pleading, said, that *apud nostrates* in Craig meant *with our ancestors*: that this was but a conjecture, for that he had looked in the Dictionary for *nostrates*, and could not find it there. The President said, "Lord Advocate, you have a very bad dictionary." But the Advocate's dictionary was not to blame, if the search was made for *nostrates* instead of *nostras*. A Greek dictionary may be a good one, though it does not contain in the plural number.

1768. *November* 23. MR ROBERT HUNTER and OTHERS, *against* The DUKE of HAMILTON.

COMMONTY.

Possession of an uncultivated Commonty by pasturage, and casting feal and divot, on a title of part and pertinent, infers a right of common property.

[*Faculty Collection*, p. 142; *Dictionary*, 2481.]

PITFOUR. A right of servitude will not give a property, neither will a right of common pasturage; and still less will a grant of *parts and pertinents* give property, without prescription; *quod minimum est* must be presumed. If a feuar is once made a joint proprietor, the superior cannot give a servitude on the muir to any other person. Why give a share greater than the feuar has occasion for? If such is the construction of the grant, I do not see that prescription can make any odds; for there is just the same sort of possession there would have been, had there been only a servitude. The grant now contended for by the feuar, is what he had no right to ask, and what no wise man would give. The distinction made in the case of *Biggar* was so slender, that I could never lay hold of it. The case of the *Mearns Muir* is not in point; for there the feuars had expressly granted to them a proportional part of the muir.

ELLIOCK. According to the doctrine now laid down, all the common muirs in Scotland ought to be divided anew.

GARDENSTON. I am moved with this argument, that, if *part and pertinent* implied property, no feu after the first could be granted without the consent of the first feuar.

AUCHINLECK. A whole muir is possessed in common by the tenants of my barony: I give off a farm to one, and his share of the common; will that hinder me from giving off other farms, and a share of the common, to each?

PITFOUR. The 5th Act of the 16th Parliament, James VI., implies that though the ground about muirs was feued out, yet still the property of the muirs themselves was reserved.

PRESIDENT. That Act of Parliament seems to have no relation to the present controversy: it relates to the King's property actually reserved. The decision of *Biggar* is a leading case often quoted and often followed. There may be

hardships arising from that judgment; but it is better to keep in the road, than to go out of it in search of new principles.

JUSTICE-CLERK. When a great barony belonged to one proprietor, together with a muir possessed by his tenants, I understand that, upon feuing out the barony with parts and pertinents, he feued out as property all that was formerly possessed as farms. When feus were granted of a whole barony, together with a commonty, the feu of the barony carried off the whole common. If this is the rule in whole, why not in part? Upon this principle a great part of the property of the nation depends.

KAIMES. The Act 5, Parliament 16, James VI., is not decisive of the present question. If two men have a common property, neither can dispone: but, if one man has 9-10th parts, why may he not dispone the whole of that, or a part of that? In the case put, a proprietor is not to be presumed to give away more than a perpetual lease or feu of his lands. The feuar will possess the several lands for ever; but this will make no alteration as to the servitude: it will still be a servitude, perpetual instead of temporary.

On the 30th July and 23d November 1768, the Lords found that the heritors who plead upon infeftments with *parts and pertinents*, and prove possession, are to be considered as joint proprietors; and that, upon a division, they will have the exclusive right of working coal within the limits of the shares of the muir set off to them, unless their rights are burdened with a reservation of coal.

Reporter, Coalston.

Act. R. M'Queen, D. Dalrymple. *Alt.* A. Lockhart, Sir A. Ferguson.

Diss. Kaimes, Pitfour, Gardenston, Monboddo, Stonefield.

1768. *November* 23. WILLIAM DOUGLAS of Bridgeton *against* ALEXANDER ELPHINSTON of Glack.

RES JUDICATA.

If a Court determines upon one ground, when several are offered, and signifies it is therefore unnecessary to examine the rest, a reversal of their judgment is a *Res Judicata* of the general issue between the parties.

[*Faculty Collection, IV.* 132; *Dictionary*, 8649.]

MONBODDO. I am sorry that the form of our proceedings should have occasioned this difficulty. If the interlocutor had been general, or if every objection had been determined, this question would not have occurred. The words of our judgment determine one point, and find it unnecessary to determine the others. I wish for either a general determination, or for a special judgment in every point. I think we ought to proceed. The decreet was extracted, and the appeal was lodged before the expiry of the reclaiming days. What the House