No 49. article *minus* the part sold. No evidence of a regular division was produced; but the entries in the cess-books, joined to the title-deeds, and a series of receipts, proving the cess to have been uniformly paid, corresponding to the valuation of L. 386 : 5 : 8, were urged as sufficient presumptive evidence that there had been a division; and the Court sustained the claim.—*See* Appendix.

Fol. Dic. v. 3. *p.* 407.

SECT. III.

By what rule are *cumulo* Valuations to be divided.

1753. *July* 20. Innes of Sandside *against* Sutherland of Swinzie.

No 50. Instance of splitting a valuation of lands valued *in cumulo*.

In the year 1701, by authority of Parliament, there was a valuation of the shire of Caithness. The lands of Reisgill and Berrydale, both belonging to Sutherland of Langwell, were valued *in cumulo* at L. 800 Scots; and, by authentic documents, preserved, it appears that, at this period, the lands of Reisgill were of yearly rent L. 772 Scots, and of Berrydale, L. 704 Scots. Recently after this period, the lands of Reisgill and Berrydale were separated, and the disponees were entered into the cess books of the shire, by what authority is not known, as liable for cess each of them, at the rate of L. 400 valuation; and the use of payment, conformable to this valuation, was continued for 40 years by the proprietor of Reisgill, as well as by the proprietor of Berrydale. In the year 1751, Sutherland of Swinzie, proprietor of Reisgill, finding no decree of the Commissioners of Supply, authorising a division of the original valuation, was advised, in order to remove all objections, to apply to the Commissioners for a division. The Commissioners took under consideration, not only the old rent, as vouched by rentals, but also the present rent of both estates, and pronounced a decree agreeable to the division made in the cess books, and to the use of payment; and, upon the authority of this decree, he was enrolled.

Innes of Sandside, one of the freeholders, complained to the Court of Session, and holding the present rent to be the rule of division, charged the Commissioners with partiality and iniquity; condescending upon many particulars, where the rent of Berrydale was kept down, and the rent of Reisgill raised

No 50.

above the truth. *Answered*, 1mo, Since the decreet was formal, which was not refused, the freeholders had no power to review the same upon any ground; nor even the Court of Session, otherwise than in a reduction; 2*do*, The present rent is never the rule for splitting a valuation, unless by a presumption that it is the same with the old rent; that, in this case, the old rent being legally proved must be the rule; and, by this rule, the rent of Reisgill being higher than that of Berrydale, L. 400 Scots was less than the proportion of the valuation that ought to be laid upon Reisgill; and, therefore, no cause of complaint; 3*tio*, Laying aside the decreet, the division made in the cess-books, submitted to for 40 years, is legal evidence of a division by consent of parties, which is equal to a division made by the Commissioners; for here, as in all other cases, there is no occasion for the sentence of a Judge, where parties differ not. Nor does it avail, that a purchaser, in order to be entitled to a vote, may take upon him more cess than the land ought to be burdened with; for a decree may be collusive as well as a private agreement, and, in neither case, is collusion to be presumed; the objection is nothing, unless it be verified.

Replied to the *first*, A decreet, dividing a valuation, serves two purposes; one direct, and one indirect. The direct effect is to ascertain the cess with which the land is to be burdened; and, with regard to this effect, the decreet cannot be challenged but by reduction. It has an indirect effect to serve as evidence of a qualification; as to which, the barons or freeholders are judges of the evidence; and, therefore, they are not bound to admit, as good evidence, a decree, which, to them, appears partial or iniquitous. To the *second*, no other reply was made, but to carp at the authority of the old rentals, questioning them as not legal evidence. To the *third* it was *answered*, That private consent can have no operation against third parties; and, therefore, cannot have the effect to split a *cumulo* valuation; because, the public has an interest as well as the private proprietors: This, therefore, must be done by a decree which binds all parties; and without a decree, there is nothing to bar the Collector of the Land-Tax from quartering upon any part for payment of the cess of the whole lands contained in the *cumulo* valuation.

THE LORDS were first of opinion, that the old rentals were sufficient evidence of the old rent, and a good foundation for the decreet of division; consequently, that the Commissioners had committed no iniquity in laying half of the original valuation upon Reisgill. But, upon a reclaiming petition and answers, it was carried by a majority to alter; and Swinzie was ordained to be expunged from the roll.

I can have little doubt that the use of payment of the cess for 40 years, according to the cess-roll, binds all parties, the King not excepted; and, therefore, is in all views equivalent to a formal decreet of division. The greatest confusion must follow were the law otherwise; for how can it be expected, that decreets of division are to be preserved for ever? Why not provide a remedy a-

No 50.

gainst the injuries of time, in this particular, as well as in all others? The Judges, indeed, seemed to be all of this opinion. The plurality who were for the complaint, put their opinion upon this narrow footing, that Swinzie's act of applying to the Commissioners was evidence against him, that there never had been a decreet of division. This evidence is extremely slender. But, admitting it to be good, For what good reason ought not an acquiescence of the Commissioners, for 40 years, to be held equivalent to their decree? For, as it is their business to see the land-tax effectually secured, their acquiescence in a private division presumes that the division is justly made, without collusion.

Sel. Dec. No. 49. *p.* 56.

1755. *January* 17.
JOHN GALBRAITH of Balgair *against* WILLIAM CUNNINGHAM of Ballindalloch.

No 51.
Though the real rent be the proper standard of division, yet a division of valued rent sustained, though proceeding on a proof of the use of payment of cess by the vassals of the lands.

The regular method of dividing *cumulo* valuations, is by proportioning them according to the real rents at the time of the division; but, when land-tax has been paid for a considerable time, in certain proportions, the valuation may be divided according to such payment.

At the meeting of the freeholders of Stirlingshire, held 17th May 1754, John Galbraith of Balgair claimed to be enrolled amongst them, upon the following titles, *viz.* partly as heir to his brother in the lands of Balgair; for instructing of which, he produced his service, dated 2d March 1753, a precept from the Chancery, dated 17th April, and his sasine thereon, dated 3d May, and registered 6th June said year; and partly as proprietor of the lands of Staneich and Rollis; for evidence of which, he produced his charter of these lands, under the Great Seal, dated 23d February 1743, and sasine thereon, dated 4th, and registered 7th April of that year; and he produced a certificate of the lands, being valued in the cess-books at L. 410 : 10 : 8.

William Cunningham, one of the freeholders, *objected, 1mo,* That he could not be enrolled in virtue of the lands to which he had succeeded as heir to his brother, because his right of apparency was at an end by his having made up titles; and he could not be enrolled in virtue of these titles, because his sasine had not been registered one year before the meeting for election; *2do,* That he could not be enrolled in virtue of the lands to which he produced a charter and sasine, dated and registered in 1743; because his title to these lands was a redeemable right, but not a proper wadset; for the contract contained no clause empowering Mr Galbraith to call for his money; *3tio,* That the valuation of the last mentioned lands, which had been purchased from Mr Stirling of Herbertshire, was not properly divided from the valuation of Herbertshire's other lands. The majority of the freeholders sustained the objections; and John Galbraith complained to the Court of Session for redress.

It was *pleaded,* in support of the objections; That, by the act *12mo Annæ,* and *16to* George II. none, except apparent heirs, can be enrolled, unless their sasines be recorded one year before the test of the writs for calling the Parliament, or at least one year before the enrolment be demanded. Now, the