For Helen Blackwell, A. Wight. A. Lockhart.
For Robert Blackwell, T. Montgomery. R. M'Queen.

OPINIONS.

The Court gave its opinion at great length when the cause was first advised, so that the opinions which I had occasion to note were few and short.

COALSTON. This provision of 6000 merks was once a burden upon the heir, by the disposition 1747. I think that the special burden 1747 is not derogated from by the general clause 1757,—but I think that the burden of the annualrent provided to Helen Blackwell must lie upon her.

PITFOUR. An alteration by the deed 1757: the lands were burdened with the 6000 merks—but if any burden imposed, it was taken off by the deed 1757.

KENNET. This case is different from any mentioned in the papers. The burdening clause, by the deed 1757, is sufficiently extensive.

Diss. Auchinleck, Coalston, Stonefield, Hailes. *Non liquet*, Strichen.

1766. *July* 24. RODERICK MACLEOD of Cadboll, HUGH ROSE, Younger of Aitroch, WILLIAM FRASER of Ardochy, and JAMES CRAWFURD, Writer in Edinburgh, all standing upon the roll of Freeholders for the County of Cromarty, *against* LEONARD URQUHART, Writer to the Signet.

MEMBER OF PARLIAMENT.

A Complaint under the 16th of Geo. II. for striking a freeholder off the roll cannot, after the death of the original complainer, be wakened and insisted in by other freeholders, whose names did not appear at the original complaint.

THE question between the parties above mentioned, resolved into this, "Whether a complaint, brought in virtue of the statute, 16th George II. for striking off the roll of freeholders a person wrongfully enrolled, can, after the death of the original complainer, be awakened and insisted in by other freeholders, whose names did not appear at the original complaint."

By an Act 16th George II., entitled "an Act to explain and amend the Laws touching Elections," it was provided, "that it shall be lawful for any freeholder, standing upon the roll, to object to the title of any person who stands at present upon the roll last made up; and, for that purpose, at any time before the first day of December, which shall be in the year 1743, by summary complaint to the Court of Session, who shall grant a warrant for summoning such persons, upon thirty days' notice, to answer, and shall proceed in a summary way to hear and determine upon such complaint; and, if no such complaint shall be exhibited within the time aforesaid, then and in that case no

freeholder, who at present stands on the rolls last made up, shall be struck off, or left out of the roll, except upon sufficient objections arising from the alteration of that right or title in respect of which he was enrolled, sustained by the other freeholders standing upon said roll."

Upon the authority of this clause, Sir James Mackenzie of Roystoun, upon the 28th June 1743, offered a petition and complaint objecting to the titles of all the freeholders on the roll, excepting himself and Roderick M'Leod of Cadboll. Leonard Urquhart was one of the persons against whose titles this objection was offered. Some proceedings upon this complaint were had in the Winter Session 1743 and Summer Session 1744, but they related principally to preliminaries; so that, during the period aforesaid, no judgment upon the merits of the question either was or could be pronounced during the vacation which ensued after the Summer Session 1744. Sir James Mackenzie died; and the cause lay over. In 1753 a further objection against such of the original respondents as still remained upon the roll, was moved by Cadboll, a freeholder on the roll, and by Thomas Mackenzie of Highfield, then a claimant to be admitted on the roll. But the freeholders did not meet at the Michaelmas Head-court; and the Lords of Session, when applied to for redress, found that they had no power to interpose, and therefore, on the 20th December 1753, "dismissed the complaint as incompetent." From that time until 1765 no Michaelmas head-court was held in the county of Cromarty; but, when that Court was held at Michaelmas 1765, a procurator for Cadboll gave in a written objection against Leonard Urquhart, founded on the reasons formerly alleged. To this it was ANSWERED,—"that the objection could not be received, as it had not been lodged two calendar months previous to the meeting." Leonard Urquhart was continued upon the roll. Cadboll insisted in a wakening of his original complaint: the other pursuers, now put upon the roll by authority of the Court, joined with him in a petition and complaint, praying that the Court would resume the complaint 1743 against Leonard Urquhart, find that he had no right to stand on the roll, and grant warrant for his being expunged. The question was, how Cadboll, who was a freeholder in 1743, but did not make the complaint, and how the others, who were not freeholders then, but are now, can be received to awaken the old complaint? They endeavoured to obviate this by pleading in manner following:—

ARGUMENT FOR THE PURSUER:—

"In 1743 Cadboll was a freeholder on the roll, and, although the complaint was not brought in his name, yet he was interested in its issue: being still on the roll, he has an interest to revive and carry it on. Sir James Mackenzie, the original complainer, is dead: The complaint cannot be revived by his heirs. Unless, then, it be competent to be revived by Cadboll, or some other of the freeholders, Leonard Urquhart, not qualified, and objected to, will remain on the roll. By the Act 16th Geo. II. "any freeholder standing upon the roll" may object. The right of objecting then is given to freeholders *qua* such: a complaint brought by one is to be understood as brought in name of himself and brethren: to bring separate complaints at the instance of each freeholder, who apprehends that the majority has done wrong, would be useless. The freeholders, who see a complaint made, desist from entering separate complaints; and therefore it would be contrary to their intentions were the death of the particular complainer to terminate the complaint. If the com-

plainer should die, it is apprehended that his heir, being a freeholder, might insist in the complaint: he cannot insist as heir: therefore he must insist as freeholder, and that is the title of the pursuers. Were this not to be held as a sufficient title, it would be in the power of any freeholder to bring a collusive complaint and not insist in it, or suffer the person complained upon to protract the determination of the cause by any objections however frivolous: for if the complaint, being once brought in his name, becomes his own cause, he may manage it as he pleases. A case similar to the present one, as to the right of complaining, was determined by the Court in 1765: *Colonel Sinclair and Sutherland of Sibberscross* claimed to be enrolled among the freeholders of Sutherland at Michaelmas 1758. Colonel Mackay of Bighouse objected, and the objection was sustained. Colonel Sinclair and Sibberscross complained: the complaint was served against Bighouse only, who made the objection: the case went on till May 1759: no final judgment was pronounced: neither party insisted for a judgment. At length the complainer, in December 1764, petitioned to have the cause determined: the counsel for Bighouse withdrew his objection, and consented to the complainers being enrolled. The Court, however, thought that the objection could not be passed from without an express authority from the freeholders; and, therefore, on the 17th January 1765, they directed the Sheriff of Sutherland to call a meeting of the freeholders, and to lay the petition, &c. before them, and allowed any party concerned, who shall think fit, to give in answers to the petition. The Sheriff reported that the freeholders, so called, "did unanimously declare it as their opinion and resolution, that the enrolment should not be opposed." In consequence, the Court appointed Colonel Sinclair and Sibberscross to be enrolled. It would seem that the judgment of the Court applies to the present case. The complainers are parties concerned, for Cadboll has been all along upon the roll, and the others now are; and they may take up the complaint in the same manner as any freeholder in Sutherland might have taken up the objection to Colonel Sinclair and Sibberscross, and the defence of that meeting which refused to enrol them. There is no objection to the competency, from the lapse of time since 1743, for all actions, once raised, in whatever form, must subsist for 40 years, unless a shorter prescription has been expressly introduced. The Act 16th Geo. II. introduces no such prescription; the action therefore subsists.

ARGUMENT FOR THE DEFENDER:—

No action can be carried on unless by him who raised it, or his representative: it matters not whether this action be advised in its course or summarily: whatever name it bears, it is still an action. The complainer, Sir James Mackenzie, is dead—it is confessed that his heir cannot insist; the action therefore falls. Had the legislature meant to allow summary complaints to subsist for 40 years, at the instance of every freeholder, as well as of the original complainer, it would have so provided. The case of the freeholders of Sutherland is not in point. Colonel Sinclair and Sibberscross were refused by a vote of the Michaelmas meeting: this therefore was the act and deed of the whole freeholders: the objection being moved by Colonel Mackay, the complaint was, in terms of law, directed against him; but all the freeholders had a title to support the objection, their own deed. But here no person complained but Sir James Mackenzie: The others must be supposed to have acquiesced in the judg-

ment of the freeholders;—but further, this complaint comes too late. It is true that the Act, 16th George II., has introduced no particular period at which a complaint, once moved, and not insisted in, must be held as prescribed. But it will be observed that, since the original complaint, more than twenty years have elapsed: during all that time the complaint has been abandoned, and the defender has stood upon the roll, voted at elections without challenge, and enjoyed every privilege belonging to a freeholder. Such a dereliction on the one hand, and such a possession on the other, must imply an acquiescence on the part of all the freeholders. Many complaints were brought immediately after the Act 16th George II. Many of them remain undecided: there are no fewer than twenty such in one office out of the three belonging to the Court of Session, and yet this is the single complaint which has been sought to be revived. This of itself shows the sense of the nation, as to the incompetency of reviving such complaints after a taciturnity of more than twenty years.

On the 24th July, 1766, the Lords "found the complaint not competent."

Act. J. Campbell. *Alt.* R. Blair. A. Lockhart.

OPINIONS.

AUCHINLECK. A summary complaint is not to be awakened after a silence of twenty years: besides, it is not competent for one freeholder to take up another's complaint. In the case of Bighouse the Court allowed every freeholder to defend the judgment which the meeting of freeholders had given.

KAIMES. *Summarily* means *quoad* the Court; a neglect in insisting will not imply negative prescription. I do not think that one freeholder, by complaining, will prevent another from taking it up. It is still competent to Cadboll to object. There was a complaint. Here is a *casus incogitatus* by the death of the complainer.

AUCHINLECK. Suppose one man only should be displeased, and complain, and afterwards should drop the complaint, and that upon a political change, one of the freeholders who enrolled, should seek to take up the complaint; would he be permitted?

PITFOUR. In 1753 a new complaint was exhibited against Leonard Urquhart: this implies that the original complaint had been departed from.

KENNET. There has been a long delay, but the complaint still competent.

ALEMORE. We must adhere to the statute. Formerly the whole freeholders, dissatisfied, might have complained: Now—one allowed to complain. If the freeholders trusted to the life of one man by suffering his single complaint to be lodged in Court, and the man dies, there is no remedy.

COALSTON. Before the statute 16th Geo. II., an action was competent to all the freeholders; since, an action competent at the instance of one, but still for the behoof of the whole. It is not in the power of any freeholder to depart from his complaint. I believe that complaints have been taken up after the death of the complainer. Taciturnity is nothing.

PRESIDENT. Any one may object: it is the fault of the freeholders if they do not join in the complaint. I doubt whether complaints have been reassumed after the death of the complainer. Many elections have intervened since Urquhart was put upon the roll: This objection ought to have been renewed at those elections.

Diss. Kaimes, Kennet, Stonefield. *Non liquet*, Coalston.

1766. *July* 25. JANET GIBB, Spouse of Andrew Glass, Merchant in St Andrew's, *against* ALEXANDER LIVINGSTONE, Merchant in Rotterdam.

BANKRUPT.

1. In a reduction of a bond upon the first branch of the Act 1621, competent to redargue by parole evidence the narrative of the bond, bearing to be for borrowed money. 2. Adjudgers from a conjunct and confident person are liable to a challenge on the Act 1621.

[*Faculty Collection, IV.* 78; *Dictionary*, 909.]

LAURENCE GIBB was proprietor of a tenement of houses in St Andrew's: he was bred a merchant, and kept a public-house in St Andrew's. Some time before 1747, he was appointed tide-surveyor at Dundee, which office yielded about L.30 sterling, besides perquisites. He had many children, particularly one married to Andrew Williamson, merchant in St Andrew's, and Janet, the pursuer, married to Andrew Glass. On the 23d November 1747, Laurence Gibb granted an heritable bond for L.50 sterling to Andrew Williamson, his son-in-law, upon the foresaid tenement. It bears this clause: "I, &c., grant and confess me, at the term of Whitsunday last past, notwithstanding the date hereof, to have borrowed and received," &c. The bond is made to bear interest from Whitsunday 1747. On the 3d February 1748, Andrew Williamson was infeft on this bond; his infeftment was immediately registered. In 1749, Williamson became debtor to Livingstone the defender, in certain considerable sums. On the 26th November 1755, after Williamson's death, Livingstone, having constituted his debts against Williamson's representatives, obtained an adjudication of his heritable subjects, and particularly of the heritable bond. On the 24th October 1756, this adjudication was completed by a charge against the superior. Livingstone, upon this, insisted in a ranking of Williamson's creditors, and sale of his subjects, comprehending the heritable bond for L.50 sterling. In 1748, Janet Gibb, as pretending to be creditor to her father Laurence in a legacy of 1000 merks, said to have been intromitted with by him, obtained decreet against him before the Commissary of St Andrew's. Upon this title, in 1748, she adjudged the tenement belonging to her father; so that her adjudication was posterior to Williamson's infeftment, dated 3d February 1748. Under this title, in 1760, she interrupted the proceedings in the ranking of Williamson's creditors, by a reduction of the heritable bond and infeftment, principally