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 servtiudes 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

the valuation the rule, *nem. con.*—but some of us *inter quos ego* had not seen the memorials, at least those for Littlegill, till the cause was called.

### No. 6. 1748, June 2. DAVIDSON *against* KERR.

THESE two heritors had some lands runridge and others possessed as commonty, and both willing to divide, but could not agree on the plan. Kerr pursued a division before the Sheriff, but Davidson offered a bill of advocation, because though by the 23d act 1695 the Sheriff may divide runridge, yet by the 28th act 1695, the power of dividing commonty is only committed to the Court of Session. Haining refused the advocation; but on a reclaiming bill we remitted to him to pass it;—but resolved when it came in, with a new summons of division that Davidson has raised, to remit to the Sheriff as usual to make the division, but to be reported to us.

### No. 7. 1748, June 3. SIR GEORGE STEWART *against* M'KENZIE.

AFTER a hearing in presence upon the import of the act 1695, act 28th, anent commonties, though we would not alter the judgment given in the case of Sir Robert Stewart of Tullicoultry, February 1740, that where there is only one proprietor and several servitudes, there lay no process of division on the act, yet we found that where there was a property in one and a servitude in another, but the proprietor has also a right of pasturage for a part of his lands, that there the superficies may be divided betwixt them in proportion to their respective interests in that superficies, the property still remaining as it was and no *præcipuum*, and the division to be not according to the valuation but according to their rights of pasturage.

### No. 8. 1752, Dec. 15. MRS BALFOUR *against* MONCRIEFF, &c.

IN a process of division of the commonty of Auchtermuchty, the Barony of Strathmiglo being by the Crown's charter 1684 conveyed (all except eight acres of it) *cum potestate et privilegio communitatis et pasturæ* in that commonty, Mrs Balfour claimed a proportion of it corresponding to the valuation of the Barony, whereas the other heritors contended, that as by the proof only the lands of Demperston had possessed that common pasturage, the valuation only of these lands and not of the whole Barony could be computed. The Lords remitted to me to hear the lawyers on that point, and I this day reported it,—and we unanimously found, that only the valuation of the lands of Demperston ought to be computed and not of the whole,—and that in these divisions it made no alteration whether any of the parties' lands were erected into Baronies or not. The lawyers on both sides seemed to agree in making this a common property, but the Court seemed to think it only a servitude, but had no occasion of deciding that point.

## COMMUNION-ELEMENTS.

### No. 1. 1742, June 9. HERITORS of STRATHMIGLO *against* GILLESPIE.

THE Lords adhered to their former interlocutor refusing an advocation from the Sheriff of a process at the heritors instance against Mr Gillespie, for the communion-element