DIVISION III.

The Qualification of Freeholders possessing Lands liable in Public Burden for L. 400 Scots.

SECT. I.

How far Teinds are considered in Questions concerning the Legal Valuation.

1745. *January* 29. Sir PATRICK DUNBAR *against* ST CLAIR of Bremster.

No 42.
Lands with the teinds thereof, making up the full valuation, entitle.

ST CLAIR of Bremster is possessed of lands in the shire of Caithness, valued at L. 370 Scots, and having acquired from the patron a right to the teinds which formerly belonged to the parson, and which were valued since the act establishing the patron's right at L. 62, claimed a vote thereon. It was *objected*, That lands and not teinds gave title to vote..

Answered, He did not claim on the teinds of other lands but his own: That the teinds being only a servitude, when they were purchased in the lands became free, and the same disburdened were of more value than L. 400.

THE LORDS, on hearing in presence, sustained the title.

Fol. Dic. v. 3. *p.* 406. *D. Falconer, v.* 1. *p.* 61.

1753. *March* 3.
Captain JOHN SCOTT and Others, Complainers, *against* Captain JOHN SUTHERLAND of Forse, Respondent.

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One having right to lands valued in the cess-books at L. 400 is entitled to vote, although he has not a right to the teinds of these lands, and although if a fifth were

CAPTAIN SCOTT purchased the superiority of part of the estate of Hempriggs, lying in the county of Caithness; which estate stood valued *in cumulo*, in the cess-books of the shire, at L. 3,600.

Captain Scott made over part of his purchase to Sir Robert Gordon and Mr Hay of Leys; and, in July 1750, these three gentlemen obtained charters, under the great seal, of their respective lands, and were duly infeft.

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Thereafter, they applied to a general meeting of the Commissioners of Supply, to have the valued rent of their respective lands ascertained; which accordingly was done, by proportioning the total valuation of the estate of Hempriggs to the present real rent thereof, and of the several parcels belonging to the complainers, whereby it appeared, that the valued rent of the part belonging to each of them exceeded L. 400; and, by order of the Commissioners, this division was entered in the valuation-books of the shire, and the cess directed to be uplifted accordingly.

These gentlemen severally entered their claims before Michaelmas 1751, to be enrolled in the roll of electors for the said county, in terms of the statute of 16th George II.; and produced their infeftments, with the evidence of the division of the valued rent, to the meeting of the freeholders; but Captain John Sutherland of Forse, and a majority of the meeting, refused to enrol them.

A complaint was thereupon exhibited before the Court of Session against Captain Sutherland; who, in answer thereto, repeated the objections upon which the enrolment had been refused by the freeholders; particularly,

Objected, That there was no proper evidence that the lands in which any of the complainers was infeft amounted to L. 400 of valued rent; for that the total valuation of the estate of Hempriggs, extending to L. 3,600, arose from the joint value of stock and teind; consequently, the several proportions thereof, at which the complainers' lands had been rated, must also be for both stock and teind; but the fact is, that the complainers have no right to the superiority of the teinds of their several lands. Their last charters indeed comprehend the teinds as well as the lands; but this must have happened by mistake, as the deeds of conveyance in their favour did not dispone, nor contain any warrant for resigning the teinds. And it appeared, that their authors had no other right to the teinds, but by sub-tacks flowing from the Bishop of Caithness. And after deducing a fifth part from the valuation of each of their lands to answer for the teinds, it appears, that none of them will have the legal qualification of being publicly infeft in lands holden of the Crown, of L. 400 of valued rent.

And, in order to prove, that the teinds were included in the total valuation of the estate of Hempriggs, the acts of convention 1643 and 1649 were referred to; which ordain, that every person's rent should be valued in stock as well as in teind, with deduction of the burdens affecting the same; and which method was accordingly followed by the Commissioners for valuing the several counties of the kingdom, as appears from some of the original valuation-books still extant, and particularly in the re-valuation of this county of Caithness, in pursuance of an act of Parliament in 1701, the directions of the above acts of convention appear to have been followed; for, where the teind was separately possessed, it was separately valued from the stock; but where the heritor was in possession both of stock and teind, which was the case in the

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estate of Hempriggs, no distinction was made; but the valuation was ascertained according to the total rent of the land in stock and teind, after deducting the teind-tack duty payable to the titular, and other burdens affecting the same; so that the valuation of this estate appears to have been both for stock and teind, though the heritor had no right of property in the teinds, but possessed them by a sub-tack from the Bishop.

And as such sub-tack is not a title of freehold by the law of Scotland, consequently the valued rent of the teinds of the complainers' several lands possessed under that title, cannot enter *in computo*, to make up the L. 400 valuation required by the act 1681. Had the teinds been separately valued, the complainers would have had no pretence to a vote; and their having been jointly valued with the stock, cannot make their right better, when it appears, that part of that joint valuation belonged to the teinds.

Answered for Captain Scott and the other Complainers, *1mo*, Their infeftments produced before the freeholders contain the teinds as well as the lands; and the freeholders have no jurisdiction by law to call for, or cognosce upon, the warrants of any infeftment; and, if this is so, neither has the Court of Session jurisdiction, in this state of the case, to judge of the above objections to the complainer's titles. These may be the ground of a reduction before their Lordships, in another capacity, at the instance of any party having interest; but, upon the present complaint, their Lordships can only judge as a court of appeal; and pronounce such judgment as the freeholders, according to the powers committed to them ought to have pronounced.

2do, et separatim, Whatever way the right of the teinds may stand, the complainers were entitled to have been enrolled by the freeholders; as it still remained true, that, in terms of the statutes 1681, and 16th of King George II. they stood infeft in the superiority of lands holden of the King, "liable in public burden for his Majesty's supplies for L. 400 of valued rent." And these statutes do not distinguish whether such valued rent of the lands arises from stock or teind, or both; or whether the proprietor or superior of such lands hath an heritable right to the teinds of the lands or not. The law requires, that the party claiming a vote be proprietor or superior of lands of L. 400 valued rent, and requires no more; and this hath been constantly held to be law since the statute 1681, over the whole nation. But according to the respondents' new doctrine, the proprietor or superior must either produce an heritable right to his teinds, or he must be proprietor or superior of lands of L. 500 valued rent. It is impossible to foresee what confusion and dangerous consequences this doctrine might introduce into the constitution of the kingdom. It seems plainly to import a repeal of all the statutes made with respect to the qualifications of electors; particularly the aforesaid statute of the 16th of King George II. which declares, "That lands holden of the King or Prince, liable in public burdens for L. 400 Scots valued rent, shall, in all cases, be a sufficient qualification of a freeholder."

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And, with respect to the acts of convention 1643 and 1649, which the respondent sets forth as the foundation of the valued rent of Scotland, the complainers differ from him in point of fact; for it appears from history, that the united Parliament of Great Britain and Ireland, held in the 1656, during the Protectorate of Oliver Cromwell, imposed a land-tax upon the three kingdoms, amounting in Scotland to L. 6000 Sterling per month, the same land-tax that continues to be levied in Scotland at this day; and as this was different from the land-tax levied pursuant to the acts 1643 and 1649, by the name of monthly maintenance, which amounted to L. 9000 Sterling monthly, and upwards; so it appears, that it was uplifted by another valuation, made at that time, which was considerably less than that of the 1643 and 1649, and which last valuation, taken up in the 1656, is certainly what is referred to in the act of convention 1667, and in the subsequent cess acts, both before and since the union of the two kingdoms; so that the respondents whole argument, built upon the acts of convention 1643 and 1649, and the valuation proceeding thereupon, entirely falls to the ground, as the land-tax of Scotland is now paid, and the qualifications of electors regulated, not by the valued rent taken up in pursuance of the acts of convention, but according to the after valuation in the 1656.

THE LORDS, in their reasoning, seemed to be chiefly moved by the second answer for the complainers, founded upon the words of the statute 1681; and

"Found, that the petitioners, in virtue of their titles produced before the freeholders of Caithness, were sufficiently entitled to have been enrolled in the roll of electors of a Member of Parliament for the said shire; and that the objections to their titles were not relevant; and that the freeholders did wrong in refusing to enrol the petitioners; and therefore ordained them to be added to the said roll, and decerned and declared accordingly."

Act. *R. Craigie & R. Dundas.* Alt. *Ja. Ferguson & Alex. Boswel.* Clerk, *Pringle.*
M. *Fol. Dic. v.* 3. *p.* 406. *Fac. Col. No* 71. *p.* 108.

*** Lord Kames reports this case.

1753. *March* 2.—WHEN in place of the old method of taxation, the whole lands of the kingdom were valued, whether held of the King or of a subject, and also all real rights relating to lands, feu-duties, teinds, mines, fishings, &c. the method of valuation established by the act of convention 1643, and by after statutes, was to value *in cumulo* all taxable subjects belonging to the same person; and these subjects were not valued separately, unless when in the hands of different persons. This was chosen as the most expeditious method in a new form of raising the land-tax, which was intended as an experiment, and might possibly not be continued. But as this, by experience, was found a more equal mode of levying a land-tax than what was formerly in use, and much less troublesome, it was followed out by subsequent Parliaments, and

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has now gained a firm establishment. But then there were two remarkable defects in this mode, which occasioned a multitude of re-valuations. One was the valuing *in cumulo* different subjects belonging to the same proprietor, which must be valued separately when they come to be in the hands of different proprietors. The other was the valuing of temporary rights, such as liferents, tacks, mines, for which a tax could not be paid after they were exhausted. With regard to the first, it is appointed by the act of convention 1667, "That where lands, teinds, or other real estate, did, the time of former valuations, pertain to one person, and are since dismembered, and disponed to several persons in parcels, so that the value of each parcel by itself cannot be known by former valuations, the Commissioners are empowered to value of new again, provided no alteration be made of the total sum imposed upon the shire." With regard to the second, I find no provision made. But as the sum imposed upon each shire was made unalterable, that part of the tax which was originally laid upon temporary rights, must have been added to the tax which was laid upon perpetual rights, gradually as these temporary rights were at an end; and this must have been the work of the Commissioners. And now the inconvenience of laying any part of the tax upon temporary rights appearing from experience, temporary rights bear no longer any part of the tax; the whole resting upon perpetual rights.

The estate of Hempriggs, in Caithness, was partly held of the Crown, partly of the Earl of Caithness. The teinds of that estate, belonging to the Bishop of Caithness, were possessed by the proprietor upon a long lease, when the lands of Scotland were first valued in order to levy a land-tax in the new form. The estate *in cumulo* was valued at L. 3600 Scots yearly, in which the teinds must have been included, for the reasons above given, that they were possessed by the proprietors of the lands. Sir Robert Gordon, Hay of Leys, and Captain Scot, having acquired right by progress to the superiority of that part of the estate of Hempriggs which held of the Earl of Caithness, in order to entitle themselves to be voters in that shire; they obtained from the commissioners a separate valuation of that part of the estate, which amounted in the whole to above L. 1200 Scots yearly, as also a separate valuation of their shares separately, by which it appeared that they had above L. 400 each; and though they purchased the lands only, and not the teinds, which belong to the King, in place of the bishop, yet to make all secure, they slipt the teinds into their signatures, which were passed in Exchequer without advertence, and thereby the teinds came to be ingrossed in their charters under the great seal, along with the lands. These titles were produced to the Barons at the Michaelmas Head Court, and were rejected, as not sufficient to entitle them to be put upon the roll of electors.

Against this judgment a complaint was exhibited to the Court of Session by the three gentlemen, and the principal ground insisted on in the answers was, That these gentlemen had no right to the teinds, which were slipt into their

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charters by inadvertence; that the value of the teinds ought to be deducted from each of their valuations; and this being done, that the remaining valuation would not be sufficient to entitle them to vote.

The parties were heard at large, and the complainers rested their complaint upon the following point, That their infeftments contained the teinds as well as the lands, and that whatever objection may lie against the infeftments as to the teinds, such objection could not be tried by the freeholders, but must be reserved to be tried in a reduction before the Court of Session. It was *answered*, That the teinds *ex concessis* belonged to the Bishop of Caithness, and now to the Crown, in place of the Bishop; that the Barons of Exchequer, supposing they had intended the thing, and had not been misled, could not grant these teinds to the complainers; and therefore the objection resolving into want of power in the granter, that the charter is void *quoad* the teinds, which may be objected *a quocunque* having interest without necessity of reduction.

At advising the cause, the LORDS were generally of opinion, that the charters were null as to the teinds, and that the Court of Freeholders had access to make the objection, and to sustain it, in order to judge whether the complainers were entitled to be upon the roll. But ELCHIES took the thing upon the following footing: He admitted, that in the valuations in order to proportion the cess, every real right was valued, not only lands and teinds, but also liferents, annuities, feu-duties, teind, tack-duties, salmon-fishings, &c. &c. when these were in the possession of different persons, that a separate value was put upon each, even though they all related to the same lands. But then he observed, that when different real rights arising out of the same lands belonged to the same proprietor, there is no instance, as there was no necessity to put separate values upon each. The lands only were valued, and the burdens to which the lands were subjected were not valued, because they belonged also to the proprietor of the lands. Thus when an heritor was in possession of his own teinds, whether by a perpetual or temporary right, the lands alone were valued in proportion to the rent they paid, which was both for stock and teind; and, from this valuation, there was no occasion to deduct the value of the teinds, which belonged also to the proprietor. Thus undoubtedly was the estate of Hempriggs valued. The valuation of L. 3600 yearly, must be understood to be the yearly value of the whole lands, without deduction of any sum in name of teinds, because the proprietor of Hempriggs was in possession of the same by a tack of long endurance.

Having premised these facts, he observed, that the dispute was to be determined by the act 1681. The words are, That such freeholders are entitled to a vote, 'Who are infeft in lands liable in public burdens for his Majesty's supplies, for L. 400 of valued rent.' What is the meaning of this clause? Does it point out the stock abstracting from the teinds, or is it sufficient that the lands be *de facto* rated in the cess books at L. 400? The last is plainly the meaning, expressed in words not ambiguous. This meaning corresponds to the method

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of valuation then subsisting, which, as aforesaid, was not to put a separate value upon the teinds, unless possessed by another than the heritor of the lands. He added, that this hitherto has universally been understood the meaning of the act 1681; that instances are without number, where the present objection might have been made, and which was yet never hitherto dreamed of, even in those keen disputes betwixt opposite parties in shires, where every objection is greedily laid hold of.

I observed further, That the statute 1681, in ascertaining the qualification of those who are entitled to elect and be elected members of Parliament, certainly intended a permanent qualification, not to be varied every minute upon change of circumstances. If lands are once valued at L. 400, however the valuation be made up, perhaps by adding the value of teinds, coal, mines, or fishings, yet if these are valued *in cumulo*, and the valuation be entered in the books for the lands only, the proprietor is entitled to vote, by the above clause, even after his right to the teind expires, or his fishing fail, or his mine be wrought out. Upon the same medium, a proprietor of land continues to have a vote after he has given real securities to the value, or above. In judging of this question, therefore, the teinds are not to be regarded. It is true, that making up the total valuation of the estate of Hempriggs, the teinds were brought into the calcul; but then Hempriggs losing the teinds, would not lose his vote, supposing his estate to be valued but at L. 400; and as the complainers have the superiority of part of the estate, which, in proportion to the whole, must be valued above L. 1200, it makes no difference with regard to their qualification, whether they have right to the teinds or not. Had they purchased a tack of the teinds of their share, their votes would have been good after the tack was expired, and they are in no worse case, though they never had a tack.

"THE LORDS ordained the complainers to be added to the roll."

Sel. Dec. No 44. *p.* 48.

*** Similar decisions were pronounced, 9th December 1790, in two cases, Edmonstone against Morehead, and these judgments were affirmed upon appeal.——See APPENDIX.