Hence that evidence which is sufficient to establish the one, must be held as adequate to confer the other. Nor is the jurisdiction of the freeholders in this matter more limited than it appears in various analogous cases. Thus, when charter and sasine are produced to them, containing lands amounting to the legal qualification, they are bound to enroll; nor though, by another production made at the same time, the charter should be shewn to be collusive or surreptitious, could they enter on any investigation of its merits. In the same manner are their investigations precluded in the case of a freehold created on an entailed estate, and, in general, in all those instances where the restriction flows *a non domino*. With respect, likewise, to a retour produced to evidence the old extent prior to 1681, it may be observed, that no meeting of freeholders have yet thought themselves entitled to discuss the justice of the verdict, or to refuse to it the appellation of *probatio probata*. No 77.

Freeholders, therefore, being destitute of right to challenge such decrees of the Commissioners of Supply as are not intrinsically null, any diversity in the mode of proceeding, whether in that of complaint or of reduction at common law, can have no influence on their title; though, indeed, there is this difference in the matter, that the former is an action authorised by statute, whereas the latter is altogether unwarranted. For there is no such idea known in this country, as an action at common law for the trial of a freehold qualification.

The Lords "repelled the objections to the competency of the action of reduction, and also to the pursuers title to insist therein; and found the *ex facie* grounds of challenge competent to be tried in the complaint."

Act. *Ilay Campbell.* Alt. *Lord Advocate.* Clerk, *Tait.*

The decision in this cause, upon the preliminary point, regulated the determination of a similar question judged of by the Court, between Earl Fife and the Duke of Gordon, June 16. 1774, which follows.

Fol. Dic. v. 3. *p.* 412. *Fac. Col. No* 110. *p.* 294.

1774. *June* 16.

James Earl Fife, Mr Arthur Duff of Ortoun, Advocate, and Captain Duncan Urquhart of Burdsyards, *against* Alexander Duke of Gordon, Alexander Dunbar of Thunderton, and Others.

The lands, lordship, and barony of Duffus, stood in the original valuation roll of the county of Elgin in 1667, in the parish of Duffus, under the following article: No 78. Found in conformity with Ross against

Lord Duffus - - - - L. 2308 5 8

No 78.
Mackenzie, No 77. *supra*. Found likewise, that valuations long acquiesced in, and acted upon, ought not to be called in question.

The said lands and barony were afterwards purchased by Archibald Dunbar of Thunderton, to whom Sir Robert Gordon of Gordonston, in 1730, disponed the lands of Ashdale, and others, in excambion for certain parts of the barony of Duffus.

Prior to 1748, Archibald Dunbar, then of Thunderton, sold certain other parts of the barony of Duffus to the Duke of Gordon, but reserving to himself the multures of the said lands, with the mills of Sheriff mill, Unthank mill, and Outlet mill; and, in that year, he disponed to the late Earl Fife the said mills of Sheriff mill, Unthank, and Outlet, and astricted multures, &c. in consequence of a minute of sale entered into between them in 1740. These mills and multures were afterwards disponed by Lord Fife to his son Mr Archibald Duff, one of the present pursuers.

The Earl Fife, &c. in the characters of freeholders, land-owners, and Commissioners of Supply in the county of Elgin, and Mr Arthur Duff, as being, besides, patrimonially interested in the question, *qua* proprietor of the mills of Sheriff mill, Outlet, and Unthank, to which the barony of Duffus is astricted, brought an action for setting aside a decree of division of the *cumulo* valuation of the barony of Duffus, in 1752, proceeding upon a petition presented to the Commissioners of Supply, in the names of the late Duke of Gordon and the said Archibald Dunbar, and certain after divisions, made by the Commissioners in 1769, 1770, and 1772, of the shares of the original *cumulo* set off to the Duke of Gordon and Dunbar, as proprietors of parts of the said barony, among the several lands belonging to them.

The defenders did not dispute Mr Arthur Duff's title, as proprietor of the mills, to insist for a rectification of the division, so far as his patrimonial interest is concerned, unless it were found that, by his or his predecessor's conduct, he is barred from insisting on such a challenge. But to the title of the other pursuers, at large, to insist in this action, an objection was stated similar to that pleaded in the case from Inverness shire, No 77. *supra*, which the Court repelled in respect of the judgment there given.

Upon the merits it was *argued*; As to the division 1752, (upon the fate of which all the subsequent divisions depended) that it was liable to three insurmountable objections; *imo*, That it was not made or authorised by a meeting of Commissioners of Supply, but by a private meeting of two Commissioners only, and precisely in terms of the prayer of the petition presented for the Duke of Gordon and Thunderton; whereas it is a clear point, fixed by sundry decisions of the Court, that all divisions of valued rent can only be made by a general meeting of Commissioners of Supply. *2do*, That all parties having interest were not called; for both Lord Fife and Sir Robert Gordon were interested in the *cumulo* of L. 2308 : 5 : 8, which was the subject of the division 1752. *3tio*, That the division itself is materially and substantially erroneous and unjust, as being made, in mere compliance with the petition, without any evidence of the real rents of the lands included under the *cumulo*; and the whole

cumulo is divided between the Duke of Gordon and Thunderton, without giving any part thereof either to the lands which Sir Robert Gordon had received in excambion, which were clearly comprehended under that *cumulo*, or to the mills of Outlet, Unthank, and Sheriff mill, then belonging to Lord Fife, as purchased by him from Thunderton, though these were also clearly a part of the original *cumulo*, and yielded no less than 1000 merks of yearly rent, which was about a tenth of the value of the whole lands comprehended under the *cumulo*. No 78.

Answered to the *first* objection; The Commissioners of Supply approved of the division in 1752, in the strongest manner possible; for, in the divisions 1769, 1771, and 1772, they proceeded upon the footing, that the valuations belonging to the Duke and Mr Dunbar were properly and legally established by the division 1752.

To the *second* and *third*; The allegation of the division being without evidence, is altogether a misrepresentation; for the Commissioners proceeded upon the *data* of a judicial rental of both estates, and a calculation made by an eminent accomptant, to which no objection is or can be made. There is not so much as an allegation of any injustice or partiality intended, but a division gone about for the legal and and necessary purpose of ascertaining the cess really payable by the respective lands, both of the parties willing to take upon them the burden of the cess to which they were really liable, but neither of them willing or intending to take more upon them than in justice they were liable to. And further, this division was finally completed more than twenty years ago; cess has been regularly paid, agreeable to it; various committees of Parliament have been since nominated for levying the cess, and those very pursuers among the number of those Parliamentary Commissioners or Trustees; and yet, during all that period, neither they in a public capacity, nor any person in a private capacity, have made any exception to those divisions.

2dly, Sir Robert Gordon makes no complaint. The excambion with him took place as far back as 1730. The excambed lands were then precisely of an equal rent; and, when that is the case, it never enters into the minds of the parties to make any variation in the payment of cess, or in the cess-books. Each of the parties continued, ever since that time, to pay cess conform to their former valuation; and Sir Robert Gordon, many years ago, divided his *cumulo*, without giving any share to the lands which he had given off to Mr Dunbar.

Lastly, Although it seems perfectly clear, that mills, where there is no thirlage, ought in no case to receive a share of a valuation, it is by no means a clear point, that mills ought to receive a share of the valuation, even where there is a thirlage; for, as the existence of a mill is altogether precarious, it seems to be an improper subject upon which to depend for payment of public burdens, which is the great object of valuation.

The defenders do not deny, that, in many valuation-books, mills are made mention of. But it is very inconclusive from thence to argue, that this was a

No 78. rule which all Commissioners either did follow, or were bound to follow; and, therefore, the defenders can by no means admit, that a division of valuation is to be held as a bad division, because a mill did not receive a share of the *cumulo*; it being, at least, a doubtful point, how far the mill was originally included in the valuation. And this general observation seems to apply with irresistible force in the present case, when it appears, that, although the mills in question were given off to another proprietor, as far back as 1740, so much was it the understanding of the country, and of all parties, at the time, that those mills ought not to receive any share of the valuation, that the proprietor's lands continued to pay the whole of the cess, and the proprietor of the mill has never paid any share of it; a circumstance which could scarcely have occurred, if the parties had understood their rights to stand as now contended for by the pursuers. At that time there were no politics subsisting, to suggest the idea of imaginary rights; and, therefore, the Court will pay much more regard to any idea which then prevailed, than to the conceptions which other views may have newly suggested.

Indeed, although no other defence occurred against the present action, the pursuers would be barred, by the circumstance last mentioned, from insisting in their present plea. Mr Duff, or his author, ought, *de recenti*, to have set up this claim, and cannot now be permitted to insist upon it, after having acquiesced for such a course of years, without making any murmur or complaint respecting what had been done. Justice, therefore, requires it to be presumed, that every thing was so settled originally, in virtue of the agreement of parties.

But, further, there is not only acquiescence, but *res non sunt integræ* to the other party. The Duke of Gordon and Mr Dunbar have not only paid the whole cess since that time, but have divided this whole *cumulo* among their respective lands; and even those divisions have again undergone sub-divisions, for lawful and beneficial purposes; and, therefore, no justice will permit those whole transactions to be pulled up by the root, at the instance of Mr Arthur Duff, whose claim was equally well founded in the 1740 as it can be now at the distance of 33 years.

THE COURT, moved by the long taciturnity and acquiescence of all parties, the division having stood so long in the cess-books, and payment of cess made conformable thereto, were of opinion, that Mr Duff's challenge came now too late; and, therefore, "repelled the reasons of reduction of the division 1752."

Act. *L. Advocate.* Alt. *Macqueen.* Clerk, *Tait.*

Fol. Dic. v. 3. *p.* 412. *Fac. Col. No* 113. *p.* 301.