of law, from which it is possible that a right might accrue in some future contingent event, might, by the same rule, be made the foundation of processes of this kind, *prævento termino*.

In fine, though the respondents have lodged a claim with the sheriff-clerk, it cannot be known whether they will present the same to the meeting of freeholders, or claim any enrolment thereon. If they do, the petitioners will not fail to object; and, if the majority of the roll is upon their side, the objection will most certainly be sustained; such, at least, has been their uniform practice hitherto. And, on the other hand, if the objection shall not be sustained, the statute law has prescribed the mode of redress, viz. by summary complaint to this Court; and, if any proofs are requisite, which could not be obtained in the meeting of freeholders, they will not be precluded therefrom when the cause is brought before this Court.

This petition was also refused.

In fact, the gentlemen did afterwards insist in their claims at Michaelmas, and the freeholders refused to admit them on the roll, in respect of the above.

No 228.

and other objections; and as it was apprehended that the claimants would not rest satisfied with the judgment of the freeholders, and might object that the freeholders were incompetent to try the question, whether the sasines were properly registered or not, the pursuers brought a new action of declarator in this Court against the claimants, upon the acts of Parliament 1693 and 1696, with regard to the registration of sasines, and with the same conclusions as before, at least in so far as respected the defenders being entitled to be enrolled as at Michaelmas 1773.

The Court, by an interlocutor, June 17. 1774, 'sustained the pursuers title to insist in this action, but superseded determining the merits of the cause, till the proof in the case of Cromarty was laid before them.' And thereafter, (July 8. 1774), upon advising mutual memorials, and abstract of the proof in the case of Cromarty, 'in respect of the practice, which has been proved, in that case, to have prevailed in many counties in Scotland, and of the great and general mischief that might insue, if the objections now pleaded were sustained, repelled the objection to the registration of the sasines in question, and assoilzied the defenders from the present action.' See APPENDIX.

Act. *Macquenn, Hay Campbell, J. Boswell.* Alt. *Dean of Faculty.* Clerk, *Tait.*  
*Fol. Dic. v. 3. p. 430. Fac. Col. No 124. p. 334.*

1777. June 17. SIR ROBERT ABERCROMBY *against* ALEWOOD and Others.

No 229.

WHEN an objection is palpable, and can be established under his own or his author's hand, without any farther investigation, they hold it competent to reject the claim. Thus, several qualifications, created by Earl Fife on certain fishings in the river Doveran, were rejected, first by the freeholders, and afterwards by the Court of Session, in respect that it appeared, from a deed under the late Earl's hand, that these fishings were held of the royal burgh of Banff, and not of the Crown. See APPENDIX. See No 110. p. 8687.

A similar judgment was pronounced in the course of the same session, 1777, Alexander Pierie *contra* Hay of Mordington, see APPENDIX.

*Fol. Dic. v. 3. p. 431. Wight, p. 223.*

1779. February 17. JOHN BURN *against* WILLIAM ADAM.

No 230.

Freeholders have no right to call for the warrant of the charter on which the infeftment proceeds, or to object that

AT the Michaelmas head court for the county of Kinross 1778, John Burn claimed to be enrolled as a freeholder on the following titles; *1mo*, Charter of sale and resignation under the great seal of the lands and barony of Kinross, and others, in favour of George Græme, Esq.; *2do*, A contract of wadset, by which Mr Græme disposed to the claimant certain parts of the lands contained in the charter, and conveyed the said charter and precept of sasine to him, so