

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 Pitkenmack was attached to the mill or millures, 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 millures 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 commonities, 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. Lairlaw, 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-

neral, of all facts and circumstances relative to the proposed division. A proof was accordingly taken; from which it appeared, that the adjacent heritors had from time to time inclosed ground from the moss; that they had each taken in that part of the moss which was adjacent to their farms, according to the extent of their respective lands lying along the front of the moss; that the tenants upon each estate had confined themselves, in their use of the ground, to such parts as were so inclosed; and that there was little or no use made of the part of the moss which still remained undivided.

The Lord Ordinary, upon advising a proof, “found, that the boundaries of the property of each heritor, who is either pursuer or defender in this cause, must be fixed according to the extent of their respective lands lying along the front of the moss in question to the centre thereof.”

Against this judgment, Blytheswood presented a petition to the Court, contending, *1st*, That the moss in question had been proven to be a common property, according to the terms of the act of King William; and, *2dly*, That there had been nothing proven peculiar in the condition of this common moss which should make it be divided according to a different rule from that fixed by the act of Parliament.

But the Court, upon advising the petition with answers, adhered to the interlocutor of the Lord Ordinary. It appeared from the proof, that the practice and understanding of all parties hitherto had been in favour of the principle adopted in the Lord Ordinary’s interlocutor; and there were decisions referred to, in which it was found, that a moss in similar circumstances was not to be divided according to the valuation of the adjacent properties, but according to the front adjoining to the moss. Such a decision was given in the case of the Paisley moss, July 2, 1713, and lately in the case of the Blackstone moss, 12th November 1800.

Lord Ordinary, Methven.  
Agent, Geo. Dunlop.

Act. Lord Advocate Hope, Campbell, jun. Reddie, Jardine.  
Alt. Solicitor-General Blair, Ross, Campbell, Jo. Murray.  
Agent, Ja. Davidson, junior. Clerk, Pringle.

J.

Fac. Coll. No. 159. p. 359.