1739. *November* 6. SIR DAVID DALRYMPLE *against* HAY of Drummelzier.

No 7.
Found in conformity with the preceding case.

IT has been found in February last in the division of the muir of Biggar, that where one tenement of a barony only has been in use of pasturing upon a common muir, the heritor of the barony was, in a division, entitled only to a share of the muir corresponding to the value of that particular tenement, much against the opinion of some of the Lords, who urged, that the heritor of the barony should be entitled to a share corresponding to the value of the barony, in so far as it was contiguous to the tenement that had been in use to pasture. When this case between Sir David Dalrymple and Drummelzier came in, the very same question again occurring, THE LORDS, without reasoning, gave the same decision.

Kilkerran, (COMMONTY.) *No* 4. *p.* 126.

1739. *December* 21. & 1740. *February* 1.
SIR ROBERT STEWART *against* The FEUARS of TILLICOULTRY.

No 8.
There lies no action upon the act 1695, for dividing a commonty, where the right of property is in one, and only a right of common pasturage in others.

SIR ROBERT, as proprietor of the hills of Tillicoultry, brought an action upon the act 1695, against the feuars who stood infeft in their respective lands, with a right of pasturage on these hills.

For the pursuer it was *urged*, That the act 1695 was a very useful and valuable law, tending greatly to advance the public interest; therefore it ought rather to be extended than restricted; consequently, if there were any dubiety anent the meaning thereof, the words should be constructed in as large a sense as they could possibly admit of. In the *first* place, it can admit of no doubt, that in the general and common way of speaking in this country, by commonties are meant any large pieces of ground that have been possessed promiscuously, by the neighbours about, in common pasturage, without any distinction as to the nature of their rights, whether the adjacent heritors have a joint interest, as of common property, and the rest the servitude of common pasturage; and words used in laws are to be taken in the sense that they are commonly used throughout the kingdom, otherwise no law would be intelligible, but the legislature behoved to define every term that is used in law. *See* Craig, lib. 2. Dieg. 8. § 33.; Stair, b. 2. tit. 7. § 14. And indeed, if the matter is seriously considered, it must be obvious, that this act was chiefly intended to authorise the division of such commonties as this: For, *first*, The reason of the law for preventing the discords that arise about commonties, applies to the case of this, as well as others; nay, there are many more where the rights are of the nature of the one in question, than of those consisting of a joint property: Hence it ought to be presumed, that this general law was calculated so as to comprehend the case of the commonties that were most frequent in Scotland; otherwise it could

No 8. never answer the end of the public utility which was intended by it. Besides, if it was only intended for a division of such commonties as belonged to heritors in common property, it was an useless and unnecessary act, because, without it, common properties might have been divided upon the footing of the common law, *actione communi dividendo ;* but, as by the principles of the civil law, there lay no action for dividing a common muir, whereof the property belonged to one, and the rest had only rights of servitude, things that were quite different ; and as that was the case of most of the commonties of Scotland, it was therefore necessary to make a special law, to authorise the division thereof, in order to promote the policy and general utility of the nation. And that this statute was intended for the division of commonties, where one has the property and the rest only servitudes, appears from the words *empowering the Lords of Session to determine upon the rights and interests, &c.* and from the exceptions, namely, commonties belonging to the King in property, and those belonging to royal burghs, conform to which it was determined, 31st January 1724, Hog of Harcarse, No 2. p. 2462.

Answered for the Feuars, That before this act, there could be no division where there was only a common pasturage ; though, as Lord Stair observes, Tit. REAL SERVITUDES, § 14. it was otherwise in the community of the full property ; and therefore the act of Parliament could never be intended to alter the laws of the land, established and approven of by custom, and the opinion of lawyers, but only to establish and make more certain what was law before, with respect to the division of common properties, and to settle a rule for such division. Nor is it a new thing for our acts of Parliament to provide for cases, which were held to be law even before the act ; though in this statute something more is done, certain exceptions are introduced, which were no exceptions by the law before, or with respect to which, at least, there was some doubt ; and also it lays down a certain rule for making such divisions. But the extension now pleaded for by the pursuer is disagreeable both to justice and equity ; for where a grant is made of a servitude of pasturage only, where is the equity, that the person to whom it is given in place of the thing granted, be allowed to claim a share of the property which the granter kept to himself ? or where the justice, that where one has granted a right of pasturage, which really and in effect exhausted the use of the land upon which it was constitute, should be allowed to recal his grant, and in place of the whole, give the grantee a part only, under the colour of giving him a privilege of blindly diving into the bowels of the earth, to search for what he knows not where to find, and which, when found, might not be profitable ? It was from the principle of common equity and justice, that our laws did not allow of such divisions, unless of consent ; and this statute cannot be so explained as to be introductive of so palpable an injustice, if it can receive another construction : If the words are considered, it provides only for the division of commonties, that is, common properties ; and there is nothing clearer in our law-books and rights, than the distinction betwixt com-

monty and common pasturage on another's property; of course, if the law had been intended for dividing lands burdened with common pasturage, the penman would doubtless have taken care to have expressed it without ambiguity, and not have used a term, which, in propriety at least, it must be admitted, expresses only common property. Where one stands infeft in a commonty, his right extends to a partial property, unless possession has explained it otherwise; but where one is infeft *cum communi pastura*, his right is limited to a servitude upon another's property; and this is a demonstration, that in the stile of our writings, by commonty is only meant common property; nor has any of our authors called common pasturage a right of commonty, though, at some times, where they are not particularly explaining the distinction, a common pasturage may be called a commonty in this sense, because many have the right of that pasturage in common. *See* Lord Stair, Tit. RIGHTS REAL, § 28. One thing is likewise observable from the act, viz. That the interest of the heritors must be estimate according to the valuation of their respective lands and properties; which is a just rule with respect to common properties; but if it were to be extended to cases like the present, nothing could be more unequal than the rule there settled. As to the observation, That if the act did not concern cases like this, it were an useless law, the same may be said of all acts which are declaratory of what was law before: And with respect to the clause, *empowering the Lords of Session*, &c. it means no more, than that they are to judge how far the several pretenders have a right to hear them upon the valuation of their lands, and to divide accordingly. With regard to the two exceptions founded on by the pursuer, they are nowise in point; for as to the first, the act does not say, that the whole lands were to belong to the King in property; but the exception is of commonties belonging to him in property, where he has a just and common property with his vassals; and, with respect to the others, of commonties belonging to royal burghs, it was observed, that such were truly properties belonging to the burgh, and are called commonties, because of the common interest that the burghers, *qua* such, and as constituting the body politic, have in them; and least the inhabitants should have pretended, upon this act, each to appropriate to himself a share of the common property of the burgh, therefore it provides, that they shall not be divisible; at the same time, there is no doubt there are some instances, where the royal burghs have only a right of common pasturage, yet, generally speaking, what is called a commonty, is really a property belonging to the burgh, for the common benefit of the incorporation. No 8.

THE LORDS found Sir Robert had no title to pursue a division of the commonty of Tillicoultry, upon the act of Parliament 1695.

Fol. Dic. v. 1. *p.* 155. *C. Home, No* 143. *p.* 244.

No 8.

*** Kilkerran reports the same case:

It had been found in the 1724, in the division of the muir of Fogo, Hogg against Earl of Home, No 2. p. 2462. that action lay upon the act 1695 for division of commonty to those having only servitudes against the proprietor, *et vice versa*, although there was no common property; and that the proprietor, besides his share corresponding to the valuation of his adjacent lands, was, in such division, entitled to the fourth of the whole as a *præcipuum*.

And in the year 1737, in the division of the lands of Mount, belonging in property to the Duke of Buccleugh, pursued at the instance of Lawson of Cairnmuir against the Duke and Geddes elder and younger of Kirkurd, the Lords so far proceeded upon the same plan as to pronounce an act in the division; but when the proof came to be advised, some change having by that time happened in the Bench, the Court found, 'That the interest of Cairnmuir in the grounds in controversy was only a right of a definite servitude, and not of common property; and therefore, and in respect of certain contracts between Netherurd and Kirkurd, whereby their several interests in the controverted ground were settled and divided, Cairnmuir's libel upon the act 1695, the act pronounced thereon, and proof taken in consequence thereof, were inept and not applicable to the case; reserving to the pursuer to insist for restricting the servitude to a certain portion of the grounds as accords.'

And afterwards, in January 1739, in an action of division at the Earl of Wigton's instance against his Feuars, some whereof were common proprietors, and others had only rights of servitude, it was found, 'That the proprietors were not entitled to a *præcipuum* in prejudice of those having servitudes; but that those having servitudes were entitled to a proportion of the property of the common sufficient for the servitude,' No 5. p. 2467.

After all these cases had been so determined, the present case occurred, being an action of division on the act 1695, at the instance of Sir Robert Stewart, proprietor of the common muir of Tillicoultry against his Feuars, who only had rights of servitude upon the hills libelled, but none of them rights of common property: And in this case the matter was argued among the Lords with more accuracy than it had been in any of the former cases.

It was on the one side *observed*, That whatever might be the vulgar acceptation of the word *commonty*, yet, in a legal sense, it supposed more proprietors than one; in the language of the law there was no commonty where there was only one proprietor burdened with however many servitudes; and therefore, to make the habile terms for division on this act of Parliament, there ought to be more proprietors *pro indiviso*; which, if there were, it was admitted, that upon the construction of the act of Parliament, the division might proceed, and that those having rights of servitude would in that division be entitled to a share of the property in lieu of their servitude; but unless there was common property the division was not founded in the act of Parliament. It was further *observed*,

that should the act of Parliament be understood otherways, it would be manifestly absurd and against principles; for at that rate the proprietor, who had but given off a few servitudes, would, in a division, be obliged to allow those servitudes to run away with his property, to the extent of the valued rent of the dominant tenement, contrary to all reason and justice. No 6.

On the other hand, it was admitted, that it was not enough to entitle to a division on this act of Parliament, that a few limited definite servitudes, of so many soums grass for example, were given off, which was the above case of Lawson of Cairnmuir, where there was only a servitude of fifteen soums grass; that would not make a commonty either in the sense of law or even in vulgar language; for very frequent instances occur of a servitude of two cows grass, for example on the richest corn-lands, which was never called a common even in vulgar language. But the case was very different where the servitudes were of such extent as to exhaust the whole use of the subject, which, from the shewing of parties, appeared to be the present case, and which is often the case of large hills and tracts of muir-ground; for in such cases, not only in vulgar language, but even in law language, at least in the language of our ablest lawyers, that was called a commonty; for which, appeal was made to Dirleton, *voce* COMMONTIES, and Sir James Stewart's answers, IBIDEM, which was the more to be regarded, that Sir James was the penman of this act of Parliament: What other sense can these words of Dirleton's admit, *A superior having right of commonty within his own property?* And Sir James Stewart's words are plain, and can as little admit of any other construction: 'The superior, says he, has still 'the right of property, and the vassals only the right of commonty,' and then adds, that *our late act of Parliament*, which is the very act in question, 'Has only 'allowed commons to be divided that hold of other superiors, *&c.*' than which nothing can be plainer to shew, that he understood this act of his own penning to comprehend the present case.

Next, there is our charter Latin, which is law language, *cum communi pastura in communia de* such a muir, which is usual from proprietors to vassals having only servitudes. It was also observed, that the exceptions in the act of Parliament much confirmed this construction, viz. of commonties belonging to the King in property, and to royal burghs in burgage; that is, where the King is proprietor, and other persons have servitudes, and where the property is in the burgh, and the burghers have rights of pasturage; which exceptions would not be applicable, if the act of Parliament were to be understood only to concern the case of common properties, whereof there never was one instance either in the case of the King's commons or of burgage lands.

And *lastly*, would it not have been a whimsical act that had not permitted a division, where there was only one proprietor, though the use of the subject was exhausted by servitudes, yet, if that very proprietor should alienate a part *pro indiviso*, *ex concessis*, a division might proceed? It was also observed, that Sir James Stewart, in the passage quoted, talks of superiors getting a fifth,

No 8. which seemed to suppose instances of giving a *præcipuum* to the superior, prior to the case of the muir of Fogo; and it was proposed that inquiry might be made, whether any such had been.

Notwithstanding all which, the LORDS upon the 21st December 1739, found, 'that the pursuer was not in this case entitled to insist in a division upon the act of Parliament 1695.'

This judgment was given by seven votes against five, the President also with the majority, and was again adhered to, 21st February 1740; but as it only determines that in this case, where there was no common property, the action did not ly, it is still a point to be settled, In what cases and to whom it does ly.

It is indeed admitted in the above argument, that although there can be no division, where there are not common proprietors *pro indiviso*; yet, if there be common property, whereby there are habile terms for a division, and that there are also servitudes, in that case as the action lies, so the rights of servitude will, on the construction of the act of Parliament, be entitled to a share of the property in lieu of their servitude: The natural consequence of which would be, that the holders of the rights of servitude should be no less entitled to pursue the division than any of the common proprietors; which would seem no less contrary to principles, than it would be to allow them the action and a share of the property, where there is no common property.

But as this proposition was only thrown out as matter of argument, it remains a point still to be settled, Whether, even in such a case, those having rights of servitude will be entitled to more, than to have their servitudes ascertained upon the divided property, to the same extent as when the property was held *pro indiviso*; for the decision between the Earl of Wigton and his Vassals, 23d January 1739, where those having servitudes were found entitled to a proportion of the common, proceeded of consent, at least without opposition.

Kilkerran, (COMMONTY.) *No* 5. p. 126.

1740. *February* 2. DUKE of DOUGLAS *against* BAILLIE of Littlegill.

No 9.
In dividing a common, the valuation of the dominant tenements was held to be the rule of fixing the proportions, notwithstanding that each had, for a long time, possessed the common pastur-

THE Duke, as heritor of the lands of Meddingcoats, brought a division of the common of Hartonhill, against Baillie of Littlegill, as heritor of Mott, &c. And a proof having been allowed of the manner how it had been possessed *pro indiviso*, and that for many years past; by an agreement among the tenants, the number of the bestial was according to a fixed proportion or souming; and when it was found by experience, that the ground was overstocked, a reduction was made; particularly in the 1719, the possessors of the dominant tenements, in order to preserve an equality, resorted to that kind of jury called a birley-court, who adjusted the number of the soums to which each of the dominant tenements was to be restricted.