1771. February 21.

GILBERT LAURIE of POLMOUNT, and Others, *against* The DUKE of HAMILTON and his TUTORS.

No. 1.
A right of servitude over a commonty, not such an interest as can authorise a division upon the statute 1695, C. 38.

In the process of division of the commonty of Reddingrig and Whitesiderig, it was found that there were three different classes of heritors, who had an interest, (No. 15. p. 2481.) The *first* and *second* of these were found to have a right of common property corresponding to their respective lands, and were intitled to a share in the division according to their valued rent. The *third* class, consisting of the feuars of the family of Hamilton, were found not to have a joint right of property, but a right of *servitude* merely in terms of their title-deeds; it being, however, declared, that the share to be set off to the Duke of Hamilton was to be burdened with these servitudes, and that the feuars were to be continued in possession, till such time as shares should be set off to them sufficient to answer such servitudes.

When the case returned to the Lord Ordinary, the pursuers, who composed this *third* class, insisted that, according to the interlocutor, they were intitled to have the commonty allotted to the Duke divided, and shares set off to them respectively. In order to determine the point, his Lordship made avisandum to the Court, with these questions; *1mo*, Whether these feuars could oblige the Duke of Hamilton to divide that share of the common allocated to him, so as each person might have a share appropriated corresponding to his servitude? and, *2do*, In case the feuars could force such division, by what rule it ought to be made?

In a memorial, the pursuers pleaded:

Their demand was founded both on the words and spirit of the statute 1695. That statute authorised the division of all commonties; and it was sufficient to constitute a commonty, that the use of the subject was common in consequence of servitudes of common pasturage, or others constituted over it in favour of different persons, though the property of the subject should belong to one. As the statute had expressly authorised such division to be made at the instance of those having interest, it necessarily followed, that those having a servitude, which was unquestionably an interest, had a title to compel a division of the common advantage; and if this was not done, the subject must remain in its present uncultivated state, to the loss of the country in general, and to the particular injury of the parties interested.

When it was acknowledged therefore, and decided that the pursuers had the superficial use and possession of the subject in common, they were certainly intitled to have that surface, the subject of their right, divided, so that each might enjoy it severally, and under his own management. Such appeared to be the intention of the statute; the words of which plainly imported, that such as had rights of common property were to have a share set apart to them correspond-

ing to their interest; and that such as had only servitudes or a superficial right, were to have a share of that surface, in like manner set apart, corresponding to the interest or value of their servitude. These cases fell, at any rate, under the purview and intendment of the statute; and as the great object of that law was to prevent discord, and to encourage the improvement of the country, its salutary effects would be much restrained, if rights, such as the present, were not comprehended. The precise question had been determined, 3d June 1748, Sir George Stewart against John M'Kenzie, No. 10. p. 2476.

No. 1.

The Duke of Hamilton pleaded:

There was not, in the present instance, the existence of the proper parties in the field to authorise a division upon the enactment of the statute 1695. By the interlocutor in No. 15. p. 2481. the Duke, as proprietor, was found intitled to a share in the division corresponding to the valued rent of such of the grounds holding of him as had only a right of servitude in this commonty; and as there were here two separate independent interests, a right of property in the one, and a servitude in the other, there was such a contradistinction and diversity of titles, that neither by the common law nor by statute were the feuars intitled to demand a division. The statute 1695 related only to the division of rights of common property; and as it assumed for the rule of division the valuation of the respective properties, it was the concourse only of such mutual rights of the same nature that constituted a common property; and in that case alone was there room for its application.

As the nature and extent of the parties' rights to the common grounds was decidedly fixed, there was no principle of law that could intitle those who had only a right of servitude to convert that servitude into a property, or to compel the proprietor to abandon his right of property, and betake himself to an inferior species of right.

These principles were not only founded on reason and justice, but had been acknowledged in various instances by the Court; in particular, 1st Feb, 1740, Stewart of Tillycoultry, No. 8. p. 2469; which bore a near relation to the present question.

"On report of the Lord President in absence of the Lord Justice-Clerk, "and having advised the memorials *hinc inde*, the Lords find, That Gilbert "Laurie, and the others *in pari casu* with him, with whose servitude Duke "Hamilton's share in said commonty is burdened, cannot, upon the act 1695, "insist against the Duke for a division of said share."

In a reclaiming petition for the pursuers, it was argued:

That the present question was of particular importance; for if the judgment of the Court was adhered to, the commonty in question must remain in its original uncultivated state, to the great loss of those interested, as well as to the loss of the country in general. If such was the law, it must be allowed to be defective, and required an amendment. But this case was not overlooked by the statute: The great object of it was the general improvement of the country,

No. 2.

which entitled it to the most liberal construction; and upon these principles it appeared to have been the intention of the law, to authorise the division of all commonties possessed by different persons; and that without distinction, whether they had only rights of common property, or where some of those interested had only rights of servitude.

At the time of passing the statute, the legislature could not be ignorant of the state of the country, and that most of the commonties then in contemplation were burdened with servitudes; so that when it was meant to provide a remedy against a national grievance, it could not be presumed that commonties loaded with rights of servitude should be exempted from the general rule, the reason for authorising a division applying to the one case equally as to the other.

To constitute a commonty in the acceptation of law, it was sufficient that the use of the subject was common; and as the statute authorised the division of all commonties, those belonging to the King and Royal Burghs alone excepted, none else were excluded; and hence those having a common use, or, in the language of the enactment, having an interest, seemed to be entitled to a division and specification of that interest. Divisions betwixt those having rights of common property, and those having only rights of servitude, had been authorised by the Court, 31st Jan. 1724, Hog of Harcarse against Earl of Home, No. 2, p. 2462; 3d June 1748, Sir George Stewart against Mackenzie of Delvin, No. 10. p. 2476.

The petition was refused without answers.

Lord Ordinary, *Justice-Clerk*. For Laurie, &c. *Macqueen*.
For the Duke of Hamilton, *Nairn*.

R. H. *Fac. Coll. No.* 81. *p.* 236.

1804, *February* 10. SMALL *against* FERGUSSON and Others.

No. 3.
Objection, that a mill and multures making part of the valuation can have no share of the commonty, repelled.

IN the process of division of the commonty of Balmacruchie, it was objected to the claim of Patrick Small of Kindrogan, advocate, one of the proprietors of the barony, that the valued rent upon which he founded his claim to a proportion of the commonty, was partly composed of the mill of Pitkermuck, which, though valued in the cess-books, did not entitle him to any share of the commonty. The Lord Ordinary, "in respect it appears from the pursuer Mr. "Small's title-deeds, that he is vested in the town and lands of Milltown and "Pitkermuck, with the mill and mill-lands thereof, with multures, knaveship, "and sequels of the same, and other pertinents therein mentioned, and also "with the rest of the town and lands of Easter Pitkermuck; and that it is "averred, and not denied, that he and his predecessors, being possessed of all "these subjects, have regularly paid cess and public burdens on a valuation of