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

No 20.
his tenant a share of the expense of a division of commonty, proportioned to the tenant's interest.

claimed from the tenant such a share of the expense as corresponded to his interest in this division, which she supposed to be the annualrent of the money disbursed; and, in an action brought on that ground, she

Pleaded; The statute proceeds on the presumption, that the division of common possession is a measure advantageous for all persons concerned, with regard to whose rights and interests in the matter it empowers the Court to determine; and among these undoubtedly tenants are comprehended, whose interest may be of the duration of centuries. Though, therefore, the statute is silent as to the defraying of the expense, either by the owner or the tenant; yet, that this expense should be apportioned between them, according to their respective interests in the acquisition, and in particular to the endurance of the tenant's possession, is both just and equitable in itself and agreeable to precedent in in analagous cases. Such are the relief given to heritors out of whose temporal lands a glebe has, by the authority of the act 1663, cap. 1. been designed; the expenses laid out by fiars and liferenters in the reparation of houses, the former of whom are entitled to the intermediate interest during the possession of the latter; 5th March 1755, Scott *contra* Forbes, Fac. Col. No 148. p. 220. *voce* LIFERENTER; and the executors of the latter to the principal sum expended; 24th January 1672, Halket against Watt, *voce* RECOMPENSE; or those incurred by joint proprietors of a mill in obtaining a declarator of thirlage; 6th January 1676, Forbes against Ross, IBIDEM.

Answered for the tenant; It is an obvious fallacy, to suppose that the division of commonties is at all calculated for the benefit of the tenants. The statute enacts, '*that any having interest* may raise summons for this purpose against '*all persons concerned.*' Now, was ever such an action brought either by or against a tenant? But supposing the tenant to derive benefit from this measure, it would not follow, because he had reaped some consequential advantage, that, with respect to him, the expense necessary for accomplishing it had been laid out *in re communi;* the principle on which the decisions proceeded quoted by the pursuer. Indeed, the obligations on landlord and tenant are bounded by the contract of location, which must exclude all extrinsical and adventitious claims between them; 20th December 1707, White's Tenants *contra* Houston, *voce* TACK; February 1664, Hodge against Brown, *voce* COMPENSATION.

THE LORDS considered the claim against the tenant as having no foundation in the act of Parliament, and as little at common law; such an eventual benefit as his being too indirect to authorise the demand of a recompence.

They therefore adhered to the Lord Ordinary's interlocutor, assoilzieing the defender.

Lord Ordinary, *Braxfield.* Act. *Ilay Campbell, Hume.* Alt. *Henry Erskine.* Clerk, *Home.*
Fol. Dic. v. 3. *p.* 137. *Fac. Col. No* 55. *p.* 86.

See TITLE TO PURSUE.

See APPENDIX.