1774. *January* 18. JAMES, EARL FIFE, and OTHERS *against* ALEXANDER, DUKE of GORDON and OTHERS.

MEMBER OF PARLIAMENT.

Found, in conformity with Ross *against* M'Kenzie, 10th March 1774. Found likewise that valuations, long acquiesced in and acted upon, ought not to be called in question.

[*Faculty Collection, VI.* 301; *Dictionary,* 8665.]

AUCHINLECK. I would repel the objection as to title. Every heritor has an interest, however remote, that the cess be rightly proportioned on every tenement. For example, a man has a stone quarry and a considerable estate: he procures the cess to be laid on his stone quarry, and he excepts his lands. The stone quarry is wrought out: the other heritors must pay *that* cess which ought to have been laid on his lands.

COALSTON. The interest arising to any freeholder, from there being few freeholders on the roll, cannot be estimated by pounds, shillings, and pence; yet it is an interest which every man must feel.

[It is the interest whether I and my son and one more shall elect a Member of Parliament, or whether I and my son, and a hundred more shall elect a Member of Parliament.]

KENNET. The objection, independent of the title, is not the same as that in the case of *Hog of Newliston.* There the division had never been approved of. The objection here is, that all parties having interest were not called, particularly Sir Robert Gordon, who had an unquestionable interest. No tract of time can ratify this omission.

HAILES. I think that there was an original error in the proceedings which has accompanied them from first to last. The defenders, sensible of this, have entrenched themselves in preliminary objections, which are strong as to Mr Arthur Duff, but insufficient as to Sir Robert Gordon.

On 18th January 1774, the Lords repelled the objections as to the title, and sustained the reasons of reduction.

Act. R. M'Queen, &c. *Alt.* H. Dundas, &c.

Reporter, Hailes.

1774. *June* 16. The following opinions were delivered:—

COALSTON. The division 1752 is essentially erroneous, for various reasons, and so we must have found had the challenge been recently made. Had the objection been only as to a point of form, the defence, that the challenge was not recently brought, would be good. That all parties having interest were not called, or that the division was made by a committee, are objections which taciturnity might remove. But the question is, Whether has any thing hap-

pened to exclude a challenge on iniquity? I think that there has not. Mills are a proper subject of valuation, and yet they were omitted. The question here is merely political, but the same thing might have occurred in the division of a common.

KAIMES. I do not like the complexion of this cause. After so long a silence, It may be presumed that there were good grounds for omitting the mills: they may not have existed at the time of the valuation. *Here* a party asks to have an additional burden imposed on him.

COALSTON. In one sense it is a *burden;* in other views, a high valuation is a *benefit.*

GARDENSTON. This is an odd sort of challenge. A man complains that he has not been high enough taxed. Of Lord Kaimes's opinion.

HAILES. At first sight this seems strange, but the bringing of the action shows that the party considered the *commodum* as greater than the *incommodum.* In some cases it certainly is. Suppose that, as matters stand at present, there were just three-fourths of the valued rent for disjoining the parish and making a new charge, and that Mr Duff was against this measure, by increasing his valuation he would disappoint the new erection, and might save more stipend than the difference of land-tax. It is said that the Sherriffmill may not have existed in Charles II's. days, and consequently was not valued. *This* is impossible; *Sherriffmill* is a corruption of *Shiremill,* or the mill of the division. This meaning of *Shire* was obsolete before the general valuation, and consequently could not have been applied to a mill which did not exist till after the general valuation.

JUSTICE-CLERK. I observe, with regret, the multiplicity of divisions. I see a plan laid for excluding a gentleman of great property from any vote at all. At this rate the right of voting will depend on the craft and subtlety of lawyers. *Here* there was a fair and candid valuation. I should have liked this cause better if Mr Duff had attempted a new division, and shown the iniquity of the present one. As to the valuation of mills, I admit that they *may* be valued, but it does not follow that they *always were.* We must suppose that the commissioners took them under consideration originally. The cess-books must be the rule, unless set aside, and consequently they entitle to a valuation *in possessorio.*

ALVA. We are not now judging what Mr Duff should do *hereafter:* he is doing all that he can *at present* by seeking to reduce the old valuation. Taciturnity has great weight, but that is in matters of form.

KENNET. The division 1752 was certainly irregular, yet divisions made in such a manner were frequent and without injustice, because in former times no man desired to be overrated. Still intrinsic errors in the valuation may be corrected. It is doubtful whether mills ought to be valued; but I think that of no moment here, because of the acquiescence. As to the excambion, a small excambion is of no consequence. The subject indeed of this excambion was considerable, but the parties themselves do not object.

AUCHINLECK. Mills are a subject of valuation, for they were extended in ancient times; but the difficulty arises from the long acquiescence *tempore pacis,* from which a better judgment of things can be formed than from any thing that passes *tempore belli.*

On 16th June 1774, " the Lords adhered as to title, but altered as to the merits, and repelled the reasons of reduction."

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

Diss. Alva, Coalston, Hailes.

1774. *August* 6. JEAN STEWART *against* SAMUEL M'KEAND.

PRESUMPTION.

Whether the oath of a person sued for the aliment of a bastard child, acknowledging that he had carnal knowledge of the mother, eleven calendar months preceding the day fixed on in the libel as the child's birth-day, but not posterior to that period, affords a proof of his being the father of that child.

[*Faculty Collection, VI.* 349 ; *Dictionary,* 11,664.]

HAILES. The character of this pursuer puts her out of the case determined in *Freisland* very favourably to the woman from an opinion of her character. She was *probatis moribus et pudicitia minime suspecta.* The pursuer's character is just the reverse. I do not know any well-vouched example of a woman going with child for eleven calendar months. It is said that there are many examples in Galloway; but all this is a delusion. Women suppose that they are not with child while the catamenia flow: they consider the contrary as a sign of conception, but these are popular errors. Besides, Judges must determine by general presumptions. The Court sometimes found that life was presumed for 100 years. This has been departed from in later practice. But suppose that such was still the course of decisions, Could it be pleaded that life is to be presumed for 152 years or 167 years, because Parr lived to be 152, Jenkins to be 167?

KENNET. The woman was sensible of the man's not having had carnal knowledge of her within the eleven months: she is therefore obliged to have recourse to an extraordinary hypothesis. In warm countries women are sooner ripe; but I never heard till now that in cold countries women went longer with child.

PITFOUR was for allowing some latitude to the fair sex.

PRESIDENT. There might be a difficulty if there were *justæ nuptiæ.* I never saw a case where a woman asserted that the child remained eleven months in her belly.

AUCHINLECK. I incline, in general, to bring in the man on such occasions, because dealers in that way are bad chronologers; but *here* the chronology is fixed, and the woman is of a loose character.

ELLIOCK. Are we to presume so extraordinary a thing as that a woman should go eleven calendar months?

ALVA. This is not a case in which we ought to quit *probabilities* for *possibilities.*

On 6th August 1774, " the Lords assoilyied."

Act. A. Crosbie. *Alt.* Ilay Campbell.

Reporter, Coalston.