

question in dependence. And it has been decided, that an assignation, *pendente lite*, could not put the other party in a worse situation than he was before. Newbyth, 14th July 1666, Sharp *contra* Brown, *voce* LITIGIOUS.

Independent of these objections, it was maintained, That the disposition to Lord Barjarg could, at any rate, go no further than to enable him to insist to have a proportion of the property set off to himself, and to Mr Barclay Maitland, but without impinging upon the servitudes, which could not be affected by this contrivance.

A person having a right of servitude cannot insist upon the maxim, *quod unaqueque gleba servit*, emulously, and where his right would not be hurt by being restricted to a particular spot. But, in this case, the servitudes would become of little or no value, were they so restricted. The greatest part of the commonty is unimproveable, and only fit for pasture; and were those who have a servitude of pasturing a few cows, or a score of sheep, reduced to a particular spot of the muir, in proportion to that right, the expence of herding would more than exhaust all the advantage, so that they would be obliged to sell their right to the superior at an under value.

Nevertheless, 'THE LORDS having considered the production now made for Lord Barjarg, found the division may proceed.'

Reporter, *Auchinleck.*

Act. *Lockhart.*

Alt. *Maclaurin.*

G. F.

Fac. Col. No 95. p. 348.

1772. *August II.*

CHARLES BARCLAY MAITLAND, *against* JOHN TAIT, and Others.

IN a process of division of the commonty called the Hill of Tillicoultry, at the instance of Mr Barclay Maitland, against certain feuars of part of the estate of Tillicoultry, it had been contended *in limine* for the defenders, that a division was not competent, there being here no common property, the whole being the property of the pursuer, subject only to servitudes of pasturage. However, a right of common property having been conferred upon one of the feuars, it was found, that the division might proceed; and a proof was allowed of what tenements had been in possession. A proof being accordingly led, the pursuers, *insisted*, That the division of the commonty should be in proportion to the valued rent.

Objected, That the valued rent could not be the rule of division; but that the defenders, who had rights of servitude disposed to them, and had possessed in consequence thereof, must have as much of the common set apart to them as was sufficient for the pasturage of the numbers of cattle and bestial they had proved to be in use of pasturing upon the common; and the remainder only to be left to the pursuers, and others claiming rights of property.

No 17.

Feuars had rights of servitude of pasturage on a commonty, followed by possession. The rule of division was found to be, not the valued rent, but the number of sheep and bestial in use to be pastured on the commonty; except where the feuars' rights limited them to a less number of sheep.

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' 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^eQueen.* 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.

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 common-ties; 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 compulsory 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.*

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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.