

or their vassals' valuation; or if the tacks were expired, and the Crown, or any other tacksman, oblige them to pay them their teinds, yet still the valuation of the lands would remain the same, and could not be altered without an act of Parliament for a new valuation, and it would be a strange paradox, that the diminishing an heritor's or freeholder's rent, would make his right to vote good, that was not so before; and yet I could not see any objection that could lie to their rates, if all their teinds were allocated to Ministers, unless that it be said, that one heritor actually infest in both stock and teind, valued at L.400, and therefore having an unexceptionable vote, would lose it upon the least augmentation of the Minister's stipend; and therefore I thought their title good, supposing they had no right at all to the teinds; and I thought that this sense of the act was confirmed by the universal sense of the nation, which was stronger real evidence than perhaps can be in the case of any other statute. I doubt if there is now, or has been since 1681, any shire, at least very few, wherein there is not some one, or more freeholders, whose valuation is below L.500, and who are not infest in their teinds, and yet by this objection, all such votes would be exceptionable; and there have been few counties where there have not in that time been sundry competing candidates, and therefore either the one side or the other ready to object to every freeholder that had not a good vote, yet this is the first time that I ever heard of this objection being made; so that we have the sense of all the freeholders in the nation, and amongst those all the lawyers of greatest note, and even most of the Judges of the Supreme Courts against it. Upon the question, we found the complaint well founded; *renit.* President, Dun, Murkle, Shewalton, Woodhall. *Pro* were, Milton, Minto, Strichen, Justice-Clerk, Kames, and I. Drummore did not vote. I also observed, that in the other cases where the valuation is made the rule, I never heard any question asked, Whether the heritors were infest in, or had right to the teinds? not even in the division of commonties, where it might be of importance; and it would be strange if the Parliament changed the rule in elections established, by the act 1681, because of uncertainty, and that it required proofs of the rentals, and went to establish a permanent rule, that would appear to every body from the valuation-book, should yet with their eyes open, make a rule as uncertain, and, where the valuation was within L.500, depending upon a much more troublesome and tedious proof than the former. They all knew, that no teinds except drawn teinds or teind-duties had been valued separately for the stock, and therefore before such an heritor could vote, there behoved to be a separate valuation of teinds, and that not as they are at the time of the objection, but *retro* at the time of making the valuation; for the teinds do not at all times bear the same proportion to the stock, or to the whole rent, because of the usual deductions in valuing teinds of rents of subjects not teindable. 2d March 1753, Adhered, except as to a new fact, on which they ordered memorials.

No. 58. 1753, June 23, Aug. 3. INNES of Sandside *against* SUTHERLAND of Swinzie.

SUTHERLAND of Langwell estate in Caithness was at a re-valuation valued at L.600. He died in 1708, and left his lands of Langwell (or Borrisdale) to his daughter of a first marriage, and his lands of Reisgill to his daughter of the second marriage, and as the

difference betwixt the rent of the two estates was not thought very great, being by a rental shewn us only about L.70 Scots, the two daughters, and their husbands, paid the Cess equally, and the Collector stated them so in his accounts. Langwell held of a subject, but Reisgill held of the Crown; and Sutherland of Swinzie, the son of the second daughter, wanting to be on the roll of freeholders in 1749, applied to the Commissioners of Supply to divide the valuation of the two estates, and they, on a sort of proof taken, valued Reisgill at L.421. 6s. 4d. of the L.800; but notwithstanding thereof, the Barons having refused to enrol him, he complained to us; and at the same time Langwell pursued reduction of the division;—and we reduced the decret in the process at Langwell's instance, and dismissed Swinzie's complaint against the freeholders, as marked by me 8th February 1751, (No. 52.) Whereupon Swinzie applied again to the Commissioners of Supply: A new proof was led, and the two parties coming to a better understanding, they transmitted it to be laid before their lawyers, to prepare a state, and get their joint opinion: The agents made a state, and got the lawyers opinion (Messrs Lockhart and Ferguson) that the two estates were precisely of the same extent of rent, without one farthing of difference, so that each should be valued at L.400; and the Commissioners approved of this report; and then the freeholders enrolled Swinzie; but Innes of Sandside opposed it at the meeting, and then complained to us. His objections were two, first, that the meeting of the Commissioners was no lawful meeting, because the act of Parliament appointed the first meeting to be 4th June 1751, to chuse their Collector, Clerk, and Convener, and with power to appoint subsequent meetings, whereas the act not coming in time, there was no meeting till the 28th June, and thereby the commission fell, and they could make no adjournments. To this objection none of us had any regard. Necessity has no law; the case frequently happens, and the consequence would be, that no Cess could be levied that year. The second reason was gross iniquity and partiality in the Commissioners, colluding with the parties in judging not only without evidence, but against evidence, in order to make each estate L.400, and mentioned several particulars. Answered, This division was superfluous, for the valuation was already divided, each party having paid Cess for L.400 since Langwell's death in 1708, and they were so stated in the Collector's book, and if there were no valuation-book extant, as in some shires there is not, there could be no other rule, and if there was any error, the Commissioners could not rectify it. 2dly, The decret quarrelled bore a production of a rental of both estates signed by Langwell, and which was in the hands of the Sheriff-clerk, and was the rule of making the valuation 1701, where the free rent of Reisgill is stated at L.772. 10s. 10d. and that of Langwell at only L.704. 8s.; and were a division now competent, it should be in proportion to the rent in 1701, whereby Swinzie's valued rent should be above L.400, and therefore Sandside has no reason to complain. 3dly, Not competent to this Court to review valuations, or divisions of valuations by Commissioners. 4thly, Were it competent, it could only be by reduction. Replied, When the two estates divided, both were liable for the Cess of the whole L.800; and if, till by a division of the valuation, it should appear what was their respective proportion, both heritors agreed to pay equally; or if Swinzie, desirous of a qualification to vote in elections, was willing to pay a few shillings more than his proportion, and Langwell, who could have no vote, found it his interest to agree, and the Collector, who neither knew their proportions, nor had any interest in the question,

took his whole Cess from either of them that pleased, such payment for 100 years would not make a division of the valuation, which can only be done by the Commissioners; and though if no other book were extant but the Collector's book of accounts, it could not appear that ever they had been jointly valued, and it behoved to be held for the valuation book, yet it cannot be so where the book is extant; and it appears that neither the parties nor the Commissioners thought this a division, since in 1749 Swinzie got his lands valued by the Commissioners at L.421. 6s. 4d. To the second, There is no evidence that the rental produced was the rule by which the Commissioners made the valuation 1701, nor does it agree with the rule and proportion observed by them in the county, as appears by their report in Parliament. 2dly, Were it the rental produced before them, yet where an estate is valued, and part of it perishes by overblowing of sand or inundation, or the rents vary, or grounds that paid no rent are improved, or a lake drained, and then the valuation comes to be divided, the rental at the time of division must be the rule, or in some cases the Cess will be lost, and in others there will be farms that pay no Cess. 3dly, At no rate can that rental justify this decret of division, because it is *toto caelo* different from it. To the third, This question first occurred between Langwell and Swinzie, 8th February 1751, *quod vide* (No. 52.) and the Court waved the decision of it, but they decided it 12th February 1751, between Sir John Gordon of Invergordon and Sir John Gordon of Embo, (No. 53.) and found the Court competent, and set aside the valuation, which also they did in effect in March last, betwixt the freeholders of Caithness and Sir Robert Gordon and others, allowing a proof of rents said to be omitted to be proved before the Commissioners, which could not be done if the Court had no jurisdiction to review. To the fourth, If reduction were necessary, that could not be before the freeholders, who therefore would be bound by the decret, however grossly injurious and partial, and therefore there could be no cause to complain of them, and very often there would be no party that had interest to reduce. In this case Langwell colluded with Swinzie, and therefore won't quarrel the division; and the other freeholders, that have no interest in either of the two estates, have no proper title to reduce it. These are the arguments used either by the Bar or the Bench, for they were not all pleaded by their counsel;—and it carried five to five to dismiss the complaint. For the interlocutor were Drummore, Strichen, Kilkerran, Kames, Justice-Clerk. Against it were Milton, Elchies, Murkle, Leven, and Minto, but he was in the chair, and had no vote. 20th July Altered, and sustained the complaint, when Kilkerran was in the chair, and Murkle absent, but Woodhall for altering. 3d August Adhered.

No. 59. 1753, Dec. 5. LORD LYON'S CASE.

LORD SHEWALTON reported a question from the bills, Whether he should pass a bill of inhibition against a member of Parliament, (Lord Lyon) now that the Parliament is sitting? Some thought we were not bound to know members of Parliament; others thought a prohibitory diligence could be no breach of privilege. I doubted much of both. However, most of the Court were for his passing it.

No. 60. 1753, Dec. 20. M'KENZIE, &c. *against* SIR JOHN GORDON, &c.

IN this county of Cromarty there are but five persons standing on the roll, Sir John Gordon, and his brother Mr Charles, and his brother-in-law Leonard Urquhart, and his