No 17.

'THE LORDS find, That the rule of division in this case is not the valued rent; but that the commonty must be divided conform to the number of sheep and bestial in use to be pastured thereon, except where any of the feuars are limited by their rights to a lesser number of sheep.'

Reporter, *Auchinleck.* Act. *M'Queen.* Alt. *Ilay Campbell.* Clerk, *Robertson.*
Fol. Dic. v. 3. *p.* 139. *Fac. Col. No* 26. *p.* 69.

1782. *February* 8. HUGH MILLIGAN *against* ALEXANDER BARNHILL.

No 18.
Found, that a brewhouse, with the utensils, of which the half had been sold *pro indiviso*, was such a subject, as that the action *de communi dividendo* was applicable to it. No person can be compelled to remain longer *in communione* than he chuses.

BARNHILL was proprietor of a brewhouse, with the brewing utensils, and accessory subjects; of which he sold one half, *pro indiviso*, to Milligan, who accordingly entered into partnership with him in that trade.

On the dissolution of the co-partnery, Milligan raised an action for compelling Barnhill to comply with one or other of the following alternatives; either to sell to him at a certain rate his own share, or at the same rate to purchase his share; or else to concur in exposing the whole to public roup, so that the price might be divided.

Pleaded for the defender, No man can lawfully be deprived of his property without his consent or delict; nor can he be obliged to part with it, though full value should be offered to him. Only the public benefit of the community could render such an act just; and even in that situation it must be enforced by a special interposition of the legislature. Hence, a common proprietor, *pro indiviso*, is not to be compelled either to sell his own share, or to purchase that of another. A particular statute, indeed, has authorised the division of commonties; but, from this enactment, the contrary determination of the common law with respect to that subject, though in its nature divisible, is apparent. By it no such compulsatory division is permitted; except, perhaps, in the single instance of joint property in a ship, on account of the peculiarly hazardous and perishable nature of that interest.

Pleaded for the pursuer, When a subject is in itself indivisible, and when the use or exercise of it, as in the present case, is likewise indivisible, the different interests of joint proprietors can only be rendered effectual by the methods now proposed. The common law, therefore, will authorise such a mode of separating the interests of parties. If, indeed, the subject may be possessed in common, or prior to any division, though with less advantage than after a separation, it does not seem that, at common law, this can be enforced; and, for that reason, the statute 1695 was necessary for authorising the division of commonties. But, otherwise, the common law would have given a sufficient sanction; as is laid down both by Lord Stair, b. 1. tit. 7. § 15. and by Lord Bankton, b. 1. tit. 8. § 40.: For when the last mentioned author takes notice of the case of ships, it is as an example of this general rule; not, according to the defender's observation, as an exception from a supposed contrary one. The same principle obtained in the Roman law; *l.* 55. *ff. De famil. erciscund.*; *l.* 1. 3. *Cod. Comm. divid.*; *Voet, ad tit. ff. De fam. ercisc, No* 2.

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 commonties, 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.

Act. *Maclaurin.* Alt. *Wight.* Clerk, *Menzies.*

S. *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'Cormick.*

Fol. Dic. v. 3. *p.* 137. *Fac. Col. No* 38. *p.* 60.

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

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

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