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

No. 3.

"£172. 13s. 4d. being the amount of three articles stated in the valuation-"books of the county, for the pursuer's father's property, though shortly en-"tered under the names of *Pitkermuck, mill of ditto*, and *Wester ditto*, are pro-"perly ascribable to the said lands, the property of the pursuer; Therefore "repels the objections, and sustains the pursuer's right and title to get a share "in the division of the commonty in question, in proportion to the said sum of "£172. 13s. 4d. being the amount of the said three articles of valuation stated "to him in the cess or valuation books of the county."

Neil Fergusson of Woodhill, and others having interest in the commonty, presented a petition to the Court against this interlocutor; and

Pleaded: If the division is to be regulated by possession, a mill, which cannot exercise any act of possession, either by pasturage, or by casting feal and divot, has no title to a share of a commonty. The interest of parties is generally ascertained by the number of cattle that the dominant tenement can maintain in winter, but a mill is a tenement which cannot maintain cattle, and which has no occasion to cast feal and divot, those thirled to it being bound to keep it in repair. If, again, the division is to be regulated by the valuation of the mill, as stated in the cess-books, it will be entitled to a great proportion of the whole commonty belonging to a large tract of country. The mill is an estate created by the sucken, and it would be most unjust to make this estate of their own creation for a particular purpose, the means of depriving the adjacent proprietors of a part of their property. Suppose the proprietors had purchased their right of thirlage, it could never be maintained that the thirlage, so extinguished, could compete with all their own lands in the division of a commonty.

The statute for the abolition of thirlage, shews that a mill cannot be considered as having any interest in a commonty, both because nothing is appointed to be valued, except the multures, and because when the multures are sold, the valuation which arose from them does not remain attached to the mill, but is united with the valuation of the lands from which the multures originally issued. A proprietor of a fishing is not entitled to a share of a commonty proportioned to the valuation of his fishing; and still less is the proprietor of a mill, independent of the lands attached to it. The *cumulo* valuation of the mill and mill lands ought therefore to be separated, and a portion of the common corresponding to the lands only, should be allotted.

Answered: The statute for the division of commonties declares, "That the "interest of the heritors having right to the said commonties, shall be estimated "according to the valuations of their respective lands and properties." The object of the enactment was to preclude all such discussions as are here attempted, by establishing a positive rule to be applied in all cases and circumstances. But, if this was deemed expedient at the time of the enactment, so recently after the valuation of the lands in Scotland, and when the evidence on which they proceeded might have been extant, it is of much more consequence to adhere to the rule now; for the matter would be perfectly inextricable, if it were neces-

No. 3. sary to go into an inquiry, in every case, into the situation of lands at the time they were valued. Accordingly, the rule of dividing by the valuation, has, for the best reasons, been held fixed and unalterable.

But, supposing such a discussion were competent, there is every reason to think that no part of the valuation of the mill of Pitkennack was attached to the mill or multures, but that it ought to be ascribed to lands which must have been then possessed by the mill, and which at present belong to its proprietor. When the general valuation took place, it was intended to select those subjects only which could bear the burden of taxation at all times; and, as multures are merely an incumbrance on property, and might be extinguished by the negative prescription or otherwise, they were seldom included in the valuation, except when they were very considerable, but in this case, they must at that time have been very insignificant. The valuation clearly applies to the lands attached to the mill, and not to the machine itself.

The statute for the abolition of thirlage affords no argument, both because it had no view to the division of commonties, and was intended merely to ascertain the commutation equivalent to the right of thirlage; and, instead of the valuation passing from the owner of the mill to the owner of the lands, it is expressly provided, that the situation of parties as to the land-tax and other public burdens shall remain as before.

Upon advising the petition with answers, the Court "adhered."

Lord Ordinary *Justice Clerk*. Act. *Ross*. Agent, *James Keay*.
Alt. *Craigie*. Agent, *Ja. Laidlaw, W. S.* Clerk, *Home*.

J. *Fac. Coll. No.* 144. *p.* 324.

1804. *May* 17.

CAMPBELL *against* LORD DOUGLAS and Others.

No. 4.
Mode of dividing a moss.

ARCHIBALD CAMPBELL of Blytheswood raised a process of division of the moss of Dargavell or Inchinnan, under the act 1695, in which Lord Douglas and certain other adjacent heritors were called as defenders. The object of this action was to have the moss divided according to the respective valuations of the lands and properties adjacent, as laid down in the act of Parliament.

A counter action of declarator and division was brought at the instance of Lord Douglas, and the other heritors, to have it found that this moss was not such a common property in the sense of the statute as to be divisible according to the valuation, and that it should be divided according to the front of the surrounding properties.

The Lord Ordinary conjoined the actions, and allowed both parties a proof of the manner in which the moss in question had been possessed, and, in ge-