AUCHINLECK. In the last cause before us, the man pleaded *remissio injuriæ*, because the woman had not left his house. Here the woman has left the man's house, and he will not aliment her. Thus, if she stays, the objection will be, You have forgiven me; if she goes, she must starve.

HAILES. Innocence is presumed. This is a presumption of law; but it is also a presumption of law that what one undertakes to prove, is true, in questions of relevancy. These are no more than unimportant axioms. The short conclusion on the case is this, A woman cannot be obliged to live with the man from whom she concludes to be divorced ever since a period already past. If she cannot live with him, she must either be alimented *extra familiam*, or no woman will have it in her power to obtain justice against her husband.

On the 11th March 1774, "the Lords refused the petition after having heard parties, and adhered to Lord Pitfour's interlocutor."

Act. H. Dundas. *Alt.* Al. Abercrombie.

1774. *June* 21. ROBERT STEPHEN *against* GENERAL ABERCROMBIE.

MEMBER OF PARLIAMENT.

[*Folio Dict., III.* 411; *Dictionary*, 8676.]

HAILES. I am satisfied that the determination given in this case is not inconsistent with the determination given in the *Forfar* case. In the *Forfar* case the Court did not approve of the proceedings of the minority, but they saw that those proceedings had been ratified by a general meeting, and therefore they sustained them. Thus the present question is entire, and there is no judgment of the Court either one way or other. Yet I think that the proceedings of the minority may in general be supported. The Commissioners were ordered to proceed in the division. The majority would not, but the minority did; so that all that we have is one division made according to the injunction of the Court. The majority ought to have proceeded to a division, if not on the Duke of Gordon's *data*, yet on their own *data*: instead of that they threw away their votes, and agreed to sist procedure; which is just the reverse of what they were bound to do. They overshot themselves. I suppose that next time they will be more on their guard. It is said that the majority not only sisted procedure, but sustained objections, and that the minority ought to have considered the objections as sustained, and then proceeded accordingly, notwithstanding the sist. But how could the minority split the judgment: it was a judgment not tending to expedite matters, but to delay. Had the majority considered that the sustaining the objections was an effectual part of the judgment, they would have proceeded to act upon the footing of the objections being sustained; that is, they would have divided upon their own data. Besides, what is the meaning of sustaining objections which do not appear from the minute. They would not divide the valuation of the parish of Ruthven,

though, as to it, there was no objection; so that their vote, however worded, was, in effect, a declaration that they would not proceed. In that case, the minority was authorised to proceed. It is vain for them to say that the Duke of Gordon would not allow his valuation to be divided unless according to his own *data*. They were the judges: he was a party: it was their duty to have proceeded in a division according to the *data* which seemed just to them, without regarding the opinion of a party.

COALSTON. The single question is, Whether was there a regular division here? The meeting was legal, but the division was not the act of the meeting: it was not the act of the majority, but of the minority. Were this case to be determined on general principles, there is no doubt the only question is, Whether any thing in the interlocutor of the Court could establish this strange proposition, that the act of the minority must overrule the majority. Had the majority voted to *adjourn*, the interlocutor would have authorised the minority to *proceed;* but the majority did not merely sist procedure, *it sustained objections.* How could the minority counteract this? The only thing that occasions a difficulty is the case of *Forfar: It* would have applied to this case, had it not been for the ratification. In fact, it does not apply. At any rate, it is but a single decision.

JUSTICE-CLERK. I lay my opinion upon the words of the injunction, as explained in the case of Forfar. The injunction is as well framed as can be. [A compliment to Lord Auchinleck in the Chair.] There was a combination in the county of Forfar to disappoint Lord Panmure of this right which the law gave him. The purpose of the Court was to force justice. The after approbation of the general meeting could not have been of much weight, for the former meeting must either have had powers or not: If the *former*, the approbation was superfluous; if the *latter*, unavailing. In the present case some gentlemen were resolved to meet and divide according to the injunction. A majority came with the determined resolution of stopping the division. *Which* party did wrong? Was it the *minority*, who returned a division, or the *majority* who returned none? We can pay no regard to the proceedings of a majority who disregarded our injunction.

COALSTON. When the majority and the minority differ, the only remedy lies in the Court.

MONBODDO. In the case of Forfar the majority had a pretence for not proceeding, namely, that there was no sufficient proof. Here the majority might have proceeded upon some *data* or other. This case, therefore, is much stronger than that of Forfar.

ALVA. It is plain that the majority meant to counteract the injunctions of the Court, not to expedite the division.

GARDENSTON. It was incumbent on the parties to obey the injunctions of the Court. The majority acted contrary to the injunctions of the Court. It is true that, in words, they *sustained objections;* but this was only to get at their conclusion,—*to sist.* Had the majority taken a part in the deliberations, and, instead of objecting to what was done, proceeded to divide, the minority must have submitted. The division by the minority is the legal division, for there is no other.

AUCHINLECK. I have the same difficulty as Lord Coalston, yet my desire is to alter the interlocutor, because every thing done speaks out the intention of

the majority to disappoint the injunction: their sole view was *nihil agere*. I am sorry that we have given an advice to future politicians for their conduct,—that they go one step farther, and proceed to make an erroneous division.

KAIMES. The majority first sustained objections, and then sisted proceedings. Their sisting proceedings will not operate *retro*.

KENNET. It surely was not the intention of the Court to find that a minority could counteract a majority. The case of *Forfar* went upon this, that the proceedings of the minority were ratified by a general meeting. As to this case, the *first* objection is, that all parties having interest are not called. This is not good; because it was competent, and omitted. *Second*, As to the actings of the minority, wherever the objection made depended on a proof not brought, the objection was frivolous. There is a difficulty as to the *Boat of Bogue*, for there the minority proceeded to repel an objection which the majority had sustained. The minority ought to have proceeded on the *data* of the majority.

COALSTON. I beg leave to qualify my opinion: when the majority gives an opinion, *that* must be the rule. There was no objection in the minutes as to the parish of Ruthven, and, consequently, that parish did not fall under the judgment of the majority.

On the 21st June 1774, "The Lords found that, in this case, the minority did right in proceeding to a division; and therefore altered their interlocutor of the 23d February 1774."

Act. H. Dundas. *Alt.* D. Rae, &c.

Diss. As to Boat of Bogue, Kennet and Hailes.

Diss. As to all but Ruthven parish, Kaimes and Coalston.

1774. *June* 22.—The objection now made to the division of the valuation, was, that the feuars who had an interest were not called.

COALSTON. If the feuars are not bound to pay a certain share of the cess, they have an interest, and ought to have been made parties.

JUSTICE-CLERK. The former proceedings are inconsistent with this. The Court ordered the Commissioners of Supply to proceed in judging among the parties then in the field. The objection is extraordinary, for the feuars themselves do not object.

MONBODDO. Suppose some person had appeared and pleaded, that some one else than the Duke of Gordon was the proprietor, Could the freeholders have taken up such an objection, if repelled by the Commissioners?

ALVA. However competent the objection may have been to the feuars, I do not think that it is competent to any one else.

COALSTON. I cannot enter into the distinction between the Commissioners of Supply and any other judges. I do not think that the objection is not now competent: the remit was only authorising the minority to act, but it was implied that they should act according to law. The objection is, that the feuars were not called, and also some claimants interested in the division.

GARDENSTON. The objection is very slight: there seems some ground for the distinction between gentlemen judges and judges who act by regular forms.

The question as to gentlemen judges must always be, whether are they materially wrong or materially right? Common sense is always law: they are not good judges who cannot reconcile them. If a man is overburdened, which is the true cause of complaint, or underburdened, which is the modern cause of complaint, he may seek redress; but he alone who is overburdened or underburdened is authorised to seek redress.

KAIMES. Had the objection been made *in initio litis*, the Commissioners must have listened to it. If want of interest is good against a pursuer, it is good against an objector.

JUSTICE-CLERK. Petitions had been presented,—proofs ordered to be taken, and actually taken, without any objection. The objection ought to have been moved in the advocation, or not at all: to sustain it now, would be inconsistent with the injunction. We have now an extracted decree of the Commissioners, *by which the cess is levied.* The freeholders say, We will disregard that decreet. In many places, the tenants are bound to pay the cess. According to this rule, if any tenant, paying L.50 Scots of rent, is not called, the decree of division is intrinsically void. This country is already in confusion enough. To require so many parties, would introduce inextricable confusion.

STONEFIELD. The power of the Commissioners is altogether ministerial: they are not bound to call any parties. No form of citation is required. We had a recent example of that in the county of Forfar, where the collector moved to have a new division,—it was never objected that parties having entered were not called.

AUCHINLECK. This case is very difficult. The Act of Parliament has said, that every man shall have a vote who stands infeft in L.400 of valued rent. If a man is not legally subjected to that extent, he cannot have a vote: The quartering lies upon the vassals; consequently, they are liable. Commissioners of Supply are not tied down to strict accuracy; but still they are subject to rules. If they act without rules, how can we support their actings? The proof, in this case, goes for nothing, because in absence of the parties interested.

KENNET. The objection, that all claimants are not parties, is not good: but the objection, that all vassals were not called, is good. The *former* may be considered as repelled by implication; the *latter* not.

JUSTICE-CLERK. While the decreet stands, the cess must be paid, according to that rule. Hence the vassals' lands are liable to public burdens to the extent of L.400.

On the 22d June 1774, "The Lords repelled that objection, that all parties having interest are not called."

Act. H. Dundas, &c. *Alt.* Ilay Campbell, &c.

Diss. Coalston, Kennet.