

the evidence of Scots witnesses, that the art had been practised in Scotland before the date of Clark's patent.

MONBODDO. I regard not arguments *ab incommodo*: we must judge according to law, not conveniency. If there are such evil consequences from patents, why, let the King grant none such, or let the Legislature regulate them.

[He misunderstood me. I endeavoured to show, from the consequences, that that could not be law which necessarily produced such effects.]

On the 4th March 1774, "The Lords found it proved, that the method of making oil of vitriol in vessels of lead, was practised in England before the date of Messrs Roebuck and Company's patent; and therefore found the letters orderly proceeded."

Act. J. M'Laurin, A. Lockhart. *Alt.* A Crosbie, H. Dundas.

Reporter, Justice-Clerk.

Diss. Kaimes, Pitfour, Monboddo.

1774. March 10. GEORGE ROSS of Cromarty, &c. *against* SIR RODERICK M'KENZIE, &c.

MEMBER OF PARLIAMENT.

It is competent to any Freeholder to challenge decree of valuation, though he has no other interest in challenging it than merely to support the objections to enrolment for Freeholders.

[*Faculty Collection, VI. 294; Dictionary, 8663.*]

HAILES. I will give my opinion in two words: I am clear as to the jurisdiction of this Court. I might hesitate as to the power of the freeholders, were it not for a series of decisions which cannot at present be departed from. I would therefore follow the course which we have held for so many years.

GARDENSTON. I am as *laconically* of the same opinion.

KENNET. I wish to see decisions uniform, especially in election matters. I have no doubt as to the jurisdiction of this Court, which indeed is not much disputed. As to the second point, it is established properly: at any rate, it is *established*. If the Court does not allow this power in one shape or other, either *ope exceptionis* or by reduction, the power of naming members of Parliament will be in the commissioners of supply.

PITFOUR. If the Act 1681 had not been the rule, I should have had no objection to the absolute power of the commissioners. I once heard it said, in French, of judges, *Ils oublient les personnes, ils attendent aux choses*. With the commissioners of supply, the rule is inverted, *Ils oublient les choses, il attendent aux personnes*. The distinction of *ex facie*, or not, is a good one; things that require proof cannot be taken up *ope exceptionis*.

MONBODDO. I am of the same opinion, both from principle and practice. By giving up the *first* point, the parties give up the second. If this Court has a power to redress wrongs, it would be singular were no person to have a right to complain of the wrong? A freeholder may complain, for he has a privilege, though not a patrimonial right.

JUSTICE-CLERK. Notwithstanding the precedents of the Court, I should have no scruple to resort to principles. It is my firm belief that they who had the penning of the Act 16th Geo. II. had no idea that it was in the power of a single freeholder to stop enrolment, either by objection, complaint, or reduction, upon exceptions taken to the decreets of commissioners of supply. I think the law has vested the trust in the commissioners; and that when a decret, perfect in itself, is laid before the freeholders, it is sufficient, as much as an old retour. Whenever the evil arising from the abuse of such powers becomes grievous, the nation will seek a remedy from the legislature.

COALSTON. I should be exceedingly happy, if, without endangering the rights of the subjects, we could find that neither this court, nor the freeholders, could question the actings of the commissioners of supply. It would relieve us of an intolerable load of causes. I think that this Court, as the Supreme Court in civil causes, and also a Court of equity, has a power to review the proceedings of all inferior courts, even in cases where this Court has no original jurisdiction. This right has been introduced as in confirmation of testaments, declarators of marriage, processes of divorce. When individuals are appointed Commissioners of Parliament, this Court may review their proceedings. The Commissioners of Supply are not a committee of Parliament more than commissioners for turnpikes, canals, &c. Upon the proceedings of the Commissioners of Supply, many important matters depend. It is admitted that parties patrimonially interested may complain. *This* supposes a jurisdiction and a power of redress. Suppose a superiority of L.1000 *per annum* were sold at a judicial sale, that A purchases one half, and B the other, the Commissioners of Supply divide and give L.700 of the valuation to one, and L.300 to the other; could not the person who gets but L.300, apply for redress? A subject which has a qualification to vote would sell higher than one without it. If there are but two freeholders in a county, their interest is greater than if there were a hundred. If an interest is once admitted, there must be a jurisdiction. A distinction has been made between objections appearing *ex facie* of the decret and not, and a sub-distinction between what strikes at the power of the commissioners and what at their proceedings. I cannot see those distinctions: 80 out of 100 of the decisions of this Court have proceeded upon iniquity appearing *ex facie*. Several of those decisions have gone to the House of Peers, and that House has determined as if there were a jurisdiction. What the House of Peers may hereafter do, I consider not myself as bound to inquire.

KAIMES. A decret of the Commissioners of Supply is like any other decret, good till reduced. If it is null, *ex facie*, it is no decret at all. I have no doubt as to the power of the Court of Session to redress wrongs, unless they are expressly debarred by Act of Parliament. The only question is, at whose instance shall the complaint proceed? This has been cleared up by my brethren who have already spoken. The only difficulty is this: One freeholder tries to reduce, and fails: another may try again; this is an inconveniency, but the like often occurs in the law of Scotland. The only *salvo* for this, is that

all concerned may complain from the beginning ; and, if they do not, they will be held as having acquiesced.

[It seems as good an answer to say, that it is at least a presumption, that the Court will repeat the judgment between A and B which it gave between B and C, if the cause is the same, and that no man in his judgment will try a question that he has almost a certainty of losing with costs.]

AUCHINLECK. Anciently, when valuations were introduced, it was not thought that in 1774 there was to be such a struggle about " who should pay most." This alteration in the disposition of men requires attention. If the decision in all cases was left to the Commissioners of Supply, there would be great injustice committed. They are not *kinless, rascally*, as was said of Oliver's judges. I therefore think we should go on as we have done formerly. The parties are able and willing to seek redress in the House of Peers. If they do so, I shall be well satisfied ; but I would rather wish to have a good Act of Parliament for cutting off those rascally votes.—[He added, in a half-whisper, " in which I myself am concerned."]

On the 10th March 1774, " the Lords sustained the jurisdiction of the Court, and also found it competent to the freeholders to make the objections."

Act. D. Rae, Ilay Campbell. *Alt.* H. Dundas, A. Lockhart. Hearing in presence.

1774. *March* 11. EMELIA FRASER *against* ALEXANDER ABERNETHY.

ALIMENT—HUSBAND AND WIFE.

Interim aliment allowed to a married woman pursuing a divorce.

MRS Abernethy insisted in an action of divorce against her husband for adultery. She applied to the Commissaries for an interim aliment ; they refused it : she presented a bill of advocation. Lord Pitfour, without hearing the other party, remitted to the Commissaries, with an instruction to give L.30 in name of interim aliment. Abernethy reclaimed, and pleaded that it is the practice of the Commissary Court to give a wife an interim aliment, when defender, because innocence is presumed, and for the same reason to refuse it when she is pursuer.

PITFOUR. I gave a speedy judgment here, to save time at this late hour of the Session. I perused the writings before the Commissaries, so that I was master of the argument. I considered that, if I erred, the party had an opportunity of reclaiming. The lady is a woman of an excellent character, Lord Strichen's niece, and, according to the report of the country, has met with very bad usage.

[This was, one way or other, the most extraordinary argument that I ever heard from the bench. Lord Pitfour ought to have reported the case.]

GARDENSTON. If the practice of the Commissary Court is as represented, it is high time to correct it.