No 2.

THE LORDS found, That the proprietor ought to have a fourth part of the muir allocate to him, *tanquam præcipuum*, as the value of his property; and that the remainder ought to be divided proportionally, conform to the act of Parliament 1695, among the neighbouring heritors who have possessed the same as commonty; allowing the proprietor likewise a share in that division effeiring to his lands, whereof the tenants had promiscuous possession with the heritors of the dominant tenements.

Act. *H. Dalrymple, sen.* Alt. *Ja. Graham, sen.* Clerk, *Mackenzie.*

Fol. Dic. v. 3. *p.* 137. *Edgar, p.* 16.

*** Lord Kames reports the same case:

HOG of Harcarse having a servitude of feal and divot, and common pasturage in the muir of Fogo, belonging in property to the Earl of Home, insisted in a division upon the act 1695; which the LORDS sustained, though he had only a a servitude, and not a joint property. And it being *pleaded* for the proprietor, That in the division he ought to have a *præcipuum*, in competition with the other parties, whose rights were only servitudes of *common pasturage, feal and divot, &c.* which servitudes, though possibly entitling them to as great a quantity of of each kind, as the property gives to the proprietor, the property does yet carry a right to all mines, minerals, &c. within the surface, which those having only servitudes, have no pretence to;

'THE LORDS found, the proprietor ought to have a fourth part of the muir allocate to him, *tanquam præcipuum*, as the value of his property, and that the remainder ought to be divided proportionally, conform to the act of Parliament 1695, amongst the neighbouring heritors, who have possessed the same as commonty; allowing the proprietor likewise a share in that division, effeiring to his lands, whereof the tenants have had promiscuous possession with the heritors of the dominant tenements.' *See* TITLE TO PURSUE.

Fol. Dic. v. 1. *p.* 155. *Rem. Dec. v.* 1. *No* 42. *p.* 83.

1724. *November* 27.

RATTRAY of Rannagulian, *against* GRAHAM of Balgowan and RAMSAY of Tulliemurdoch.

No 3.
A person infeft upon a charter, granting him *totas et integras terras de Rannagulian cum partibus, pendiculis et pertinentiis quibuscunque*

RANNAGULIAN being infeft upon a charter granting him, 'Totas et integras 'terras de Rannagulian cum partibus, pendiculis lie sheilings, gleanings, et aliis 'suis pertinentiis quibuscunque usitat. et consuet. jacen. in foresta et baronia de 'Alyth, et Vicecomitatu de Perth, ac totas et integras terras de Corb et Drum-'turn, cum molendino, *&c.* domibus, *&c.* lie grasings, sheilings, et aliis suis 'partibus, pendiculis et pertinentiis quibuscunque, usitat. et consuet. jacen. 'itidem in dict. baronia et foresta de Alyth, et Vicecomitatu prædict.' raised a

No 3.
usitat. et consuet. jacen. in foresta et baronia de Alyth, was found entitled to pursue a division of the forest, on the act 1695.

process of division of the forest of Alyth, upon the 38th act of Parliament *anno* 1695, concerning the dividing of commonties, against Balgowan, who was his superior in the said lands, and had a joint property with him in the forest, and against Ramsay of Tulliemurdoch, as being likewise joint proprietor.

When the process was called, Tulliemurdoch joined with the pursuer in his action of division; but, for Balgowan it was *contended*, 1*mo*, That commonties belonging to the King were expressly excepted from the act 1695, and that the forest of Alyth was, as all other forests, *inter regalia majora*, belonging in property to the Crown; that a grant of such forest to a *Subject* imported no right of property in the soil, but only a constitution of that *Subject* to be heritable keeper of the forest, as appeared from Lord Stair's Institutions, lib. 2. tit. 3. § 67. 2*do*, The right of gleaning, grasing and shieling, contained in the pursuer's charter, gave no general or universal right over the whole forest, but related only to the lands of Rannagulian, Corb, and Drumturn, mentioned in the charter, which were indeed antiently parts of the forest of Alyth, but were distinct and separate from the other parts of it belonging to the defender, and were mentioned to be in the forest, not so as to constitute any right over the whole, but *designative*, as is common in all charters, which generally mention, by way of description, the name of the shire, of the parish, and often of the regality or barony, whereof the lands granted are a part, which never was interpreted to give any right over the shire, parish, &c. beyond the bounds of the lands granted, and expressly named; all which seemed plain from the difference between the words in the above charter and those by which a right of servitude of pasture, &c. over a forest, muir or commonty, are ordinarily constituted, which are *cum communi pastura infra bondas* of the forest, muir or commonty. 3*tio*, If the pursuer claimed his servitude of gleaning, grasing and shieling, on the general words of parts and pertinents, according to use and wont, or *solitis et consuetis*, then he must first prove the custom of gleaning, &c. in the forest beyond the bounds of the lands named in the charter, before his title to pursue a division can be sustained, as was found in the case of the Feuars of Dunse against Hogg of Harcarse :* And the defender insisted, that the pursuer was never in possession of any servitude of pasturage or gleaning, &c. in the forest of Alyth, beyond the bounds of the particular lands named in his charter.

It was *answered* for the pursuer to the first defence, 1*mo*, That the denomination of *forest* did by no means necessarily imply that the forest was a King's forest, or *inter regalia*, as was plain from many authorities, particularly *Skeen, de verborum significatione, voce* FOREST; as also from the 17th and 21st chapters of the Forest Laws, collected by the same author, the first of which begins, *Si quis venatur infra forestam Regis sine licentia*, &c. and goes on to speak of the King's forests: The other begins, *Si quis commiserit delictum in foresta alicujus baronis infeofati per Regem cum libera foresta*, and treats throughout of forests belonging to subjects; and likewise it appeared from many acts of Parliament, that *forest* was a denomination common to such possessions of *Subjects*, as well as of the Crown, particularly act 10th James V. by which every

* *See* TITLE TO PURSUE.

man worth L. 100 Scots per annum is appointed to plant wood and forest. Act 130th Ja. VI. 1592. concerning his Majesty's parks and forests, does not use the word *forest* in general, but *King's forest*, and the like in the act 210th James VI. anno 1594, which makes use of the words *His Highness's forests*, importing that there were forests belonging to *Subjects* as well as to his Highness. And as to the particular forest in question, the words of the charter granted by the Crown, show it to be none of his Majesty's forests, viz. 'Totas et integras terras et baroniam de Alyth, &c. cum illa parte forestæ de 'Alyth, &c. jacen. infra dictam baroniam de Alyth et Vicecomitatum nos-'trum de Perth;' from which it seemed evident, that if Alyth had been one of his Majesty's forests, it would have been called *foresta nostra de Alyth*, as well as the *Comitatus* is called *noster*. As to the citation from Stair, it was *answered*, That it related only to the case of a charter granted of a barony within which a King's forest lay, and determines that the property of the forest will not be conveyed under the general name of *Baronia*, but only the right of keeper of the forest. 2*do*, Admitting that in *re antiqua* it were doubtful whether this had been a King's forest or not, the presumption should run against its being one; *first*, for the same reasons that are used by my Lord Stair against presuming *in dubio* that a *Fortalice* belongs to the King, lib. 2. tit. 3. § 65. and 66.; 2*dly*, For the reasons, mentioned by the same author, in § 67. *eod.*; upon which the Lords of Session reported to the Exchequer their opinion against granting of rights of forestry to subjects, viz. the great inconveniency of them to the neighbourhood; and 3*dly*, the act founded on by the pursuer affords an argument against presuming *in dubio* that forests belong to the Crown, because thereby it becomes impossible to divide or improve them, according to the intention of that act. No 3.

It was *answered* to the second defence, 1*mo*, That the words in the pursuer's charter, as to sheiling and gleaning in the forest, were direct and plain, and not taxed with the addition of the words *usitat. et consuet.* so as to subject him to a proof of possession in order to establish his right; for these additional words respected only the *aliis pertinentiis quibuscunque*, so that the defender might as well require a proof from the pursuer of his possession of his lands of Rannagulian, in order to establish his right to them, as of his gleaning and sheiling; not that the pursuer declined entering into a proof of his possession of these, but he contended, that his infeftment was sufficient to entitle him to pursue for a division; 2*do*, The form and words of the defender's charter explained the meaning and import of the pursuer's right, and showed that the one as well as the other carried a right in the whole forest; for they likewise circumscribe and limit the defender's right to particular lands in the forest and their pertinents, but do not give a general right to the whole. The words are, 'Et similiter de 'lie forestis de Alyth, cum annexis, connexis et pertinent. eorund. jacen. infra 'dict. Vicecomitatum nostrum de Perth, comprehenden. terras aliaque infra 'script. viz. Terras de Watershall et Craighead ad dict. Dominum Jacobum 'Ramsay in proprietate pertinen. cum terris de Rannagulian, Corb et Drum-

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'turn, una cum terris de West Forest et King's Seat, de quibus terris annuat. 'solubilis est dict. Domino Jacobo summa triginta librarum monetæ Scotiæ 'feude-firmæ divoriæ;' which sufficiently evidence that the defender's right extends only to the property of the particular lands of Watershall and Craighead, and in superiority to the pursuer's lands, &c. and shows the difference between the effect of words giving right to sheilings and gleanings *jacen. in foresta*, and those which describe lands to be part of a particular shire or parish; and likewise make it plain, that *infra bondas* of a muir, forest or commonty, are not the only words by which a right of pasturage, or gleaning and shieling can be granted in a muir, &c. but that an infeftment of pasturage or sheiling in the muir, is the same with pasturage, &c. *infra bondas* of the muir.

To the third defence it was *answered*, That the pursuer did not decline proving the extent of his possession of gleanings, &c. in order to fix the quantity of the forest to be allotted to him, but insisted that he was sufficiently founded in his infeftment for sustaining his title to pursue a division, and for obtaining an act for proving the extent of his interest.

THE LORDS found, That the pursuer Rannagulian was infeft in the sheilings and gleanings within the forestry, and was entitled to pursue the division.

Act. *Jo. Fleming* & *Jo. Ogilvie*. Alt. *Jo. Graham*, sen. Clerk, *Gibson*.
Fol. Dic. v. 3. *p.* 137. *Edgar*, *p.* 120.

1738. *November* 17.

ALEXANDER TENNANT of Handaxwood *against* MURRAY of Meadowhead, &c.

No 4.

A number of heritors, joint proprietors of a commonty, having agreed among themselves that it should remain common, each holding a certain number of soums; it was, notwithstanding, found that it might be divided; and the number of soums, not the valuation, was made the rule of division.

IN the year 1663, several heritors having right to a commonty, entered into a contract, whereby they divided part thereof; but, as to the remainder, it was stipulated the same should remain common amongst all the parties, and that ilk one of them should hold their proportional number and quantity of soums thereupon, as set forth in the agreement. Alexander Tennant, one of the heritors, brought a process on the act 1695, against the others, for dividing the part that remained common.

The defence offered was, That the muir could not be divided on the above statute, seeing, by the foresaid contract, the same was already done by the then heritors of the circumjacent lands; so that any new division upon that law would be to recede from that agreement, whereby a right, with consent of all parties concerned, was acquired to each, and could not be taken from them.

Answered for the pursuer; The only design of the contract was to hinder the commonty from being overstocked, and so rendered useless; and therefore it could be no bar to a division on the act, especially as there are no words in it which show the same was intended to stand as a perpetual rule amongst the parties. Besides, nothing was thereby settled but a souming and rouming, which