infeftment in the just and equal half of it, and a contract of division in 1671 between the proprietors of both halves, agreeably to which they have possessed ever since, and yet he was found to have no right to vote. The Court seemed inclined to repel both these defences. Only Drummore and Kames seemed to doubt of the first;—but we allowed him proof before answer that these lands of Whitefield were possessed, falling under one or other of the names of lands in his charter, and both parties to prove all facts and circumstances to clear the matter. 22d July, Adhered to the interlocutor touching the retour, and found it proved that Whitefield is part of Northfield, and therefore dismissed the complaint.

No. 56. 1753, Feb. 16, 21. COLONEL ABERCROMBY *against* LESLIE.

THIS was a complaint for admitting Mr Leslie on the roll who was infeft in property in lands valued L.302, and in a superiority of lands belonging to Mr Garden of Troup, upon an adjudication against the family of Buchan as old as 1686, and which lands had been valued jointly with the lands of Troup held of the Crown, and the valuation divided by four Commissioners of Supply at Troup's house, who gave an order on the clerk to divide them so in the Cess books: So two objections were made, first that he had no right to the superiority by the old deserted adjudication which was preserved. But this we unanimously repelled, in respect of the answer that he was infeft and in possession by Troup his vassal, who was infeft on a charter from him, and that the complainer or freeholders had no title to object to his adjudication. Objection second, That four Commissioners privately had no power to divide joint valuations, which by the acts of Convention 1667 and 1678, and act of Parliament 1690, and subsequent acts, could only be done by a general meeting of the Commissioners, either appointed by a preceding meeting, or called by their Convener. Answered, The division was fairly and equally made on a proof taken of the rent of both lands, and the justness of it would appear on comparing it with former valuations of both lands; and the acts did not require a general meeting to divide valuations that had formerly been made jointly. Replied, If four Commissioners had not power, the Court or the freeholders could not enquire into the equality or justice of it; and on the other hand, if the law had given them power, the freeholders could not have altered their act; and that by all the Cess acts the powers therein committed cannot be executed by any without a general meeting, except allenarly the question touching quartering, for which three is a quorum. The Court pretty unanimously sustained this objection, *remit. tantum* Dun.

No. 57. 1753, Jan. 31. March 2. SIR R. GORDON, &c. *against* FREEHOLDERS OF CAITHNESS.

THESE three gentlemen (Gordon, Scot, and Hay) purchased from Sir William Sinclair the superiority of certain lands in Caithness, that had been held by Sir William Dunbar of Hemprigs, of the Earl of Breadalbane, and thereafter by progress of Sir William Sinclair, (which Sir William Dunbar the vassal did not oppose.) They divided the superiority among them three, and got charters from the Crown each of certain parts of the lands, and applied to the Commissioners of Supply, and got the valuation of these several parcels divided, they having been formerly valued not only jointly together, but also

jointly with Sir William Dunbar's other estate held of the Crown; and by the division each of them had somewhat more than L.400 of valued rent. The teinds of these lands did belong to the Bishop, and were by him set to the Earl of Breadalbane for a very long endurance, almost equal to a perpetuity, and were by the Earl of Breadalbane subset to Sir William Dunbar of Hemprigs for the space, when he feued to him the lands, and for a tack-duty somewhat higher than he paid to the Crown. The last valuation of Caithness was in 1702 by authority of Parliament, when the Bishop's benefice was valued for the tack-duty payable to him, and the Cess whereof is paid by the Collector of the Bishop's rents. The Earl of Breadalbane was valued for the tack-duty payable to him by Hemprigs, but deducting the tack-duty due by him to the Bishop, and the Cess thereof paid by him and the purchasers from him and Sir William Dunbar. The vassals lands were valued (so far as appeared) in proportion to the real rent, without distinction of stock and teind, but after deducting the feu-duty payable by him to the Earl of Breadalbane. But these three gentlemen, by some means or other, got the teinds thrust into the charter from the Exchequer, though not contained in the procuratory of resignation by Breadalbane to Ulbster, nor in the assignation of it by Ulbster to Sir William Sinclair's father, or the translation by Sir William to them, Earl Breadalbane having only assigned to Ulbster the tack that he had from the Bishop of his teinds; but it was said that the lands were in some former charter of Breadalbane's. These three gentlemen claimed to be enrolled at last Michaelmas head court, but were refused by the freeholders, and thereupon severally entered complaints to us. The objection to their being enrolled was, that although it is true, as certified by the Commissioners of Supply, that the lands wherein they are infeft are valued each above L.400, yet that valuation was for both stock and teind, and they were not infefted in the teinds, but only in the stock, nor could not, because the Bishop, and now the Crown, was titular of the teinds, and their author, the Earl of Breadalbane, had himself no other right to the teinds but a tack, and thereupon subset them to his vassal Hemprigs, and did not so much as dispone the property of the teinds to their author, nor insert them in his procuratory of resignation; and though the teinds are foisted into the charters, yet that is by obreption, without any warrant; nor are they in possession of the teinds as titulars; for although a right of superiority gives a good right to vote, and the vassal's possession is the superior's possession, and therefore the complainer's title would be good if the stock were valued at L.400, because that they possess by their vassal Hemprigs; yet they have no possession of the teinds, neither as titulars in their own right, nor by their vassal Hemprigs, who is not their vassal in the teinds, and is not infeft in them. Answered, It does not appear that the teinds made any part of Sir William Dunbar's valuation; but that the L.3600, at which his whole estate was valued in 1702, was all for the stock. 2dly, That supposing the teinds valued, by the act 1681, and 16th Geo. II. they were entitled to vote, because their lands were valued at L.400. 3dly, That they had both a charter of stock and teind, and they were not obliged to produce to the Barons the procuratory of resignation, or warrant of that charter, because the Barons had no power to reduce or quarrel that charter, nor had this Court that power in judging of this complaint, in which we were only a Court of appeal, and therefore in this cause our jurisdiction could be no broader than that of the meeting appealed from. And that lastly, Breadalbane's charter did

contain the teinds. Replied, That from the acts 1643 and 1649, which first introduced the method of levying the public taxes by assessment, it is evident that the teinds, as well as stock, were made subject to Cess, and the form of doing it accurately preserved in the act 1649; and the act of Convention 1667, which was the first introduction of Cess after the Restoration, refers to the valuation 1660, which could be none other than what was during the Usurpation; that they produced authentic copies of sundry rentals in Caithness, from which the valuation of that county in 1702 was made exactly agreeable to that rule, whereby it appeared that rentals of the whole estate, that is, the whole rents payable for the lands stock and teinds were taken; that from that were deducted the burdens affecting it, viz. Ministers stipends, which are liable in no Cess, feu-duties, teind-duties, or teind tack-duties, and the remainder stock and teind was valued to the heritor at L.62 and a fraction for each L.100 of real rent; that the feu-duties were valued to the superior, and the teind-duties to the titular or tacksman, to whom they were payable, and they charged with the Cess corresponding to them; and produced also valuations of several other counties, all agreeable to that rule; and as the same rule behoved to be uniformly observed in the same county, Sir William Dunbar's valuation must have arisen not only from the stock, but from the teind;—and therefore answered to the 2d, That the complainers do not subsume in terms of the act 1681, or 16th Geo. II. that they are infeft in lands valued at L.400, for it is the stock and teind both that are valued at L.400, whereas they are infeft only in the stock. To the 3d, That it would be absurd to oblige freeholders to put a person on the roll because he had by obreption got a charter from the Exchequer of a subject that his author had not conveyed to him, and was not, in his property, and much more of a subject that his author neither had conveyed, nor could convey to him, nor had himself right to; that it is a general rule *concesso quovis jure omnia concedi videntur*, &c. and therefore as the Barons have the right of enrolling or refusing to enrol, they must have right to enquire into the validity and sufficiency of the claimants' titles, and if they had not, yet this Court have a power to try; for it is not, nor is it called, a Court of appeal; but that on complaint they are to judge of the party's right, whether it does or does not entitle him to be enrolled. And the freeholders denied that their teinds were in Breadalbane's charter, though that would not alter the case, since he has not resigned them. Duplied, the acts 1643 and 1649 were repealed; and there is no authentic evidence that the same rule was followed after the Restoration. The point chiefly argued on the Bench was, Whether there was sufficient evidence that the teinds were included in the valuation, and the effect thereof? for we generally thought that the complainers charter as to them was very unwarrantable, and gave no right. The Court was of different opinions. I thought it evident enough that the teinds were included in the valuation; and observed, that it appeared from our book of statutes, that ever since we paid taxes to the Crown, the teinds paid a part of them; that when they were levied by taxation the laity paid by their old extent, and the clergy paid the equal half of the tax for their lands and teinds, and had relief of a proportion from their vassals in their lands, and their tacksmen of the teinds; that this was thought an unequal way of levying the taxes, and therefore the method by way of assessment was introduced, and all real estates and rents, except annualrents of money, were assessed, and in particular the teinds;—that this was appointed not only by those acts 1643 and

1649, but also after the Restoration by the acts of Convention 1667 and 1678, and Commissioners appointed for valuing all these subjects, and particularly the teinds; but then the meaning was not that these Commissioners should make valuations of all the teinds in Scotland separate from the stock, as is done in the Commission of Teinds, but such a valuation that the teinds, as well as stock, should pay a part of the tax, and therefore where there were drawn teind, those indeed behoved to have a value put upon them separate from the stock; or where rental bolls, or a teind-duty, or a teind tack-duty was paid, those behoved to be valued apart, and the titular or tacksman to whom they were paid, charged with them, and after deducting those from the full rents of the lands, all the rest, which included all the rest of teinds, were valued jointly, and the proprietor of the lands charged with the valuation, and with the Cess in proportion to it; and this agrees exactly with all the valuations produced; and thereby all the teinds in Scotland (except Ministers stipends, that were exeemed from Cess) did effectually pay Cess; but then in the case of drawn teind, or teind-duties, or teind tack-duties, the heritor of the teinds was liable for that Cess, and the execution by poinding, and now also by quartering, was directed against him, and the possessors of the lands, and could not be against the teinds; that when these were first appointed, no more appears to have been in view but the equal levying the supply; but for the equity of it, it was soon made the rule in other cases; as early as 1663 it was made the rule for taxing parishes for maintenance of the poor; afterwards it was made the rule for repairing the highways,—for building and repairing Ministers manses,—for elections to Parliament,—for dividing of commonties,—for the expenses of prosecuting criminals, and even the valuations during the Usurpation continued after the Restoration, as appears by the act 1663, and this is the valuation referred in the act of Convention 1667, for there neither was, nor could be any other valuation in 1660; only every person aggrieved was allowed to complain, and the Commissioners empowered to rectify wrongs, and that rectification to have a retrospect;—that as to elections to Parliament, it was found that the old extent was a very imperfect and insufficient rule, especially after the kirk-lands came to laicks hands held of the Crown, and therefore in 1661 another qualification was added, viz. heritors, liferenters, and wadsetters held of the King, or who formerly held of prelates, and whose yearly rent amounted to 10 chalders of victual or L.1000 Scots, all feu-duties being deducted, whereby it is not very clear whether an infeftment was necessary, but it seems pretty plain that teinds were not deducted. This was a pretty uncertain and variable qualification depending on proofs to be taken, as changing as the yearly rent varied; but thus stood the law both with respect to valuations and elections in 1681, when the act that is now the rule was made; and there the rule is not lands valued at L.400 but lands liable in public burdens for his Majesty's supply in L.400 valued rent, so that the question is, Whether the complainers lands, wherein they are infeft, that is the stock, are liable in the public burdens, supposing that in making that valuation the whole rent, stock, and teind had been computed, and supposing they have no infeftment, or even no right to the teinds? and I thought they are liable, and that the execution for levying the Cess can go only against the possessor or heritor of those lands; and for that very reason, supposing that the whole of their teinds were allocated to the Minister, or should be next year, (which are liable for no Cess) that would make no alteration on the complainers,

or their vassals' valuation; or if the tacks were expired, and the Crown, or any other tacksman, oblige them to pay them their teinds, yet still the valuation of the lands would remain the same, and could not be altered without an act of Parliament for a new valuation, and it would be a strange paradox, that the diminishing an heritor's or freeholder's rent, would make his right to vote good, that was not so before; and yet I could not see any objection that could lie to their rates, if all their teinds were allocated to Ministers, unless that it be said, that one heritor actually infeft in both stock and teind, valued at L.400, and therefore having an unexceptionable vote, would lose it upon the least augmentation of the Minister's stipend; and therefore I thought their title good, supposing they had no right at all to the teinds; and I thought that this sense of the act was confirmed by the universal sense of the nation, which was stronger real evidence than perhaps can be in the case of any other statute. I doubt if there is now, or has been since 1681, any shire, at least very few, wherein there is not some one, or more freeholders, whose valuation is below L.500, and who are not infeft in their teinds, and yet by this objection, all such votes would be exceptionable; and there have been few counties where there have not in that time been sundry competing candidates, and therefore either the one side or the other ready to object to every freeholder that had not a good vote, yet this is the first time that I ever heard of this objection being made; so that we have the sense of all the freeholders in the nation, and amongst those all the lawyers of greatest note, and even most of the Judges of the Supreme Courts against it. Upon the question, we found the complaint well founded; *renit.* President, Dun, Murkle, Shewalton, Woodhall. *Pro* were, Milton, Minto, Strichen, Justice-Clerk, Kames, and I. Drummore did not vote. I also observed, that in the other cases where the valuation is made the rule, I never heard any question asked, Whether the heritors were infeft in, or had right to the teinds? not even in the division of commonties, where it might be of importance; and it would be strange if the Parliament changed the rule in elections established, by the act 1681, because of uncertainty, and that it required proofs of the rentals, and went to establish a permanent rule, that would appear to every body from the valuation-book, should yet with their eyes open, make a rule as uncertain, and, where the valuation was within L.500, depending upon a much more troublesome and tedious proof than the former. They all knew, that no teinds except drawn teinds or teind-duties had been valued separately for the stock, and therefore before such an heritor could vote, there behoved to be a separate valuation of teinds, and that not as they are at the time of the objection, but *retro* at the time of making the valuation; for the teinds do not at all times bear the same proportion to the stock, or to the whole rent, because of the usual deductions in valuing teinds of rents of subjects not teindable. 2d March 1753, Adhered, except as to a new fact, on which they ordered memorials.

No. 58. 1753, June 23, Aug. 3. INNES of Sandside *against* SUTHERLAND of Swinzie.

SUTHERLAND of Langwell estate in Caithness was at a re-valuation valued at L.800. He died in 1708, and left his lands of Langwell (or Borrisdale) to his daughter of a first marriage, and his lands of Reisgill to his daughter of the second marriage, and as the