

payment was in like manner applied to this arrear 1739, and so forward till this year 1742,—when the Commissioners of Supply of this year, who were all different from the Commissioners 1739 except one or two, directed quartering upon Southdun the Collector of 1739 for this arrear, though Southdun had truly paid up the whole sums by him collected; and having applied to the Commissioners of the year 1739, and got an order discharging quartering, which the party would not obey,—on these grounds he presented a bill of suspension; and in particular that these Commissioners were not Commissioners of the year 1739, and therefore on account of the prohibition in the Cess-acts, that we should not stop the levying the Cess imposed by the Commissioners therein named, Kilkerran Ordinary refused the bill,—and on a reclaiming bill without answers we adhered. I own I was diffculted, but what determined the Court was, that this quartering was ordered as for the Cess 1742, and whether justly or unjustly we could not stop them.—22d December Adhered and refused a bill without answers.—*Vide* the bill.

No. 4. 1744, Feb. 17. TOWN of KIRKWALL *against* INHABITANTS of STROMNESS.

WE found that the Town of Kirkwall could not tax the inhabitants of Stromness lying at 12 miles distance, and outwith their jurisdiction, for any part of the Cess of the Town, not even those who were Burgesses of the Town but did not trade in it. *Vide* 6th Junc.

The principal cause being determined against the Town of Kirkwall 17th February last, Balmerino found the Town liable in the expenses of extracting the decret, which we this day altered, and found no expenses due because of the Town's immemorial possession. And Arniston observed, that had he been here he would have differed from the interlocutor *in causa* on the supposition of immemorial possession, because of the terms of the articles of Union concerning the Cess.

No. 5. 1751, Feb. 12. GORDON *against* GORDON.

See Note of No. 53. *voce* MEMBER OF PARLIAMENT.

No. 6. 1753, Aug. 3. SUTHERLAND of Swinzie *against* SUTHERLAND.

See Note of No. 58. *voce* MEMBER OF PARLIAMENT.

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COMMONTY.

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No. 1. 1738, Nov. 17, 24. TENNANT *against* MURRAY.

ARNISTON doubted whether any process of divison was competent after the contract 1663; 2dly, He thought if such process were competent, that the division behoved to be according to the rule in the statute 1695, and not the interests settled by the interlocutor. But the Lords by a great majority were of a different opinion in both points, and refused

the bill without answers; and adhered to the Ordinary's interlocutor; and 24th November adhered, and refused a reclaiming bill without answers.

No. 2. 1739, Feb. 1. EARL of WIGTON and CARNWATH *against* FEUARS.

A Baron feuing certain parts of his Barony with parts and pertinents, by virtue whereof the feuars possessed pasturage feal and divot in the common of the Barony upwards of 40 years, and the Baron himself had no other sort of possession of the common, nor was it capable of any other. The question was, Whether the feuars' right to the common was a common property or only a servitude? It carried—property, and it was observed, that had the question occurred next year after the feus, it must have been a common property or nothing, because there could be no servitude while the Baron remained proprietor of the land, and the 40 years possession was only considered evidence at and before the feu; and therefore refused a reclaiming bill for the Baron without answers, except as to one vassal Nisbet, whose feu contained only privilege of pasturage.

No. 3. 1739, Nov. 6, 7. SIR DAVID DALRYMPLE *against* HAY.

THE Lords altered the last interlocutor in January 1716, and found that the rule of division must not be the value of the whole Barony or whole Town of Whittinghame, but only of the lands of Lugreat part of that Barony, in the same way as was decided, Earl of Wigton and Mr Lockhart, about the common of Biggar, which decision Arniston said was the reason of his opinion now, otherwise he thought in all cases where a commonty is to be divided betwixt a Barony and other lands, the whole Barony ought to be valued.

No. 4. 1740, Feb. 1. SIR ROBERT STEWART *against* HIS VASSALS.

IN this important question, Whether a process of division lies on the act 1695, even at the proprietor's instance, of a commonty where the property is in one, and only servitudes of common pasturage in his vassals, but such as to exhaust the whole use of the superficies? the Lords found that such process does not lie, six to five besides the President, who was on the side of the majority.—*Renit.* Justice-Clerk, Drummore, Kilkerran, Monzie, *et me.* 1st February 1740 The Lords adhered, seven and the President to six, Haining and Leven absent.

No. 5. 1740, Feb. 2. DUKE of DOUGLAS, &c. *against* BAILLIE.

IN a division of a common which had been immemorially possessed by certain definite proportions of horse, nolt, and sheep, in 1719 the parties or their tenants observing that the grounds were overstocked, they by a birley-court restricted the number, but still by the same proportions. The question was, Whether the division should be made after the rate and by the proportions in which they possessed, which was the rule that Littlegill insisted for, or, if on the other hand it should be according to the valuation of the lands, the rule mentioned in the act of Parliament, which the Duke of Douglas and Mr James Baillie insisted for, and it was said would have a very different effect? The Lords found