APPENDIX.

PART I.

COMMONTY.

1771. *January* 22.

The DUKE of QUEENSBERRY, *against* WILLIAM JOHNSTON of LOCKERBY, and Others, Proprietors of dominant Tenements upon the Commonty of Bengal.

No. 1.

In the division of a commonty, where the dominant tenements were included in a *cumulo* valuation, the immemorial payment of cess, found to be the proper rule for making the division of the *cumulo*, and thereby to ascertain the respective interests of the dominant tenements claiming in the division.

Such division of a *cumulo* valuation competent only to the

THE pursuer having brought a process of division of the Commonty of Bengal, the marches and rights of the dominant tenements were ascertained, so that nothing remained but to make the division in terms of the statute 1695, C. 38. according to the valuation of the properties of those having interest. Upon this point, however, owing to the particular situation in which the dominant tenements stood, a question occurred.

Part of the pursuer's lands having a right in this commonty, and part of Johnston of Lockerby's, were stated in the cess books under one *cumulo* valuation; which also comprehended other lands belonging both to the pursuer and Lockerby, which had no interest in the commonty. There were also other lands belonging to Lockerby having an interest in the commonty, which were stated under one *cumulo* along with other lands which had no interest; besides some other lands of Lockerby's which were stated under separate and distinct valuations.

Though the tenements that had, and those that had not an interest in this commonty, were in this manner, as to their valuations, blended and intermixed with one another, yet the dominant tenements had, for time immemorial, paid cess according to a certain valuation.

The pursuer conceiving that this use of payment afforded a sufficient rule, whereby the respective valuations of the different tenements might be ascertain-

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ed, submitted that proposition to the Lord Ordinary, who pronounced an interlocutor in these terms: But objections having been stated, the following judgment was given: "Finds, That as it is not controverted that the several "lands which are found to have an interest in the commonty of Bengal under "division have immemorially been in use to pay cess and other public burdens, "leviable conform to the valuation of the lands, according to a certain and "uniform rule or valuation, although their valuations were not separately mark-"ed in the cess books of the county, this use of payment is sufficient presump-"tive evidence, that any of these lands, which stand valued *in cumulo* with other "lands, have been anciently separated in the valuation; which would be suf-"ficient ground for the Commissioners of Supply rating them at valuations con-"form to the use of payment, and thereby making those that had borne in "former times a high proportion of the cess reap the benefit thereof, in draw-"ing a proportional share of the commonty corresponding thereto; therefore "adheres to the former interlocutors, so far as concerns the rule by which the "division is to proceed."

Lockerby and the other defenders having still objected to the rule, the Lord Ordinary doubted if it was not incumbent on the parties to get the Commissioners of Supply to divide this valuation, the Court having no power in that matter; and having ordered informations,

The pursuer pleaded:

Where lands have paid cess at a certain fixed rule for time immemorial, the presumption of law was, that the cess had been so proportioned at the date of the original valuation of the county, and agreeable to the rents of the lands as then ascertained; and this being the case, it was the only rule which, in law and justice, could afterwards be followed in ascertaining the valuation of their respective lands, where they happened to be stated under one *cumulo* in the books of supply. This was the rule uniformly followed in subdividing valuations for political purposes; the division being made, not according to the proportional real rent of the different parcels composing a *cumulo*, but according to the rate by which they had paid cess for time immemorial.

Unless this was followed in the present instance, the ascertainment of the valuation required could not be made; for as it was not now known what were the particular lands belonging to Lockerby, which composed the *cumulo* valuations at which these lands were rated in the cess books, it was impossible, by making a reference to the rents presently payable, to proportion these valuations amongst the different dominant tenements.

Lockerby and the other heritors pleaded:

As there never had been any legal division of the valuation of the several farms, the use of payment of the cess could be no rule. Cess was usually allotted by the proprietor upon the farms of his estate, without any regard to their extent or value; which, however it might be, was immaterial to the com-

owner, as, if the tenant paid much cess, he paid less rent, and *vice versa.* No. 1.
When any of the farms therefore included in a *cumulo* valuation came to draw separately upon a commonty, the just and legal rule was, that they should be rated according to the proportion their value bore to the other farms in the *cumulo* with which they were connected; which value ought to be ascertained either by the correct rental of the whole lands *in cumulo*, or by a just proportioned rental put thereon by judicious farmers.

This was the only mode in which equality and justice to those interested could be procured; whereas if the rule by payment of cess was adopted, the pursuer's dominant lands, the rental of which amounted only to £153, would draw a fifth more than Lockerby's, whose rental was £200. and upwards.

It was observed upon the Bench, that the best rule or measure of division was the original valuation; and that the next best was the use of payment of cess: But that in order to authorise the division in this Court, it was necessary that a proper division of the *cumulo* valuation, amongst the respective tenements having interest, should be made by the Commissioners of Supply, whose proper business it was; and that it was to a valuation of this kind only, appearing from the cess books, that the act 1695 applied.

The Lords accordingly "sisted process till the parties obtain a division of "their valuation by the Commissioners of Supply."

The pursuer, in a reclaiming petition, maintained, that a valuation by the Commissioners of Supply was unnecessary: That as the Court was authorised and required by statute to make the division, it could not be made to depend upon other courts and jurisdictions; and as the Court was bound to bring the cause before them to a conclusion, it was a necessary consequence that they should be invested with every power which for that purpose was required. If in the course, therefore, of a process of division of commonty, the subdivision of a valuation became necessary, the Court might incidentally take what proof was necessary: The statute 1695 had not said that the valuations of such lands could only be proved by the books of Supply, but had left that, like any other matter of fact, to be ascertained by proper evidence.

Upon advising this petition with answers, it was observed, that the Commissioners of Supply alone were authorised to divide valuations; otherwise there might be two valuations, one for the cess, and another for civil rights, as in the present instance, which might be contradictory to one another.

The Court adhered.

Lord Ordinary, *Auchinleck.* For Duke of Queensberry, *Macqueen.*
Clerk, *Kirkpatrick.* For Johnston, &c. *Armstrong.*

R. H. *Fac. Coll. No. 64. p.* 191.