

In the action *pro socio*, had the division now claimed been sued for in that process, the defender would have had no plea.

No 18.

Observed on the Bench, No person, in such a case as the present, is to be compelled to remain longer *in communione* than he chuses. Long before the act 1695, the brief of division was known respecting property in lands. That statute, with a view to the improvement of agriculture, refers to the peculiar nature of commonities, and does not relate to common property in general. With regard to this, as in the case of heirs portioners, such remedies as those here proposed, must always have been competent.

This case was reported by Lord Kames; and afterwards, on a hearing in presence.

'THE LORDS repelled the defence.' See COMMON INTEREST.

S. Act. *Maclaurin.* Alt. *Wight.* Clerk, *Menzies.*
Fol. Dic. v. 3. p. 139. Fac. Col. No 30. p. 51.

1782. February 21.

SIR ROBERT HENDERSON, *against* Captain GEORGE MAKGILL, and Others:

IN the process of division of the commonty of Lucklawhill, Captain Makgill, as sole proprietor, claimed, *tanquam præcipuum*, a share, exclusive of that which fell to him in virtue of the statute 1695, and endeavoured to enforce his plea by the following authorities: Craig, *De Feud. lib. 2. dieg. 8. § 35.*; Lord Stair, b. 4. tit. 3. § 12.; Lord Bankton, b. 1. tit. 8. § 36.; Erskine, b. 3. tit. 3. § 57, 58.; 31st January 1724. Hogg *contra* Earl of Home, No 2. p. 2462.

No 19.
 Found that the proprietor was not entitled to a *præcipuum* in the division of a commonty; but, that he had right to the mines and minerals.

THE LORD ORDINARY 'found, That Captain Makgill was not entitled, by virtue of his right of property, to any *præcipuum* in the division, but that he had thereby a right to coals, mines, minerals, and other fossils that might be under the same.'

To this interlocutor, on advising a reclaiming petition for Captain Makgill, without answers, the COURT adhered, reserving to him to claim that part of the commonty which should remain after the respective shares had been allotted to all the parties having interest.

Lord Ordinary, *Alva.* For Captain Makgill, *M'Gormick.*
Fol. Dic. v. 3. p. 137. Fac. Col. No 38. p. 60.

1782. July 18. Mrs AGATHA DRUMMOND *against* JAMES SWANSTON.

IN the division of an extensive commonty, carried on under the act 1695; cap. 38., an allotment having been made proportioned to a farm belonging to Mrs Drummond, and possessed by Swanston as her tenant, the proprietrix

No 20.
 Found that a landlord was not entitled to claim from