SECT. II.

What evidence must the Freeholders receive of the Valuation.

1760. *February* 5. CAMPBELL and GRAHAM *against* MURE.

No 44.

A CERTIFICATE by two commissioners of supply is sufficient evidence to a meeting of freeholders, of the amount of a valuation regularly divided, without producing the proceedings of the commissioners.

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

1760. *March* 6.

SIR MICHAEL STEWART of Blackhall, and WILLIAM CUNNINGHAM of Craigends, *against* Captain JOHN POLLOCK.

No 45.
A person infeft in the just and equal half, *pro indiviso*, of lands rated *in cumulo* in the cess-books at L. 1000 Scots of valued rent, is not intitled to a vote.

AT the Michaelmas meeting of freeholders of the county of Renfrew, in October 1759, Captain John Pollock claimed to be enrolled upon the following title, viz. a charter under the great seal in his favour, of the just and equal half, *pro indiviso*, of all and hail the twenty pound land of Over Pollock, proceeding on the procuratory of resignation contained in a disposition by his brother, Sir Robert Pollock, to him, of the aforesaid just and equal half of the said lands, upon the precept in which charter he was duly infeft.

And for instructing, that these lands were rated in the cess-books at *L.* 400 Scots of valued rent, and upwards, reference was made to the valuation-book of the county, then lying on the table; from which it appeared, that the whole twenty pound land of Over Pollock, was valued, and paid cess at the rate of L. 1000 Scots.

This title was *objected* to by Sir Michael Stewart, one of the freeholders; but it was carried by a majority to enrol the claimant, upon which Sir Michael Stewart, and Mr Cunningham of Craigends complained to the Court of Session.

Objected by the complainers, That the enrolment was improper and illegal in a double respect; 1*mo*, The defender's title is founded upon an undivided property; 2*do*, The valuation is also undivided.

The right of freehold, and the privileges thereto annexed, suppose a certain estate, either of property or superiority, in which the claimant stands infeft,

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distinct from the estate of every other person, and of which he must also be in possession. None of these requisites can apply to the case of an undivided property, whether it be by inheritance or purchase. In such case, *concursu faciunt partes*, and neither of the joint proprietors can say that any particular estate belongs to him either in property or superiority. For this reason it was, that the statute 1681 enacted, that apprisers or adjudgers should have no vote during the legal, and that after the legal expired, the appriser or adjudger first infeft should only have a vote, and no other appriser or adjudger, until their shares were divided. If the half, *pro indiviso*, of L. 800 of valued rent could entitle to a vote, by the same rule a vote might be created by disponing the one half, *pro indiviso*, of a four pound land of old extent, retoured before the 1681; but it is an established point that such retours cannot be divided, and that though the retour contained a twenty pound land, it would entitle only to one vote.

In the contested election for the county of Dumbarton, between the Honourable John Campbell of Mamore, and Mr Haldane of Gleneagles, in 1724, Mr Campbell having petitioned the House of Commons against the election of Mr Haldane, and the affair being remitted to the Committee of Privileges and Elections, that Committee came to the following resolutions, which were approved of by the House, *nemine contradicente*, 'That it is the opinion of this 'Committee, that any conveyance of undivided shares of the superiority of any 'lands in the shire of Dumbarton, in order to multiply votes, or split an inte-'rest in such superiority amongst several persons, with a view to enable them 'to vote, is contrary to the act of Parliament made in Scotland in the 1681, 'entitled, *Act concerning the election of Commissionors for shires*.—Resolved, That 'it is the opinion of this Committee, that no person claiming a right by a pur-'chase to an undivided part of the superiority of any lands, where the extent 'of the lands of which he claims the superiority is not particularly specified, 'and the lands distinguished by the charter by which he claims a vote, has 'any right to vote in the election of a Commissioner to serve in Parliament for 'the shire of Dumbarton.'

This authority is in point. And, upon the same principle, the *cumulo* valuation of the lands in question afford a separate objection to this claim. The respondent's proper estate has no valuation; he has no estate that can be valued while the property remains *pro indiviso* with him and his brother. It is the estate itself, and not the person, that is to be rated, and pay cess according to such valuation.

Answered for Captain Pollock, The respondent is infeft and in possession of a certain estate, belonging to himself only, and to no other person whatever, viz. the just and equal half of the twenty pound land of Over Pollock; and although that half remains undivided from the other half belonging to Sir Robert, yet, in reason, and in the eye of law, it is an estate in him certain in itself, and distinct from the estate of his brother. He is admitted vassal of the Prince in the just

No 45. and equal half of the lands; he is liable by the *reddendo* of his charter, in the half of the duties payable to the Prince for the whole tenement, which half is ascertained and specified in the clause of *reddendo*. In every respect he is vassal to the Prince in one half of the lands, as much as Sir Robert is in the other. The act of Parliament 1681 says, that he who is infeft in property or superiority, and in possession of lands paying cess at the rate of L. 400 of valued rent, shall have a vote, but makes no distinction whether the property is divided or undivided. The respondent, therefore, subsumes, in the express terms of that statute, that he is publicly infeft and in possession of lands liable in public burdens to his Majesty for L. 500 of valued rent, and consequently he is entitled to vote as a freeholder.

Many freehold estates in Scotland, by old extent as well as by valuation, consist in part of lands possessed in rundale, or in common property, *pro indiviso*. Now, although these lands, possessed in rundale, and in common property, did certainly enter into the computation both of the old extent and of the valued rent, yet this was never considered as a good objection against the proprietor claiming to be admitted to the privileges of a freeholder; and if a part of the estate may consist of common property, there occurs no good reason why the whole may not be undivided, *nam majus aut minus non variant speciem*. The case of adjudgers make no way against the respondent's argument; for, antecedent to the act 1661, introducing the *pari passu* preference of apprisers, the first apprising completed by charter and sasine, vested the sole right of the lands in that appriser, subject to redemption within the legal. The act 1661, from equitable considerations, brought in all apprisings equally that were within year and day of the first effectual one; but notwithssanding this departure from the common rules of law in favour of creditors, the first appriser or adjudger who obtains himself infeft, does still, as to all other effects, divest the debtor, and after the expiry of the legal, is held to be the proper vassal in the lands. Neither does the argument which is used, with regard to dividing the old extent, apply; for it is expressly declared by the statute 1681, 'That no division 'of the old extent made after that time by retour, or any manner of way, shall 'be sustained as sufficient evidence of the old extent;' but there is no such enactment with regard to the valued rent.

The objection, That the valuation of this estate is undivided, is equally ill founded; for it is not disputed, that the valuation of the whole lands is L. 1000 Scots, and therefore the valuation of the half must necessarily be L 500. A decree of the commissioners of supply could not make it more certain, that L. 500 is the half of L. 1000, than it is by the nature of the thing.

Replied, The case of estates consisting partly of a common property in muirs and mosses, is very different from the present. Such commonties are considered as accessory to the property to which they belong, and are regulated thereby, and the person claiming being in possession of a distinct and certain estate, is

entitled to vote upon that estate, although perhaps a commonty, which, as being *accessorium sequitur suum principale*, should be computed in the valuation. No 45.

"THE LORDS sustained the objections to Captain Pollock's vote, and granted warrant for expunging him from the roll."

Act. *Wa. Steuart* and *Lockhart*. Alt. *Garden* and *Miller*. Clerk, *Tait*.

I. C. *Fol. Dic. v.* 3. *p.* 407. *Fac. Col. No* 218. *p.* 396.

1790. *February* 25.

The Honourable HENRY ERSKINE *against* The Honourable JOHN HOPE.

No 46.
Proof of the valued rent, by long use of paying the land-tax, where no decree of division appears, sustained.

IN the original valuation of the county of Linlithgow in the year 1667, as well as in the subsequent one in 1687, the whole lands of Little Blackburn were rated at L. 366: 13. But after this, for much more than forty years, that parcel of those lands, called "Napier's part of Little Blackburn," was separately entered in the books kept by the Collector of the Land-Tax, being rated at L. 210: 11: 4; and the tenants of the lands paid a corresponding share of the public burdens.

It also appeared, that, in the county of Linlithgow, till a very late period, the more formal method of dividing a *cumulo* valuation by a decree of the Commissioners of Supply, proceeding on a proof of the real rent, and engrossed in their minutes, had seldom or never been thought of. The whole minutes of the Commissioners, from the year 1687, were extant; but no traces could be found of a regular division of the valued rent of the lands of Little Blackburn.

Mr Erskine having acquired the superiority of Napier's part of Little Blackburn, produced to the freeholders of the county, at the Michaelmas meeting in 1789, a certificate from two Commissioners and the Clerk of Supply, bearing, that these lands were rated at L. 210: 11: 4.

Mr Hope, a freeholder in the county, objected to this evidence; and

Pleaded, Where a proprietor cannot shew that he is entitled to vote, in consequence of the old extent of his lands, he must have recourse to the original valuations, made up in every county by the Commissioners of Supply; or where the lands belonging to him have at first been valued *in cumulo* along with others, he must ascertain the separate valuation of his property by a regular decreet of division, pronounced by a *quorum* of the Commissioners, in whom alone is vested the power of proportioning the land-tax among the different Crown-vassals; Bankton, b. 4. tit. 9. § 3.; Wight on Elections, p. 183. 184 197. 200.

In the proceedings, too, before the Commissioners of Supply, the payment of the land-tax, however uniform, cannot be considered as an unerring rule. This may have arisen from some erroneous calculation, from the wish of a par-