1777. *June* 17.

SIR ROBERT ABERCROMBIE, of Birkenbog, Bart. and ALEXANDER DIROM of MUIRESK, Pursuers, *against* MUSGRAVE ALEWOOD, and Others, Defenders.

No. 3.
Particulars of the case referred to at p. 8687. and p. 8852.

AT the Michaelmas meeting of the freeholders of Banffshire 1775, there was a claim lodged for Musgrave Alewood, claiming to be enrolled as a freeholder in the said county, upon all and whole the salmon-fishings called the Craigshot, and salmon-fishing called the Back of the Bar of Banff, in virtue of a charter under the great seal in favour of James Earl Fife, dated 24th February 1772; disposition and wadset by the said Earl to him dated 15th March 1774; and infeftment in his favour following on the said charter and conveyance, dated and registered 16th March 1774.

To this claim it was objected by the above pursuers; that the subjects on which the claim was founded could not entitle the claimant to be inrolled as a proprietor in Banffshire, as they do not belong to the county, neither have they place in the valuation or cess books thereof; that they were originally a part of the patrimony of the burgh of Banff, and have always held burgage of that town; that they have always stood upon the valuation and cess books of that burgh, and pay cess to the burgh-collector; and that the proprietor always paid and does still pay a yearly feu duty to the town of Banff for these fishings.—The pursuers added, that William Duff of Braco, in the year 1707 and 1710, had made a destination and tailzie of his estate of Braco, in favour of William Duff of Dipple, in which the above salmon-fishing, and sundry burgage lands about Banff, are described as parts of the barony of Braco, and, as such, a Crown charter passed over them. After Dipple's death, the late Earl Fife, his only son, was served and retoured heir in special to his father, in which service these salmon-fishings and lands about Banff, were still erroneously retoured, as parts and pertinents of the barony of Braco, and, as such, he was infeft in them. Soon thereafter, the Town Council of Banff commenced a process of reduction and declarator against Lord Fife, for having the foresaid charter from the Crown, with the service and precepts from chancery, reduced and set aside, and his Lordship obliged to take a charter from them. This process ended in an agreement; and by contract, dated 24th April 1729, entered into between the Town Council and Lord Fife, then William Duff of Braco, they agreed to give him a charter upon the salmon-fishings and burgage lands holding of them; and his Lordship, on his part, agreed to accept of the charter from the town, and to *disclaim the above entries from the Crown.* In terms of this contract, a charter was granted upon the 4th October 1729, to Lord Fife; and his Lordship, upon his part, of the same date, *renounces and disclaims* the foresaid entries from the Crown, in the strongest terms, and declares, that these fishings had been *wrongously and erroneously retoured, as*

holding of his majesty, in place of the Town of Banff; and binds and obliges himself, his heirs, successors, and assignees, to hold the same of the said community, in all time coming. No. 3.

Upon these grounds, the pursuers insisted, that the charter upon which Mr. Alewood's claim was founded, was void and null as to these fishings, and could never entitle him to be enrolled as a freeholder in the county.

For instructing their objections, the pursuers produced to the freeholders, an extract of the above mentioned deed of disclamation, registered in the register of sasines for the burgh of Banff, the same day it was granted, viz. 4th October 1720.

The freeholders repelled the objection, and enrolled Musgrave Alewood as one of their number.

Against this interlocutor, and other four in similar circumstances, complaints were entered to the Court of Session. In these it was set forth, that in order to give a colour to such extraordinary proceedings, a few of the freeholders, in the character of Commissioners of Supply, the very day of the Michaelmas head court, made a division of the fishings as if they had stood on their own books, and appointed their collector and clerk to give out certificates of the valued rent of each fishing accordingly; and at the head court, not only Mr. Alewood, but four other persons, who were also upon the same foundation, were added to the roll of freeholders: But that it was impossible to justify the conduct of the freeholders, in enrolling Mr. Alewood upon the above titles, as certainly neither he nor any of the four other claimants upon the fishings, had any subject conveyed to them which ever appeared in the valuation book of the county.

Argument for the respondent: Along with the titles narrated in the objections, there was produced to the meeting for instructing the valued rent of the particular fishings conveyed to the defender, a decree of division of the *cumulo* valuation of the whole fishings contained in the charter; which decree of division was pronounced by a regular meeting of the Commissioners of Supply of said county; and it was thereby instructed that the valued rent of the particular fishings conveyed to the respondent exceeded £400 Scots, and for which the land tax and other public burdens had been paid accordingly.

The objections import in substance, *1mo*, That the fishings in question were originally a part of the patrimony of the Town of Banff; and, in a question with the town, in 1729, Lord Fife obliged himself to hold them of the burgh, and to disclaim his entry with the Crown; *2do*, That the decree of division by the Commissioners of Supply of the county, was inept, the fishings in question not being in their books, nor making a part of the valued rent of the county, but paying cess to the burgh.

To the *first* of these objections it was answered, that as the respondent produced a charter under the great seal containing the fishings, with a regular conveyance thereof, and infeftment in them, his titles were, *ex facie*, good and

No. 3. unexceptionable, and it was not competent to the freeholders to canvass the validity of them, by founding upon the supposed right of third parties. It may be true, that there were disputes between Lord Fife and the Town of Banff, concerning their right to the fishings; but his Lordship, having obtained a charter thereof from the Crown, assigned the same to the respondent, who stands infeft in them as Crown vassal, in virtue of said charter; and the respondent's right can no way be affected by these disputes, nor is he bound, *in hoc statu*, to enter into a discussion of them. The Town of Banff has not yet pretended to insist in any challenge of his title; and it is utterly incompetent for the freeholders, or the Court of Session, in the summary question of enrolment, to go into a competition of this kind with parties who are not in the field. It would, therefore, be consuming time to no purpose, were the respondent to follow the pursuers into an investigation of his author's rights, as they cannot be judged of by the Court in this form; though he would have no difficulty, when called upon in a proper action for that purpose, to show, that the pursuer is misinformed, and that the respondent is preferable to the Town of Banff.

To the *second* objection, viz. that these fishings stand rated on the cess-books of the burgh; and that they are a part of the burgage territory; and that the division of them, as a subject paying land-tax in the county, was inept;—the answer was, That the pursuers were likewise here mistaken, both in point of fact and law. The fishings in question never held *burgage*, though it may be true that they once held *feu* of the town of Banff. They are not included in the royalty of the burgh, but are a part of the county; and if they ever paid cess to the burgh, this was clearly most erroneous, as there can be no doubt, that being locally within the shire, and no part of the burgage territory, they were liable in their proportion of the land-tax with the rest of the county. They are subject to the jurisdiction of the commissioners of supply of the county; and if, from mistake, during a certain period, they stood rated in the books of the burgh, in place of standing in the books of the county, it was the duty of the commissioners of supply to rectify this; and every heritor in the county was entitled to insist, that they should stand in the county books, and should be subjected according to their valuation in the land-tax, and other public burdens, to which all the heritors in the county are liable.

The commissioners of supply are entitled to do every thing necessary for raising and bringing in his Majesty's supply, to lay on and proportion the land-tax upon the several lands and subjects situated within their respective counties, and consequently, to ascertain and divide the valued rent, and to decide in all questions relative to it, at the suit of any party concerned. Several burghs have large estates belonging to them in the counties in which they are locally situated. These estates are, or ought to be valued in the land-tax books of the county, and are chargeable with their share of the county land-tax. They may even be quartered upon for it; and they cannot likewise be subject to a share of the *quota* laid upon the burgh, unless by voluntary agreement

No. 3.

with the tenants or feuers. This additional burden may happen to be laid upon them, which does in no shape exempt them from the obligations which necessarily must lie upon them as part of the county. They can, by no paction or mistaken usage, be withdrawn from their legal situation within the county to which they belong; and every heritor in the county has a clear title and interest to reclaim them, in order that he may be relieved of the proportion of land-tax payable out of these lands.

It is not however pretended that Lord Fife, in his transactions with the town of Banff concerning these fishings, became bound to pay cess for them to the town; and supposing Lord Fife and the town should have agreed either one way or other as to this particular, it would not follow that tney ought not to be liable for their share of the land tax, in the county where they were locally situated, far less, that the freeholders would be entitled to state such an objection.

Lord Fountainhall reports a case, 24th November 1698, Town of Edinburgh against Biggar, an heritor of some houses beyond the Windmill, in these words: 'The Town craved he might be found liable to all the burgal prestations, as lying within the royalty; such as watching and warding with the neighbours, quartering, assessment, militia, thirlage, &c. Biggar had a declarator of immunity, on this reason, that John Gairns, his author, had got a feu-charter of this ground from the town in 1681, bearing a *reddendo* of ten merks of feu-duty *pro omni alio onere*, which must free him from watching, warding, outreiking militia or trained bands, paying of local, transient, or dry quarters with the burgh of Edinburgh or Canongate, and from all astriction to their mills, or imposition due to them on malt, or any impositions laid on by their authority; and that he is no further liable to the town, but for the yearly duty foresaid.—Answered for the town, that the ground whereon these houses stood, was clearly, by their charter in 1636, a part of the royalty of the burgh, and annexed to the same; and their right bears the *vias et passagia* leading to the said burgh; and when they are too broad, they feu the ground on the sides of their causeways for melioration and decorement; and its being given in feu, does not hinder their being burgage; for so Thomas Robertson's land in the Meal-market, and the Society, are feus; and yet they are liable in watching, warding, and all other burgal prestations.—Replied, Though the magistrates held the town *in burgagio* of the King, so he was the town's superior, and not the magistrates; yet where they feu ground without the ports of the burgh, to be holden feu, that cannot be repute burgage.—The Lords found the defender, by the *reddendo* of his charter, not liable in the burgal prestations of watching, and warding; but as to the militia, quartering, thirlage, &c. they ordained the parties to be further heard. On a subsequent debate, the Lords found, these lands lay within the territory and jurisdiction of the shire, and not of the town; and so must pay cess, outreik militia, and other burdens within the shire.'

No. 3. This decision is in point to the present case; and it is plain, that if any party had a title to complain, it would be the town of Banff alone, which is the only sufferer, by withdrawing the fishings in question from paying cess to the burgh. In the case of the Town of Edinburgh against Biggar, neither the freeholders nor the heritors of the shire were considered as parties in the question; the matter being taken up solely between the town and the feuer; and therefore, it would seem, that the freeholders, in the present case, have no proper title to object to the proceedings of the Commissioners of Supply, in rectifying the former error. Their interest, as heritors, is entirely the other way. But independent of this, the proceedings of the Commissioners were clearly competent and regular; and they must be held as conclusive in the present question of enrolment.

Replied: The pursuers think it unnecessary for them to maintain, that, in every case, a court of freeholders can enter into an investigation of the progress of the lands upon which a person claims to be enrolled. Where such investigation is attended with niceties in point of law, or depends upon matters of fact, that cannot be easily or immediately cleared up, it would be in vain for a court of freeholders to enter upon it. But, that the production of a charter from the Crown, and an infeftment following thereon, should at all times be held as *probatio probata* of a claimant's being entitled to be admitted to the roll as a Crown vassal, would be rather going too far. On the contrary, the pursuers apprehend, that were the objection to the claimant's right to hold of the Crown is palpable, or can be instructed by deeds under his or his author's hands, without the necessity of resorting to any further proof or investigation, it would be absurd to suppose, that the freeholders were still bound to admit the claimant. And, in the present case, it appears from the minutes of the freeholders, that an extract of the discharge and disclamation by the late Lord Braco, which was recorded in the register of sasines for the burgh of Banff, upon the 4th of October 1729, was actually produced at the meeting, in support of the objection which was then most properly made, to the respondent's right to be enrolled.

Let it be supposed, that the late Lord Braco, after granting the disclamation in 1729, and accepting of a new charter from the town of Banff, had produced to a meeting of freeholders his former titles, which he had erroneously made up, as having a right to hold these fishings of the Crown, it surely, in that case, would have been competent for the freeholders to have founded upon the said disclamation and new charter, as a bar to his enrolment: And if so, it must have been equally competent for the freeholders to found upon them, as evidence, that the new charter, which his son, the present Earl, took from the Crown at his own peril, without any resignation from the town of Banff, his immediate superior, was perfectly void and null.

In short, the doctrine maintained by the defender, if carried to its full extent, would be productive of the most absurd consequences, by giving occasion for

introducing the vassals of subject-superiors to the freeholders' roll, and, of course, entitling them, contrary to the general principles of the constitution, and to every statute relative to these matters, to elect, or to be elected, members of Parliament. The third party to whom the right of superiority truly belongs, may not incline to complain, or to assert his right; at any rate, the legal *induciæ* that must be given to every defender in a process of reduction, must necessarily take up a considerable space of time; so that before they are run, the fate of an election may be determined, or even a county itself may be represented by a person who has no right whatever to assume the character of a freeholder; unless it shall be supposed competent to the meeting of freeholders to enter into an objection of this sort, when it is in their power to verify it immediately, as was done in the present case. No. 3.

The case of a person claiming under a disposition from an heir of entail, who is prohibited from alienating any part of the entailed estate, is very different from the present. In such a case the conveyance is good, and must remain so, unless it be brought under challenge by a substitute in the entail; and it is *jus tertii* to the freeholders, to take up a right of challenge, which, perhaps, none of the substitutes may ever insist in themselves. But it surely cannot be said to be *jus tertii* to them, to insist, that a person, who, from his situation, has no right whatever to hold of the Crown, ought not to be admitted into their body, or to object, that the titles which he has expede, either erroneously or fraudulently from the Crown, are absolutely void and null, in respect of his being under the strictest obligation to hold the lands, on which he claims, of a subject superior, and of its being incompetent to the Crown, to deprive such subject superior of his right.

This however is not the only objection that strikes against the respondent's qualification. The act 1681 requires, that a claimant shall be infeft in lands liable in public burden for his Majesty's supplies for £400 of valued rent. But it is absolutely impossible for the respondent to point out the fishings on which his pretended qualification depends, in any valuation or cess books of the county of Banff, either ancient or modern; or to show that they ever paid one shilling of the cess which the land-holders of that county are liable to pay. On the contrary, it appears from the very evidence of the alleged *cumulo* valuation of these fishings, which was produced upon the part of Earl Fife when he applied for a division thereof, that they were included in the valuation rolls of the burgh of Banff. The evidence here alluded to, was an extract from the records of the council of burgh, of the following tenor: "At Banff "the 19th day of June, 1708 years. The Magistrates and Council present in "council. The said day the valuation rolls of the said burgh were concluded "and subscribed by the valuators, at the council table, extending in hail to "the sum of £4323. 9*s*. 7*d*. Scots money, by which all impositions, stents, "taxations, and others, are to be proportioned and imposed on the heritors in "time coming. In which valuation roll, the following articles and subjects

No. 3. "stand thus, viz. Laird of Braco for Aehry's fishing, twenty barrels salmon; "Airlie's, fifty-eight barrels; Provost Stewart's, sixteen barrels; the Middle-"shot, four barrels; Craig-shot, five barrels; in hail 103 barrels salmon, "at twenty pounds per barrel, is £2060. *Item*, the white fish boats, £96."

Such being the state of the case, the proceedings of the Earl Fife's junto of commissioners must appear to the Court in a very extraordinary light. In the *first* place, they had no more jurisdiction over the valuation of the burgh of Banff, than over the valuation of Aberdeenshire, or any other county in Scotland. In the *next* place, the immediate tendency of their proceedings was to take away at once, near the half of the valuation of the burgh, and to leave the whole cess payable by the burgh, upon the remainder; and, at the same time, to add no less than £2060 to the total valuation of the county, neither of which they had any power to do.

It is remarkable, that though, in their decree of division, they appoint the valuations of the several fishings to be stated separately in the cess books, yet they have not thought fit to explain whether they meant the cess books of the shire, or those of the burgh. They certainly have no sort of power over the last of these; and it will not be pretended, that any alteration whatever has been made upon the county valuation, in consequence of their proceedings; which, in fact, have been attended with no sort of effect, as these fishings still continue to pay cess to the Town of Banff, in proportion to their valuation of £2060, as appears from a certificate under the hand of the town's collector, and of the town-clerk, of the 11th February 1777. This being the case, it is no ways material whether they hold burgage or feu. It is plain and evident, that they make no part of the valuation of the county; and it must necessarily follow, that the commissioners of the county could not take the sum at which they stand valued in the cess books of the burgh, from the burgh, and add it to the valuation of the county; and that neither they, nor the collector, could legally authorise quartering upon the proprietors of these fishings.

The respondent has appealed to a decision reported by Lord Fountainhall, in the case of the Town of Edinburgh against Biggar. But the complainers cannot discover in what respect it is applicable to the present case. The question there, was, whether Biggar's feu was within the territory of the town or not, and whether the feu-duty contained in his charter was to be considered as in full of all prestations to the burgh? But in the present case, it is not disputed, that besides the feu-duty contained in Lord Braco's charter from the town of Banff, these fishings are liable in, and have always paid cess and other public burdens to the burgh.

Duplied: In point of fact the pursuers are in a mistake, when they suppose that Lord Fife remained without this superiority from 1729, till it was again inserted in his late Crown charter, and that this was done without any warrant. The respondent has no occasion to go into the history of the

No. 3.

transaction 1729, which it would seem, was either not carried into full execution, or soon departed from; as it appears, that as early as 1736, the late Lord Fife did again take out a charter from the Crown, of these fishings, and another charter in 1749; and the present Earl, the respondent's author, obtained a third one in 1765.—The respondent had no doubt that the Earl's right to the superiority was unquestionable; and he was entitled to contract with him upon the faith of the record. Neither ought he to be obliged, *in hoc statu*, to enter into a competition with the Magistrates and community of the town of Banff, who are no parties here, and are making no claim upon the deed of renunciation 1729. This deed may have afterward been given up or discharged by a contrary deed. The late Lord Fife may have had no power to grant it to the prejudice of his heirs of entail; and, besides, it is *ex facie* prescribed; so that unless this deed can be supported in some other shape, it can evidently be of no avail even in a competition with the town of Banff.

But surely nothing can be more incompetent than to enter into points of this kind, in the present shape of the question, when the Court is acting merely as a court of review in the matter of enrolment, and have not the proper parties in the field for determining upon any supposed right which may be in the town of Banff to the superiority, in consequence of the transaction 1729.

The complainers endeavour to make a distinction between cases where the investigation may be attended with nicety, and those where the objection is palpable, and can be easily instructed. But, this distinction is altogether new, and so extremely vague, that it could not be well extricated; for, if such a doctrine were gone into, it would be necessary, in all cases, to have a previous discussion, whether the objection made to the titles is easy or difficult; whether attended with much, or with little investigation; because, in the one case, it would be competent, in the other incompetent; and if it should happen to be something between the two, the Court would not know how to decide, the argument for and against the competency being equally balanced. This is a refinement upon the election law, which has not yet come into practice, nor is it to be found in any of the books written upon that subject.

The law has made no distinction between one Crown charter and another, provided it be formally expede and not liable to any *ex facie* objection. If the freeholders are entitled, in any case, to enter into a discussion of the feudal title produced by a claimant, and to set it aside on account of objections competent to third parties, they must be at liberty to do so in every case. The supposed niceties in point of law, or difficulties in point of fact, might be cleared up before the Court in the course of the complaint; and even new evidence might be admitted, and writings recovered, to instruct how the point of right really stood. The respondent can see no reason why any line should be drawn, or how it is possible to draw a line in such cases.

No. 3. It is said, what if the late Lord Fife, after having granted the disclamation 1729, and denuded himself of the superiority, had produced his former titles; could not the freeholders have enrolled him upon such titles, after they had been extinguished and put to an end by contradictory titles made up? And the case is said to be the same here.

But the respondent denies the conclusion, so far as it proceeds upon the supposition, that the late Lord Fife had claimed, after having been denuded by contrary titles. The deed of disclamation could not of itself have the effect to denude him; but he no doubt might have resigned in the hands of the Crown for new infeftment in favour of the town of Banff; and when the town became invested, by a new charter from the Crown, this of course would have denuded Lord Fife; after which he could not have claimed, having no title in him. But supposing him afterward to have obtained a charter of these fishings from the Crown, the title came again to be in him, at least *ex facie;* and he not only would have been entitled to claim, but must have been enrolled, the freeholders having no right whatever to raise up a competition between him and the town of Banff. The town might bring a reduction before the Court, in order to set aside this new charter and infeftment in his person, upon shewing that it was erroneous, or improperly taken out; and if they prevailed, by a final decree in their favour, setting aside his right, he once more became divested, and the freeholders might, upon evidence produced to them of this alteration of circumstances, have turned him off the roll. They likewise would have been entitled, even while he stood on the roll, to put the oath of trust and possession to him, in order thereby to expiscate whether he had a real and true right in the subject, and was in possession, or not; but further than this they could not go, it being evidently *jus tertii* to them to plead in the right of the town of Banff, by objecting to titles *ex facie* good in the person of Lord Fife.

In the present case, it is not so much as said, that the late Lord Fife denuded himself, by resigning in favour of the town of Banff; but it is said that he executed a *disclamation*, which is a deed of a personal nature, and that he at the same time took a charter of the fishings from the town. Supposing this to have been the fact, it would seem he afterwards repented, and renewed his investiture with the Crown, so early as 1736; and he, and his son the present Earl, have stood infeft in these fishings, as Crown vassals, ever since. Nor is there the smallest pretence for saying, that the present Earl ever did, in any shape whatever, either divest himself, or come under any obligation so to do, in favour of the town of Banff. All that can be said is, that the *late* Earl, at one period, came under an obligation to hold of the town, which is now prescribed, and is not insisted in by the town itself; but the present Earl stood apparently in the full feudal right of these fishings, as holding of the Crown, when he conveyed his right in favour of the respondent, who accordingly is entitled to found upon that right in the present question of enrolment.

No. 3.

The plea of the town of Banff, supposing it to be well founded, resolves merely into a ground of personal challenge against the present Lord Fife, upon the warrandice of his father's obligation; and how far this would militate against the respondent, a *bona fide* purchaser, is a question which cannot be tried here: For, at any rate, the *freeholders* cannot take up the plea of the town of Banff, either against Lord Fife or the respondent; and of course the Court cannot do it in the complaint against the enrolment.

If the freeholders can inquire into the warrants of the feudal title last made up, why not carry their investigation still further, and require a complete feudal progress for the whole years of prescription? The consequence of which must be, that every claimant shall bring his whole charter-chest to the meeting of freeholders, that they may inquire into, and cognosce upon his title-deeds.

Entails are not the only cases in which it is *jus tertii* to the freeholders to take up grounds of challenge competent to third parties. In a competition of feudal rights, the *prior* infeftment is undoubtedly preferable; but surely the meeting of freeholders have no title to plead upon the preference of the prior infeftment, in order to found an objection entered before them against the last charter and infeftment duly registered; and yet this case is much stronger, and might be as easily instructed by producing an extract from the register, of the prior infeftment, as the present case can be by the deed of disclamation granted so long prior to the charter claimed on.

It would be endless to quote examples, and unnecessary to go to decisions upon a point so plain in itself, and so familiar to the Court. In the case of Sir Patrick Dunbar against Budge of Toftingall, 26th Feb. 1745, No. 220. p. 8844. it was objected, that the superiority did not belong to the claimant, but to the Hospital of St. Magnus: But the decision says, "The Lords considered that the claimant was infeft under the great seal; and nobody appeared, who, as Master of the Hospital, or otherwise, might dispute the superiority with him; and therefore, thought the freeholders had no title to contest his title to his estate."

In the same way, in a late question concerning Sir John Gordon's vote in the county of Cromarty, one of the objections stated, and which was said to appear *ex facie* of the writings produced, was, that his father, Sir William Gordon, had denuded himself of the superiority in question, by making votes upon them in the form of wadset, leaving nothing with himself but a faculty of redemption, which had never been properly exercised, so as to denude the wadsetters; and therefore, they or their heirs still continued in the right, although Sir John had lately taken out a Crown charter, containing this superiority. This objection was said to be altogether incompetent to the freeholders; and, accordingly, it was repelled by the Court. See No. 257. p. 8874.

Upon these grounds, the respondent could not have a doubt, that the Court would over-rule the first objection.

No. 3. As to the *second*, it is material to observe, that the fishings in question are, *ex concessis* of all parties, locally situated within the county, and are no part of the burgh of Banff, being an estate altogether separate from the burgh, holding feu, and not burgage, and not included within the royalty; so that their paying cess to the burgh, appears to have been altogether erroneous, and contrary to the principles of the decision in the case of the Town of Edinburgh against Biggar, where it was specially found, "That the lands lay within the territory "and jurisdiction of the shire, and not of the town; and so *must pay cess, out-* "*reiking militia, and other burdens within the shire.*"

The fishings in question appear to have been regularly valued; but in place of being entered in the county-books, they have by some mistake gone into the valuation books of the burgh, probably at a time when the burgh had some right of property or superiority in these fishings. The Commissioners of Supply were entitled to rectify this mistake. The act of convention 1667, not only empowers, but directs them to rectify valuations, "and to take "course, that all persons within the shires and burghs be equally and propor- "tionably burdened."

The pursuers say, that the Commissioners had no jurisdiction over the valuation of the burgh of Banff, more than the valuation of Aberdeenshire; and that the tendency of their proceedings was to take away near one-half of the valuation of the burgh, and to add it to the county.

But the plain answer to this is, that they have not touched or interfered with the valuation of the burgh of Banff in any one particular, the fishings in question being, as already said, no part of the burgh, but part of the county. They have taken nothing from the burgh that belonged to it. In the case of the Town of Edinburgh against Biggar, the valuation according to which the town had erroneously demanded cess and other burdens from the subject belonging to Biggar, would no doubt be transferred from the town's books to those of the county; and although in the present case, as in that of Biggar, the total valuation of the county must be so far enlarged, yet this does not affect the valued rents of the other heritors, or the right of voting consequential thereof. It will only have the effect of making every heritor's proportion of land-tax so much less, which they have no reason to complain of, as they will be thereby so far relieved. Neither can the town be entitled to complain, that lands or subjects not belonging to the burgh, but locally within the county, are not brought in to relieve them of a part of the land-tax or cess laid upon the burgh. In fact, no complaint comes from either of these quarters; and in the question of enrolment, any objection of this kind appears very ill-founded.

It is not pretended that the valuation of the fishings in question, is inadequate to the rent thereof, or that they are higher valued than other subjects of the like rent in the county. On the contrary, it appears from the extract from the town's records, formerly mentioned, that the valuation of these fish-

No. 3.

ings has continued to be uniformly the same for a period of near seventy years back.

But it is said, that no alteration whatever has been made upon the county valuation, in consequence of the proceedings of the Commissioners of Supply, as these fishings still continue to pay cess to the town of Banff, as appears from a certificate under the hand of the town-collector.

If the alteration has not yet been made, this is not the respondent's fault, it is the business of the collector. The Commissioners of Supply, by their decree referred to, appointed the respective valuations of the fishings in question to be entered in their books, and to pay cess and other public burthens accordingly; and they farther appointed their collector and clerk, to give out certificates of the valued rent of each fishing, according to the said decree. The respondent produced this decree to the freeholders, which was complete legal evidence to them, and in every case of a division of valued rent, is understood to be so, whether the particulars are entered by the collector in the cess-books or not; and many instances can be given in the same county, where persons stand on the roll, in consequence of decrees of division, without any mention of such division in the cess-books kept by the collector; but this was never supposed to afford any objection against an enrolment. However, supposing there were any thing in the objection, it would soon be removed; for at the general meeting of the Commissioners, to be held upon the 30th April 1777, application will be made by those concerned to have the decree carried into execution, by an order upon the collector, not only to enter the valued rents of the fishings in his cess roll, but to levy a proportion of the total cess imposed upon the county from the same, which will entirely remove every pretence of objection arising from the supposed non-execution of the decree.

It might farther be observed, that the proceedings of the Commissioners of Supply, being *ex facie* regular, the same must be held as conclusive in the question of enrolment, the freeholders not being at liberty to reduce or disregard them, whatever may be done in an action of reduction before the Court.

The Lords found, "that the freeholders of the county of Banff, convened "at their Michaelmas head-court the 29th of September 1777, did wrong in "admitting the respondent upon the roll of freeholders of the said county, "and therefore granted warrant to ordain the clerk of the county to expunge "the respondent's name from the said roll, and decerned and found the com-"plainers entitled to their full expences."

Act. *A. Wight et A. Gordon, jun.* Alt. *Ilay Campbell.* Clerk, *Robertson.*

J. W.