[Process of Archibald Macduff of Ballinloan
" against Sir John Stewart of Grandtully Baronet,
regarding the latter's right to the lands of
Ballachtachan]

July 27. 1768.

MEMORIAL

FOR

ARCHIBALD MACDUFF of Ballinloan,

AGAINST

Sir John Stewart of Grandtully, Baronet,

IN 1628, Sir William Stewart of Grandtully granted a feu-right to John Macduff of Ballinloan, of the town and lands of Ballachlachan, with the uſual clauſes of graſings, ſhealings, muirs, moſſes, parts, pendicles and pertinents, *&c.* as the ſame were occupied and poſſeſſed by the tenants and poſſeſſors thereof.

Theſe lands were originally part of the barony of Strathbran, the tenants and poſſeſſors of that barony having their corn-lands or head-rooms in the lower grounds upon the river-ſide, and without their head-dikes a large commonty of wild uncultivated muiriſh ground, common to that whole barony, inſomuch that there is not a ſingle farm of that barony, whether ſtill remaining with the family of Grandtully, or feued out, that does not poſſeſs this muir in common; and accordingly it ſtands clearly in proof, and will not be denied, that the tenants of Ballachlachan have immemorially poſſeſſed this commonty as their joint property with the other feuers and tenants of the barony of Strathbran, by every act of poſſeſſion that the ſubject was capable of, inſomuch that it is

presumed, that this fact, which was admitted upon the hearing of the cause, will not now be denied.

In the heart of this commonty, and close by the burn of of Riebeg, there is a spot of ground of about twenty-five acres, reputed one of the best grasings in the whole commonty; and it was apparently on this account that this was most commonly used as a shealing-place by those who had right of commonty upon this muir.

In 1725, Sir John Stewart of Grandtully, purposing no doubt to appropriate this part of the commonty to himself, begun some improvements upon it; against which an instrument of protest was taken, and civil interruption thereby used in 1726. But as the respondent was not in condition to engage in a law-suit with so potent an adversary, though he continued constantly to grumble on account of this incroachment, and made frequent complaints thereof to his friend Mr Menzies of Culdares, he was by him dissuaded from engaging in a law-suit, in hopes that some other method might be fallen upon to put a stop to these incroachments: and thus it happened, by offputs and delays, from one time to another, that forty years had near elapsed from the instrument of protest 1726 till the commencement of this process; but as the pursuer happened to be under age for some part of that time, the prescription was thereby staid.

The scope of the action was for declaring the pursuer's right to those parts of the commonty called *Riebeg* and *Blairnabuiag*, or at least a common property therein; which being disputed by Sir John, a condescendence was given in to the Lord Ordinary, on the pursuer's part, and answers made thereto for the defender; upon advising of which, his Lordship allowed a proof before answer; which being reported, a state thereof prepared, and counsel heard thereon, your July 14. 1768. Lordships were, of this date, pleased to pronounce the following interlocutor.

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" The Lords having adviſed the ſtate of the proceſs, teſti-
" monies of the witneſſes adduced, writs produced, and
" heard parties procurators thereon, find, That the defender
" is intitled to continue in the excluſive poſſeſſion of the
" ground called *Riebeg*, as now incloſed and improven;
" and that in caſe any action is brought for dividing
" the ſame, and the grounds adjacent, as a commonty, he
" ſhall be intitled to get the ſaid farm of Riebeg adjudged
" to him as part of his ſhare, computing its value at what it
" may have been worth before any improvement or incloſing;
" reſerving always the queſtion, Whether, upon ſuch divi-
" ſion, the purſuer is intitled to a ſhare, as having a right of
" common property, or only as having a right of ſervitude
" therein? and ordain memorials *hinc inde* to be given in on
" this queſtion," *&c.*

Upon this ſtate of the caſe, as the ſingle point that remains to be determined is, Whether the purſuer, in right of his property lands of Ballachlachan, has a right of common property in the aforeſaid common grounds, or only a ſervitude of paſturage, feuel, feal, and divot? the purſuer propoſes to give your Lordſhips the trouble of very little argument upon it; becauſe, however doubtful it may have been in former times, it ſeems now to be ſettled by a train of deciſions, ſome of them very recent.

That the purſuer, and his predeceſſors, and their tenants, poſſeſſors of the town and lands of Ballachlachan, have immemorially poſſeſſed theſe grounds in common with the tenants and poſſeſſors of the other parts of the barony of Strathbran, is an indiſputed fact, and ſtands clearly in proof by a cloud of witneſſes, contradicted by none; which therefore renders it unneceſſary to reſtate the proof of that fact.

The defender was indeed pleaſed to obſerve, That the only poſſeſſion which the tenants of theſe lands appear to have had in this commonty, were acts merely ſuperficial, ſuch as paſturage, and caſting; that ſuch acts of poſſeſſion are more pro-

perly aſcribeable to rights of ſervitude than of property; which therefore *in dubio* ought rather to be conſtrued the poſſeſſion of a ſervitude, than of a proprietor; more eſpecially conſidering, that there are words in the purſuer's original rights, which are more properly deſcriptive of a ſervitude only, ſuch as ſhealings, grafings, muirs, moſſes, *&c.*

But there is nothing in this peculiar to the caſe in hand. Theſe are words of common ſtyle in all charters, though it frequently happens, that many of the particulars have no exiſtence in the particulars diſponed.

The words, *parts and pertinents*, comprehend every right connected with the ſubject principally diſponed, and may be either a title of acquiring by preſcription rights that did not fall under the original grant, or more properly are explanatory of what was meant to be comprehended under the grant, *viz.* whatever was at the time known to pertain thereto as part and pertinent.

And this laſt is preciſely the caſe in hand: The lands of Ballachlachan were originally parts of the barony of Strathbran; the grounds in queſtion were common to that whole barony, and poſſeſſed as ſuch in common, in the only way and manner it was then capable of being poſſeſſed: The feu-rights granted to the purſuer's predeceſſor, diſpones the town and lands of Ballachlachan, with parts, pendicles, and pertinents, *&c.* "as largely in "all reſpects as the ſame had been bruicked and poſſeſſed be"fore by the tenants and occupiers thereof, and were then poſ"ſeſſed by the tenants therein mentioned."

And as it ſtands in proof, that the tenants of theſe lands have immemorially poſſeſſed this commonty, in the preciſe form and manner with the tenants and poſſeſſors of the other farms of this barony, and as immemorial poſſeſſion proved, muſt preſume *retro* to the very commencement of the right, it is a clear caſe, that theſe lands of Ballachlachan have that ſame right of commonty, or common property, in theſe muirs, as any of the other farms of this barony; and conſequently, that the poſſeſſion

by

by them had, was a poſſeſſion of common property, not of a ſervitude. Whilſt this farm belonged to the defender's predeceſſors, the paſturage on this commonty muſt have been enjoyed as a right of property, becauſe *res ſua nemini ſervit*; and as there is no limitation in the conveyance, the purſuer and his predeceſſors muſt have enjoyed it upon the ſame title as part and pertinent of their lands.

But there is truly no place now for a queſtion of this kind, as it has been repeatedly ſo judged by your Lordſhips, in a variety of caſes within theſe few years, which are all ſo well known to your Lordſhips, that the bare mentioning of their names will be ſufficient. It was ſo judged in the diviſion of Biggar commonty; again in the diviſion of Tranent muir; ſo alſo in the queſtion reſpecting the Mearns muir; and but the other day, in the diviſion of Reddingrig and Whitſiderig muirs, being originally parts of the barony of Abbotſkerſe: ſo that no one point can be better eſtabliſhed than this, if ſuch a train of deciſions can eſtabliſh any point.

It is a circumſtance of no moment, whether the purſuer's property-lands conſiſt of but 30, or of 300 acres; if his property is ſmall, he will be intitled to ſo much a leſſer ſhare of the commonty. The ſmallneſs of his property cannot ſurely be ſuſtained as a ſufficient reaſon for denying him his due proportion in the diviſion of this muir as common property; and therefore he cannot doubt your Lordſhips will ſo find and declare.

In reſpect whereof, &c.

ALEX. LOCKHART.

MEMORIAL

FOR

Sir JOHN STEWART of *Grandtully*, Baronet.

IN the proceſs brought at the inſtance of Archibald M'Duff of Ballinloan againſt Sir John Stewart of Grandtully, libelling upon the purſuer's right to "the lands of Balchlachan, with "houſes, biggings, yards, orchards, tofts, crofts, outſets, graſings, "ſheallings, fiſhings, meadows, common paſturages, muirs, "marſhes, moſſes, liberties, freedoms, eaſements, privileges, "parts, pendicles, and haill pertinents whatſomever, uſed and "wont, pertaining to the ſaid lands of Balchlachan, by all rights, "meiths and marches thereof, as the ſame were firſt occupied "and poſſeſſed by the tenants and poſſeſſors thereof; that, in "conſequence of his right to theſe lands he, his predeceſſors "and authors had poſſeſſed and enjoyed, as part and pertinent "of theſe lands, paſt memory of man, the property of the ſheal-"ling of Riebeg, as alſo another ſhealling called Blairnabuiag, "with the whole grazings and paſturages and others belonging "to theſe two ſheallings, until ſeveral years ago, that the defender, "his predeceſſors or authors, violently encroached upon the pur-"ſuers's property, by entering into the poſſeſſion of theſe two "ſheallings and grazings belonging thereto; which poſſeſ-"ſion the defender ſtill continued in; and concluding that "it ought to be declared, that the property of theſe two ſheal-"lings, with the whole grazings and others belonging thereto,

" pertained and belonged to the purſuer, as part and pertinent " of the ſaid lands of Balchlachan :" Which concluſion, in the courſe of the proceſs, the purſuer afterwards reſtricted to that of having only a right of common property in theſe ſheallings. The Court of Seſſion, after a proof had been led, and a ſtate prepared, upon adviſing that ſtate, on the 14th July current, pronounced the following interlocutor : " The Lords having adviſed the ſtate " of the proceſs, teſtimonies of the witneſſes adduced, writs pro- " duced, and heard parties procurators thereon, find, that the " defender is entitled to continue in the excluſive poſſeſſion of the " ground called Riebeg as now incloſed and improven ; and " that in caſe any action is brought for dividing the ſame and the " grounds adjacent as a commonty, he ſhall be entitled to get " the ſaid farm of Riebeg adjudged to him as a part of his ſhare, " computing its value at what it may have been worth before a- " ny improvement or incloſing, reſerving always the queſtion, " Whether, upon ſuch diviſion, the purſuer is entitled to a ſhare " as having a right of common property, or only as having a right " of ſervitude therein? and ordain memorials *hinc inde* to be given " in, in this queſtion, againſt the 21ſt July current ; with certifi- " cation, that, if the memorials are not then put into the Lords " boxes, they will not be received thereafter, but on payment of " an amand of forty ſhillings Sterl." By an after interlocutor, the Court allowed theſe memorials to be given in on or before the 28th current.

In obedience to this appointment, what follows is humbly ſub- mitted to the Court on the part of Sir John Stewart the defender.

The Lords will then pleaſe remember, that the purſuer's right to the ſubjects in queſtion ſtand thus : That, upon the 11th of April 1628, John M'Duff of Ballinloan, the purſuer's predeceſſor, acquired right by feu-contract from Sir William Stewart of Grandtully, the predeceſſor of the defender, " to all and haill " the town and lands of Balchlachan, with houſes, biggings, " yards, houſes, tofts, crofts, annexis, outſets, cottages, connex- " is, grazings, ſheallings, fiſhings, meadows, paſturages, muirs, " mires, moſſes, common paſture, commonty, parts, pendicles, " and pertinents whatſomever, pertaining, or that juſtly may ap- " pertain thereto, by all right meiths, and marches thereof,

" uſed

" uſed and wont, and als largely in all reſpects, as the ſamen-
" has been bruiked and joyed of before by the tenants and oc-
" cupiers thereof; and is now preſently occupied and poſſeſſed
" by Thomas M'Duff, James Black, David M'Gilchriſt, and
" John Moir M'Farlane, and their cottars, pertaining to the
" ſaid Sir William by right heretable, lying betwixt the town
" and lands of Bellinliek on the eaſt, and the town and lands
" of Carſtormie on the weſt, within the barony of Strathbran,
" and ſheriffdom of Perth, to be holden of the ſaid Sir William,
" his heirs, aſſignees, and ſucceſſors foreſaids, in feu-farm and
" heritage for ever." That by virtue of a precept of *clare conſtat*, dated the 5th day of May 1732 years, granted by Sir George Stewart of Grandtully, the uncle and predeceſſor of the defender, the purſuer ſtands infeft upon the 22d day of May 1732, in " all and haill the town and lands of Balchlachan,
" with houſes, biggings, yards, orchards, tofts, crofts, outſets,
" grazings, ſheallings, fiſhings, meadows, common paſturage,
" muirs, mariſhes, moſſes, liberties, freedoms, eaſements, privi-
" leges, parts, pendicles, and haill pertinents whatſoever, uſed
" and wont, pertaining to the ſaid lands of Balchlachan, be all
" rights, meiths, and marches thereof, as the ſame was firſt oc-
" cupied and poſſeſſed by the tenants and poſſeſſors thereof." And that upon a ſpecial retour, dated the 9th of September 1765, the defender, as heir of entail to Sir George Stewart of Grandtully his uncle, ſtands infeft, amongſt other lands, in the barony of Strathbran, comprehending the ſeveral lands therein mentioned, particularly thoſe of Balchlachan.

The Lords will likeways pleaſe know, that theſe lands of Balchlachan, independent of any grazings upon the hills of Strathbran, that may have been uſed by the poſſeſſors thereof, are not in extent above 30 acres of ground; and that theſe hills of Strathbran, a part of the barony of that name, all originally belonging to the defender's predeceſſors, whereof the property ſtill belongs to him, except in ſo far as ſome ſmall parts of that barony have been fued, and hold of him as ſuperior; which hills of Strathbran have never been incloſed by the defender or his predeceſſors, nor ſet to any particular tenants, excluſive of others, but have been poſſeſſed in different places by the tenants

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of the barony, according to the contiguity of thoſe places to the farms ſet to theſe tenants, extend, it is believed, at leaſt, to 6000 acres.

That it is an admitted fact, that this ſhealling of Riebeg, which is the only ſubject of the preſent queſtion, has been poſſeſſed by the defender and his predeceſſors, as their excluſive property, at leaſt from the year 1726, that the ſame was incloſed by the late Sir George Stewart of Grandtully, without any other interruption on the part of the purſuer, than that upon the 11th of July 1726, he took a proteſt againſt John M'Duff, then poſſeſſor of the ground where that ſhealling formerly had been, againſt his proceeding to build houſes thereon, or labouring any part of the ground lying near it, till the commencement of the preſent proceſs, at which time the years of preſcription were run, which was only interrupted by a proof of the purſuer's minority, during a very ſhort ſpace of that period.

That it does not appear from the proof that has been adduced in this cauſe, that the purſuer ever attained to any other poſſeſſion of this ſhealling, and the grounds adjacent, than to a promiſcuous paſturing thereon, and by having a ſhealling there for ſome years before the time that it was incloſed by Sir George Stewart, the defender's predeceſſor: Whereas it is proved on the part of the defender, that before the time the tenants of Balchlachan, belonging to the purſuer, poſſeſſed this ſhealling of Riebeg, his predeceſſors tenants had ſhealings there; and that the proprietor of Balchlachan, his ever having ſhealings there, was owing to the farms of Tulloch and Carſtormie, belonging to the defender, to which that ſhealling properly belonged, being incloſed, by which means they had no further uſe for the ſame.

That the tenants of Tulloch and Carſtormie, belonging to the defender, poſſeſſed this ſhealling of Riebeg, before the tenants of Balchlachan, belonging to the purſuer did ſo, is plainly proved. John Steil, aged 100 years and upwards, page 19th of the printed State, Depones, "That he was born in Meikle Logy, in the "neighbourhood of the ſhealings in diſpute, where he lived "till he was about 8 years of age, when he went to ſome little "diſtance to herd, and continued to herd during the ſummer "ſeaſon for ſeveral years thereafter, ſometimes to tenants in the

"neighbourhood

" neighbourhood of ſaid ſhealling, and ſometimes to others at a " diſtance therefrom. That during this period, he had occaſion " to ſee the tenants of Tulloch, belonging to the eſtate of Grand- " tully, *viz.* James Maniter, Robert Fleming, and Alexander " Duff, and likewiſe Thomas Fleming, Alexander Dow, and " John Machemiſh, tenants in Carſtormie; alſo a part of the " eſtate of Grandtully, their beſtial paſturing upon the ſhealling " of Riebeg, and that the tenants of the ſaid towns had ſheal- " bothies built thereon; thoſe of Carſtormie being built on " the eaſt, and thoſe of Tulloch on the weſt ſide of the burn " of Riebeg. That about 77 or 78 years ago, ſo far as he re- " members, the ſaid two towns of Tulloch and Carſtormie " were incloſed, and they have ever ſince been called the park " of Strathbran; that after the ſaid incloſure was made, there " was no perſon that built ſheal-bothies upon the foreſaid Rie- " beg for ſeveral years: That the firſt he obſerved to do ſo, was " the tenants of Meikle Trochry, *which is a part of the eſtate of* " *Grandtully*, who built bothies thereon, and ſhealled thereon, " during two or three weeks in ſummer, for the ſpace of five " or ſix years. That during the poſſeſſion of the Trochry-po- " ple, as aforeſaid of the ſaid ſhealling, there was no other per- " ſon that ſhealled there, ſo far as he knows."

ALEXANDER MACFARLANE, aged 80, page 21 of the State. Depones, " That he was married about 48 years ago; that be- " fore, and moſtly ſince that period, he has reſided in Meikle " Trochry: That ſome years before his marriage, the tenants " of ſaid Meikle Trochry, ſhealled four years, as he thinks, upon " the grounds of Riebeg: That during the four years the Troch- " ry people ſhealled at Riebeg, there were no other perſons that " ſhealled there, ſo far as he knows."

WALTER STEWART, aged 79, page 22. Depones, " That " he was born in the neighbourhood of the ſhealings of Rie- " beg and Blairnabuiag, and has reſided there all his life: That " he remembers the tenants of Meikle Trochry many years ago " ſhealling at Riebeg, which the deponent thinks was about the " year 1712 or 1713 years: That they continued to ſheall there " for three years or thereby: That after the Trochry people " left the ſaid ſhealling of Riebeg, the tenants of Balchlachan " ſhealled there till the year 1725; but that after the Trochry

" people left the ſhealling, as aforeſaid, there was two years that " there was no body ſhealling at Riebeg."

The right of the parties in the preſent queſtion, according to the inveſtitures, and likewiſe their poſſeſſion, ſtanding as above repreſented, Sir John Stewart the defender humbly apprehends, that the purſuer's right upon the ſubject in queſtion can go no farther than that of a ſervitude, for the following reaſons :

1*mo*, That as the words of the original feu-right above recited, do not neceſſarily comprehend in them a right of common property, it is far more natural to preſume that there was no more intended to be granted by Sir William Stewart the proprietor of the barony of Strathbran, to Archibald M'Duff, to whom he feued the lands of Balchlachan in the year 1628, than a right of ſervitude for paſturage upon the hills of Strathbran, ſo far as the tenants of Balchlachan, while theſe lands remained Sir William Stewart's, were in uſe to poſſeſs the ſame. It is, in the memorialiſt's apprehenſion, unnatural to think, that when a feu of ſo ſmall extent as that of 30 acres, in excluſive property, was granted, that, as part and pertinent of that feu, a right of common property was intended to be granted in ſo large a tract of ground as that of the whole hills of Strathbran, which had never been ſet to particular tenants in excluſion of others. It may perhaps be contended for the purſuer, that the word *commonty* being mentioned in the feu-contract 1628, implies a right of common property : As to which, the memorialiſt begs leave to obſerve, that theſe words being ſubjoined to the words *common paſture*, cannot be underſtood to enlarge what was comprehended under the former words, which are commonly underſtood only to mean a ſervitude; and beſides, the memorialiſt muſt obſerve, that that word *commonty* is not mentioned in the precept of *clare conſtat* whereupon the purſuer himſelf ſtands infeft, nor, for what appears, in any right ſubſequent to the feu-contract in the year 1628; from whence it falls naturally to be preſumed, that nothing ſpecial was meant to be comprehended under that word *commonty*, more than would have been underſtood if no ſuch thing had been mentioned.

2*do*, It appears to the memorialiſt, that if a right of common property had been intended by his predeceſſor to have been conveyed to the purſuer's predeceſſor in the year 1628, in ſo large

a tract of ground as that of the hills of Strathbran, it would not have been limited to the poſſeſſion of the tenants, as mentioned in that feu-contract. If the feuar was to have a right of common property in the hills of Strathbran, he ſeem to have it in proportion to his excluſive property. The limiting therefore of his right to the poſſeſſion of the tenants before the feu was granted, ſeems plainly to denote a right of ſervitude according to that poſſeſſion, and not a right of common property.

3*tio*, If there were otherways difficulty in this matter, the memorialiſt apprehends, that, from the poſſeſſion had by the ſeveral parties, there ariſes ſufficient evidence that the property of this ſheal of Riebeg now belongs to him, and that the purſuer has only a right of ſervitude thereon. The memorialiſt might admit, that, upon the ſuppoſal a right of common property was, by the feu-contract 1628, expreſsly granted to the purſuer's predeceſſor in this ſhealling of Riebeg, his poſſeſſion ſince that time would be aſcribed to that right of common property: But what he humbly contends, is, that the poſſeſſion of the ſeveral parties ſufficiently ſhows, that the right of the purſuer and his predeceſſors, was only a right of ſervitude, and that of the defender and his predeceſſors a right of property. Since the year 1726, that the defender and his predeceſſors have been in poſſeſſion of this ſubject as their excluſive property, is admitted. That before that time, the purſuer's predeceſſors may, for a few years, have had a precarious or promiſcuous paſturage, the memorialiſt has no occaſion to deny: But this he begs leave the Court would advert to, that his predeceſſors tenants having poſſeſſed ſhealings upon the ſubject now in diſpute, which is an act of poſſeſſion, which rather looks like a property than a ſervitude, is much ſtronger upon his part than that of the purſuers; as by the proof it appears, that the tenants of the defender's predeceſſors had ſhealings there before the tenants of Balchlachan had any, and that theſe tenants of Balchlachan only took poſſeſſion of theſe ſhealings when the defender's tenants had no farther uſe for them.

The memorialiſt is aware that the Court has, in ſome caſes, found parties intitled to a right of common property, where they had no right *per expreſſum* to the ſubject under diviſion, but only a general right to their lands, with parts and pertinents; particularly

particularly in the caſe of Biggar in 1739, and in the later caſe of Sir Robert Pollock againſt the feuars of Merns-muir.

But theſe caſes were extremely different from the preſent: For, in the *firſt* place, it was there admitted, that the muir in queſtion was the common muir of a barony, poſſeſſed as ſuch by all the tenants and others in the barony; and that both parties were originally *in pari caſu*, their property-lands having been anciently parts of that ſame barony, and, as ſuch, intitled to their proportion of the common muir. *2dly*, Both parties in theſe caſes proved, that they had been in the immemorial uſe of exerciſing all acts of common property in the muir, not only paſturage of cattle, but digging peats, caſting feal, divot, cutting bent, *&c.* ſo that there was no ground for limiting the right of one party more than of the other to a ſervitude.

The preſent caſe is different in every circumſtance. The hills in queſtion are a part of the barony of Strathbran, belonging in property to the defender; and any right which the purſuer can pretend to in theſe hills, muſt be founded on the general clauſe of his feu-charter flowing from the defender, giving him a right to parts, pendicles, common paſturage, *&c.* as occupied and poſſeſſed by the tenants, according to uſe and wont. Theſe general words can convey no broader right from the defender to the purſuer, than the purſuer can ſhow he was either poſſeſſed of at the date of the feu-right, or has ſince been poſſeſſed of. The whole was the original property of Sir John Stewart's predeceſſors, and muſt at this day be his property, unleſs in ſo far as the purſuer can ſhow he has been denuded. The general words of the feu-charter are pliable in their nature, and muſt be explained by poſſeſſion. By this criterion it muſt be judged, whether the purſuer's right is more or leſs extenſive; and therefore it is incumbent on the purſuer to ſatisfy the Court from the proof, that his right amounts to a common property.

It is laid down in our law-books, and has been always underſtood, that where a party has only exerciſed a right of paſturage, this amounts to nothing more than a ſervitude, and does not make him a common proprietor. Where acts of poſſeſſion are, in their own nature, ſuch as may either be aſcribed to a right of property, or to a ſervitude, the principle of law is, That *levior obligatio ſemper præſumitur*: and this principle applies directly to the

the preſent caſe, where the tendency of the purſuer's claim is to evict a part of the defender's property, for no other reaſon but becauſe he has been in uſe, for ſome months in the ſummer, to paſture his cattle upon the barren hills, or rather upon a particular ſpot of theſe hills. The putting up little hutts for a ſhelter to his herds or ſervants, makes no difference, as it is laid down in the civil law, and perhaps is agreeable to our own law, that the putting up ſuch hutts is conſiſtent with a ſervitude of paſturage.

Several caſes are to be found among the deciſions, where the general clauſe of parts and pendicles, *&c.* has, from the poſſeſſion, been conſtructed to carry only a ſervitude of paſturage; particularly in the caſe of Borthwick, 16th February 1668, obſerved by Lord Stair; and the ſame appears in effect to have been determined in the caſe, Haining againſt the Earl of Selkirk, 15th February that year: And where the words *common paſturage* are added to parts and pertinents, it is expreſſive of a ſervitude, as was found in the above-cited caſe of Biggar, *Dictionary, vol.* I. *p.* 147. that a clauſe with parts and pertinents, *and common paſturage uſed and wont*, did import only a right of ſervitude. In the late caſe too of the feuars of Merns-muir, ſundry of the parties concerned were found to have only rights of paſturage, particularly Lord Eglinton's tenants of Eagleſham, the feuars of Floak and Cairn, and the proprietor of two farms called *Bannerbank* and *Langtown*; becauſe they had never exerciſed any other right than that of paſturing a certain number of ſoums on the muir.

For the whole of theſe reaſons, it is hoped the Lords will be clearly of opinion that the purſuer has inſtructed no right of common property in theſe hills.

In reſpect whereof, &c.

DAVID GRAHAME.

Late Arch.d McDuff
of
Sir John Stewart

39.

STATE of the PROCESS,

ARCHIBALD MACDUFF of Ballinloan,

A G A I N S T

Sir JOHN STEWART of Grandtully, Baronet.

THE ſaid Archibald Macduff brought a proceſs of declarator, at his inſtance, againſt the ſaid Sir John Stewart; libelling, That the ſaid purſuer ſtands heritably infeft and ſeiſed in all and haill the lands and others after mentioned, in virtue of a precept of *Clare conſtat* from the deceaſed Sir George Stewart of Grandtully, Baronet, dated the 5th day of May 1732 years, and inſtrument of ſeiſin following thereon, dated the 22d day of May, and regiſtrate in the particular regiſter of ſeiſins the 8th of June 1732 years: *viz.* All and haill the lands of Ballaclachan, with houſes, biggings, yards, orchards, tofts, crofts, outſets, graſings, ſhealings, fiſhings, meadows, common paſturages, muirs, marſhes, moſſes, liberties, freedoms, eaſements, privileges, parts, pendicles, and haill pertinents whatſomever, uſed and wont, pertaining to the ſaid lands of Ballaclachan, be all rights, meiths, and marches thereof, as the ſame was firſt occupied and poſſeſſed by the tenants and poſſeſſors thereof: And in conſequence of his ſaid infeftment, and the other rights and infeftments of the ſaid lands of Ballaclachan, the ſaid purſuer, and his predeceſſors and authors, have poſſeſſed and enjoyed, as part and pertinent of the ſaid lands, paſt memory of man, the property of the ſhealing of Riebeg, or at leaſt the ground on which the

ſame

A ſame is built, lying on the eaſt ſide of the burn of Riebeg; as alſo another ſhealing called *Blairnabuiag*, both lying in the hills betwixt the ſaid lands of Ballaclachan and the other lands adjacent thereto; and the march in the ſaid hill, B betwixt that part of the country of Strathbrane and the biſhoprick of Dunkeld; with the whole graſings and paſturages, and others, belonging to the ſaid two ſhealings, until ſeveral years ago, that Sir John Stewart of Grandtully, the C deceaſed Sir George Stewart his uncle, or others his predeceſſors or authors, did violently incroach upon the ſaid purſuer's property, by entering into the poſſeſſion of the ſaid two ſhealings, and graſings belonging thereto: And the D ſaid Sir John Stewart ſtill continues the ſaid violent poſſeſſion, thinking thereby to exclude the ſaid purſuer from the ſaid ſhealings, and eſtabliſh the property thereof in his own perſon: And concluding, That it ought and ſhould be E found and declared, by decreet of the Lords of Council and Seſſion, that the property of the two ſhealings above mentioned, with the whole graſings, and others, belonging thereto, does pertain and belong to the ſaid F purſuer, as part and pertinent of the ſaid lands of Ballaclachan; and the ſame being ſo found and declared, the ſaid Sir John Stewart ought and ſhould be decerned and ordained, by decreet foreſaid, to make payment to G the ſaid purſuer of the ſum of L. 20 Sterling yearly as the rent of the ſaid ſhealing, from and ſince he and his predeceſſors entered to the poſſeſſion thereof, and in time coming, during the continuance thereof, with the ſum of L. 100 Ster- H ling in name of damages, and as the expences of proceſs.

There is produced for the purſuer the precept of *Clare conſtat*, and inſtrument of ſeiſin, both before mentioned, libelled upon, of the reſpective dates and contents before ſpecified; I *Item*, Inſtrument of interruption, Archibald Macduff of Ballinloan, againſt John Macduff, dated the 11th day of July

1726

1726 years, and regiſtrate in the regiſter of interruptions, at A
Edinburgh, the 27th day of the ſamen month.

At a calling of this action upon the 15th of January 1767, in preſence of the Lord Pitfour Ordinary, his Lordſhip made aviſandum to himſelf with this proceſs, parties being under B communing. Thereafter there was given in for the ſaid Archibald Macduff, purſuer, the following condeſcendence; bearing, That by contract of feu, dated the 11th of April 1628, entered into betwixt Sir William Stewart, then of C Grandtully, with conſent therein mentioned, on the one part, and John Macduff, then of Ballinloan, on the other part, the ſaid Sir William Stewart became bound, duly, validly, and ſufficiently, to infeft and ſeiſe the ſaid John Macduff, his heirs D and aſſignees, in the lands and others after mentioned; and for that purpoſe, to grant charters of feu, containing precepts of ſeiſin for infefting them, *viz.* All and haill the town and lands of Ballaclachan, with houſes, biggings, yards, tofts, E crofts, outſets, cottages, annexes, connexes, graſings, ſhealings, fiſhings, meadows, paſturages, muirs, mires, moſſes, common paſture, commonty, parts, pendicles, and pertinents, whatſomever, or that might juſtly appertain there- F to, by all rights, meiths, and marches, thereof, uſed and wont, and as largely in all reſpects as the ſame had been bruiked and poſſeſſed of before by the tenants and occupiers thereof, and were then poſſeſſed by the tenants there- G in mentioned, lying betwixt the town and lands of Ballinloan, on the eaſt, and the town and lands of Carſtormie, on the weſt, lying within the barony of Strathbrane and ſheriffdom of Perth: That the purſuer has now right to theſe lands by H connected titles to the above John Macduff, and ſtands publicly infeft therein in virtue of a precept of *Clare conſtat* granted by the late Sir George Stewart of Grandtully to him, as heir to his father, dated the 5th of May 1732, and his ſeiſin follow- I ing thereon, dated the 22d day of May, and regiſtrate the 8th of June 1732: That in conſequence of the above contract, the purſuer and his predeceſſors enjoyed, as part and pertinent

A pertinent of the ſaid lands of Ballaclachan, the property of the ſhealing of Riebeg, or at leaſt the ground upon which the ſame is built, lying upon the eaſt ſide of the burn of Riebeg, as alſo another ſhealing called *Blairnabuiag*, both lying in
B the hills betwixt the ſaid lands and the other lands adjacent thereto, and the march in the ſaid hills betwixt that part of the country of Strathbrane and the biſhoprick of Dunkeld, with the whole graſings, paſturages, and others, belonging to
C the ſaid two ſhealings, without the ſmalleſt legal interruption, till about the year 1726, that the late Sir George Stewart of Grandtully turned them out of poſſeſſion, and ſet the above ſhealing of Riebeg, (which he turned into a
D farm, by building houſes thereon, and ploughing up the ground), to one John Macduff: That the purſuer at this time interrupted the ſaid John Macduff, as appears from a proteſt of the tenor following. " At the ſhealing called *Riebeg*, be-
E " longing to Ballaclachan, the 11th of July 1726 years, and
" of the reign of his Majeſty King George the 12th year, in
" preſence of me notary-public, and witneſſes after named,
" hereto ſubſcribing, compeared perſonally Archibald Mac-
F " duff of Ballinloan, heritable proprietor of the town and
" lands of Ballinloan, mill thereof, graſings and ſhealings
" thereto belonging, with the pertinents; and with him Ro-
" bert Macduff merchant in Dunkeld, one of his curators;
G " and paſſed with me and my witneſſes to the ſhealing of
" Riebeg; and there ſeeing a little houſe poſſeſſed by John
" Macduff, and another houſe building there; and having
" inquired at his ſpouſe, he being abſent, by whoſe order
H " the houſe was poſſeſſed? or if any tack was given to them
" in writing, or written orders? ſhe replied, That by Sir
" George Stewart of Grandtully his orders it was poſſeſſed;
" but refuſed to ſhow it, if ſhe or her huſband had any: And
I " the ſaid Archibald Macduff finding the tenants of Balla-
" clachan moleſted by the ſaid poſſeſſion, and their goods
" daily hounded and driven off their uſual going and paſture;

" declaring,

" declaring, That, paſt memory of man, there never was a- A
" ny ſtop or interruption made againſt his tenants for poſ-
" ſeſſing the ſaid ſhealings and graſings, by the ſaid Sir
" George Stewart, his authors or predeceſſors, or their order;
" and thereupon the ſaid Archibald made legal interrup- B
" tion, by throwing down a part of the little houſe;
" and alſo made interruption againſt building the o-
" ther houſe there, as having good and undoubted right
" to that ſhealing; and proteſted againſt the ſaid John C
" Macduff his building up any more of the houſe, or
" poſſeſſing the other, or labouring any part of the ground
" lying near it; and thereupon aſked and took inſtru-
" ments in my hands: And further proteſted, That John D
" Macduff might be liable for all coſt, ſkaith, and damages,
" that the ſaid Archibald or his tenants might be at, or
" incur, through want of the ſaid ſhealing, and graſing there-
" of, and for remeid of law. Theſe things were done and E
" acted at the ſaid ſhealing of Riebeg, between the hours of
" one and two afternoon, or thereby, day, month, year, and
" his Majeſty's reign foreſaid, in preſence of James Stew-
" art in Logiealachie, John Macduff, ſon to William Mac- F
" duff in Ballaclachan, and Charles Small, ſon to me George
" Small notary-public in Dull, and hereto ſubſcribing, wit-
" neſſes to the premiſſes ſpecially called and required." The
family of Grandtully having thus got poſſeſſion of this ſheal- G
ing, by means which, though too common in that part of
the country, are not altogether juſtifiable, the purſuer from
time to time remonſtrated, and demanded back his poſſeſſion;
which can be proved by Mr Archibald Stuart, then doer for H
the family, and Mr Menzies of Culdares, and others. He
was indeed unwilling to enter into a law-ſuit with ſuch pow-
erful adverſaries, the ſuperiors of his whole eſtate; he was
therefore perhaps too eaſily put off with fair promiſes and I
flattering expectations of getting redreſs. He has however
brought the preſent action within the years of preſcription,

as it will not be denied, that he was for many years minor during the period which intervened betwixt the 11th of July 1726, the date of the proteſt, and the raiſing of this action in October 1766. He has indeed ſuffered one very great loſs by this ſo long delay, which is, That the proof of his predeceſſors poſſeſſion of this ſhealing, antecedent to the ſaid year 1726, muſt now be difficult; and as his narrow fortune is but ill able to ſupport the expence of a law-ſuit, he has been at ſome pains to be informed of the facts which, in the courſe of this proceſs, he undertakes to prove; and ſhall endeavour to be as pointed as poſſible in ſtating of them, that the Lord Ordinary may thereby be the better enabled to judge of their relevancy. And in order to this the Lord Ordinary will be informed, that there are now in life one perſon of one hundred years old, another of ninety-ſeven, a third of eighty-two, a fourth of eighty, three of ſeventy, and ſeveral of ſixty and upwards, who had particular acceſs to know the ſhealings of Blairnabuiag and Riebeg. With regard to Blairnabuiag, ſo far as the purſuer's information goes, it ſeems to have been once the property of the purſuer's predeceſſors, though at ſtarts, and precariouſly, it may have been poſſeſſed as a commonty between the tenants of Ballachlachan and Trochry; and ſome of the witneſſes heard from people more aged than themſelves, that the cattle of Ballaclachan were in uſe to paſture, and the cows thereof to be milked there; though it may be true, that ſaid tenants of Ballaclachan have, for ſome years paſt, only poſſeſſed a part of the ſaid ſhealing of Blairnabuiag, *viz.* that part which is next to their own dikes, and upon which very ancient huts belonging to them are raiſed. But the purſuer is leſs anxious about this ſhealing of Blairnabuiag than that of Riebeg, as indeed, now that the ſhealing is turned into a farm, he is thereby almoſt ſhut out from his other graſings in the hills; and the poſſeſſors of that farm are conſtantly hounding his cattle off their paſture, to his great annoyance. He ſhall, therefore,

ſtate

ſtate the facts with regard to it. And here he muſt beg A
leave to inform the Lord Ordinary, that all of theſe aged
perſons, except the firſt, whom he has not yet inquired at
concerning it, concur in ſaying, not only from their own
proper knowledge, but from the information of others, aged B
ſixty or ſeventy, whom they had occaſion to be informed by
in their youth, their ſhealing was poſſeſſed by the purſuer's
predeceſſors, and their tenants. And although it may be
true, that about fifty-ſeven years ago, when the proprietor C
of Grandtully ſold the ſhealing of Meikle Trochry to Logie-
almond, the tenants of the ſaid farm did paſture their cattle
upon the ſhealing of Riebeg during two or three weeks, and
only for two ſeveral years; yet this poſſeſſion was confined D
to that part of the ſhealing of Riebeg which lies on the weſt
ſide of the burn of Riebeg: whereas the purſuer's tenants
were in full and free poſſeſſion of what lay on the eaſt ſide.
So that it is clear, that ſuch precarious and different poſſeſ- E
ſion could operate nothing. But ſuppoſing the poſſeſſion
ſhould come out, on proof, to have been promiſcuous, the
purſuer humbly ſubmits to the Lord Ordinary, if he muſt
not be ſtill found to have a right of common paſturage up- F
on ſaid ſhealing of Riebeg; and that it cannot be converted
to a farm, in regard the defender has no right thereto by
charter, and has acquired none by preſcription; and ſo is,
at leaſt, in that reſpect, in no better caſe than the purſuer, G
who, though this ſhealing is not mentioned in his rights,
has likewiſe poſſeſſed the ſame. Nay, his right muſt ap-
pear better to the Lord Ordinary than that of Sir John
Stewart: for there are many ſhealings to which the clauſes H
in Sir John's charter may apply; but there are none to
which the article of ſhealings in the rights of the purſuer's
predeceſſors can apply, except to thoſe of Blairnabuiag and
Riebeg; the latter of which, eſpecially, lies moſt convenient I
for him, and is, as it were, a pendicle of his farm. He
therefore humbly hopes, that if the fact of excluſive poſſeſ-

ſion

A sion previous to the 1726 be admitted, the Lord Ordinary will find the same relevant to infer property; and if promiscuous possession shall be allowed, that the same will infer common pasturage. He trusts much to the candour of the B gentlemen employed for the defender; and he is persuaded, that, if not much misinformed, they will admit the first: but should they yield the second, to avoid further expence and trouble, he will put up with it; and either betake himself to C the common pasturage upon this farm, or will accept of the just and equal half thereof. But if the defender will admit neither of the facts, and the Lord Ordinary should judge them relevant to infer the respective conclusions, the pursuer, though D extremely unwilling to put himself or the defender to further expence or trouble, must, with great reluctance, be obliged to have recourse to a proof before answer as to both. And to which condescendence there was given in for the said E Sir John Stewart of Grandtully, defender, the following answers, SETTING FORTH, That the question presently depending betwixt Mr Macduff of Ballinloan and Sir John Stewart of Grandtully, being, How far the former has a F right of exclusive property, at least of common property, along with the defender, in two shealings lying in the hill of Strathbrane, *Riebeg* and *Blairnabuiag*. In answer to the condescendence given in for the pursuer in this process, it is humG bly insisted on for the defender, That as there appears no relevancy in the facts condescended on, no proof thereof ought to be allowed; which it is hoped will appear to the Lord Ordinary, when it is attended to, That it is admitted that these H shealings were originally a part of the barony of Strathbrane, which whole barony formerly belonged to the defender's predecessors: That the pursuer only claims right to these shealings, in virtue of a feu-contract, dated the 11th of April I 1628, whereby Sir William Stewart then of Grandtully, became bound to grant a feu-charter in favour of John Macduff of Ballinloan, of the town and lands of Ballaclachan, with

with houſes, biggings, yards, tofts, crofts, outſets, cottages, A
annexes, connexes, graſings, ſhealings, fiſhings, meadows,
paſturages, muirs, mires, moſſes, common paſture, commonty, parts, pendicles, and pertinents whatſomever, or that juſtly might appertain thereto, by all rights, meiths, and marches B
thereof, uſed and wont, and as largely in all reſpects as the
ſame had been bruiked and poſſeſſed of before by the tenants
and occupiers thereof, and were then poſſeſſed by the tenants
therein mentioned: That ſome time preceding the year 1726, C
full forty years before the commencement of the preſent action, theſe ſhealings were incloſed by the defender's predeceſſor Sir George Stewart; ſince which time they have been
conſtantly poſſeſſed as the excluſive property of him and his D
ſucceſſors: That though the purſuer alledges, that the poſitive preſcription ſtands interrupted by his own minority; yet
he does not undertake to prove, either that theſe ſhealings were
at the date of the contract 1628 poſſeſſed by the tenants therein E
mentioned as ſhealings wherein they had intereſt, or that they
were poſſeſſed for forty years by him and his predeceſſors anterior to the incloſing thereof by the late Sir George Stewart; without a proof of the one or other of which particulars, in the F
defender's apprehenſion, the purſuer's plea is quite untenible:
He does indeed ſay in his condeſcendence, that there are ſome
very old witneſſes, particularly one perſon of a hundred years
old, and another of ninety-ſeven, whom he propoſes to ad- G
duce in this cauſe; but he does not undertake to prove by the
teſtimonies of theſe witneſſes, that he and his predeceſſors enjoyed the peaceable poſſeſſion of theſe ſhealings for forty years
antecedent to the incloſing thereof by the defender's prede- H
ceſſors; which proof ſeems to be abſolutely neceſſary before
any benefit from that poſſeſſion can ariſe to him: That where
poſſeſſion is proved as far as the oldeſt witneſſes in life can
remember, there may in ſome caſes ariſe a preſumption of the I
poſſeſſion having been the ſame further back; but it is humbly thought that this will not apply to the preſent caſe, where

A the purſuer muſt impute it to himſelf, that he has allowed the defender's predeceſſors to continue ſo long in the ſole and uninterrupted poſſeſſion of theſe ſhealings, without laying any claim thereto; and that the rather, that it appears from the in-
B ſtrument of proteſt condeſcended on for him, that he pretended ſome right to one of theſe ſhealings as far back as the year 1726; ſince that time his making no attempt to vindicate ſuch right ſeems to be a demonſtration, that he was ſa-
C tisfied his pretence thereto was groundleſs. And the Lord Ordinary will pleaſe attend to what will be the neceſſary conſequence, if in this caſe a proof of any ſlighter poſſeſſion than that of forty years together, antecedent to the incloſing of
D theſe grounds by the defender's predeceſſor, ſhould be available to create a right in the purſuer: it will thence follow, that the purſuer, who, if he had inſiſted in the preſent action before the year 1726, behoved to have proved forty years poſ-
E ſeſſion before he could prevail therein, then diſcovering that he could not make out ſuch a proof at that time, when there was a number of witneſſes living, with whoſe knowledge the poſſeſſion of theſe years conſiſted, by letting the matter lie over
F for about forty years, renders it greatly more eaſy, by only proving twenty years, or perhaps a ſhorter poſſeſſion, and arguing from thence, that the ſame muſt be preſumed *retro*: That, upon theſe conſiderations, the defender hopes the
G Lord Ordinary will be of opinion, that no proof ought to be allowed to the purſuer in the preſent caſe, unleſs, either as above taken notice of, he ſhall undertake to prove, that the ſhealings he now pretends right to, were, at the time of the
H feu-contract 1628, poſſeſſed by the tenants named therein as the proper ſhealings of their farms, or that he and his predeceſſors had poſſeſſed the ſame, without interruption, for the ſpace of forty years antecedent to their being incloſed by Sir
I George Stewart. At the ſame time, if the Lord Ordinary ſhall be of opinion, that there is ſuch an appearance of relevancy in the facts condeſcended on for the purſuer, as that

a proof thereof, before anſwer, ought to be allowed, it will likewiſe be incumbent upon him to prove his own minority, in order to interrupt the poſitive preſcription, as the defender knows nothing of that fact: and in that caſe, the defender likewiſe inſiſts on his predeceſſors having conſtantly, and without interruption, poſſeſſed theſe grounds now pretended to by the purſuer, as their property, without any interruption on the part of the purſuer: That the ſhealing of Riebeg was of old underſtood to be the proper ſhealing of a farm incloſed by one of the defender's predeceſſors, to the ſouth of Riebeg, about eighty years ago, and poſſeſſed as ſuch by the tenants of that farm; and even the purſuer himſelf admits, in his condeſcendence, that the tenants of Meikle Trochry, a town belonging to the defender, did ſheal at Riebeg for two years together; and that only about fifty-ſeven years ago: How then is it poſſible for him to prove an uninterrupted poſſeſſion of that ſhealing for forty years prior to the 1726? It is thought, that it will not be denied by the purſuer himſelf, that it is the univerſal cuſtom of that country, that ſmall towns, ſuch as that of Ballaclachan, ſhould have but one ſhealing; and this it poſſeſſes at preſent, and has been in poſſeſſion of it for theſe forty years paſt, and more; and this ſhealing lies in that part of the hill called *Blairnabuiag*. The defender will only beg leave to obſerve one thing as to Blairnabuiag, in order that the Lord Ordinary may underſtand it: *Blairnabuiag* ſignifies, in Engliſh, *the field of the daiſies;* and a very large part of the hill of Strathbrane goes under that name. The ſhealing poſſeſſed at preſent by the town of Ballaclachan is called *Blairnabuiag;* becauſe it lies in that part of the hill which goes under that name. The farm belonging to the defender, now claimed by the purſuer, lies alſo in that part of the hill called *Blairnabuiag*, and is itſelf called *Blairnabuiag*. The defender might now proceed to ſtate many things relative to the purſuer's claim on this farm of Blairnabuiag, taken

from

from the facts as laid down in his own condeſcendence, which he humbly thinks would be ſufficient to convince the Lord Ordinary of the abſurdity of the claim; but he will trouble the Lord Ordinary with nothing on that head, as the purſuer has not offered to prove one relevant fact as to it, and, in ſome meaſure, has paſſed from his claim upon it.

The Lord Pitfour Ordinary having, upon the 7th day of March 1767 years, conſidered the foregoing condeſcendence given in for the purſuer, and anſwers foreſaid made thereto for the defender, his Lordſhip, before anſwer, allowed the purſuer to prove his libel, and facts ſet forth in his condeſcendence, and all facts and circumſtances relative thereto; allowed the defender to prove the facts ſet forth in his anſwers, and all facts and circumſtances relative thereto; and allowed both parties a conjunct probation upon the whole; and granted commiſſion and diligence.

Whereupon both parties extracted acts and commiſſions, and expede letters of diligence, at their inſtance; and, by virtue thereof, cauſed cite ſeveral perſons as witneſſes, for proving the ſeveral points admitted to their reſpective probation; who accordingly compeared before the commiſſioners, and deponed as follows, *viz.*

PURSUER's PROOF.

Wit. 2. Barbara Binning in Ladywell, widow, aged 78 years, depones, That ſhe came to reſide at Ballaclachan about fifty-ſeven years ago, at leaſt fifty-ſeven years at the 11th of June next, (*i. e.* June 1767): That at this time ſhe had occaſion to ſee the purſuer, when he appeared to be a boy of about three years of age; and the neighbours then told her, that he was three years old the January preceding. And depones, That ſhe has ever ſince been acquainted with the purſuer. *Cauſa ſcientiæ patet, &c.*

John

James Stewart in Tomnagrew, aged 69 years, depones, A Wit. 5.
That he ſaw the purſuer when he was at nurſe, which was about ſixty years ago; and knows that the purſuer is at preſent ſixty years of age, and no more. And depones, That from the time he ſaw the purſuer at nurſe till now, he has B known him; the deponent being a near relation of the purſuer's, and being often about his and his father's family. *Cauſa ſcientiæ patet, &c.*

James Menzies of Culdares, aged 60 years, and upwards, C Wit. 1.
depones, That the purſuer, about the year 1732, or 1733, complained to the deponent of Sir George Stewart of Grandtully having, in his minority, turned his tenants out of ſhealings that had been regularly, and the deponent thinks D the purſuer ſaid yearly, poſſeſſed by him, and his authors, paſt memory of man; and that by ſtrong hand, without taking any legal ſtep to authoriſe him the ſaid Sir George for ſo doing; and that this he had done by putting the ſaid ſhealings into corn-farms, and ſetting them to tenants: and at E this time the purſuer aſked the deponent's advice, as a friend, how to behave, ſo as to be put in poſſeſſion of what he believed to be his undoubted right. Depones, That the purſuer, F after ſeveral times laying open his grievances to the deponent, as opportunities occaſionally offered, inſiſted that he ſhould ſpeak to Sir George Stewart about the matter: That he declined ſpeaking to Sir George thereanent; but G promiſed to converſe with Mr Mackewan, Sir George's factor, upon the ſubject: which he afterwards did; but could get nothing effectual done for the purſuer's intereſt. Depones, That ſome time after the aforeſaid period, and, as H he thinks, about the 1734 years, 1735, or 1736, the purſuer continued to grumble at his ſituation: And he the deponent being at that time obliged to be much at Edinburgh, undertook to adviſe his cauſe there, provided he I would ſend him his papers to Edinburgh: That accordingly

A the purſuer ſent copies of his rights, either to the deponent, or to Mr Leonard Urquhart, his doer, from whom the deponent received them. Depones, That he the deponent, after receiving theſe papers, ſpoke to Mr Archibald Stuart,
B writer to the ſignet, who was then doer for Sir George Stewart, and ſhewed them to him; but nothing further was then done anent the affair: And the deponent at this time adviſed the purſuer to have a little patience till ſome favourable
C opportunity in the ſituation of the family of Grandtully ſhould caſt up, when he might more eaſily obtain redreſs of what he complained. Depones, That ſeveral years ago, but cannot ſay the preciſe number, the purſuer came to the de-
D ponent, and acquainted him, that there was a proceſs about to be commenced betwixt Sir George Stewart and the proprietors of the biſhoprick, relative to their marches or hill-graſs; and that he the purſuer had been aſked by the bi-
E ſhoprick people to join with them. Depones, That the purſuer at this time adviſed with the deponent as a friend, what courſe he ſhould take. Depones, That he adviſed him not to meddle till he ſhould ſee how things would turn
F out; for probably, in the courſe of that proceſs, things might caſt up that would make the purſuer's claim appear in a favourable light, or that might be of advantage to him. Further depones, That the ſhealings Sir George Stewart had ta-
G ken poſſeſſion of, the purſuer informed him, were called *Riebeg* and *Blairnabuiag*. And what he has deponed is truth, *&c.*

Wit. 3. Margaret Macfarlane, ſpouſe to James Macgilchriſt in
H Meikle Funduy, aged 72 years, depones, That her father was tenant in Meikle Trochry: That after the towns of Tullich and Carſtormy were incloſed, and before the preſent town of Riebeg was built, the tenants of ſaid Meikle Troch-
I ry ſhealed their beſtial at Riebeg for two years, and built their ſheal-bothies on the weſt ſide of the burn, (as far as ſhe remembers). Depones, That ſhe was in uſe, during the two years,

years, of going to the ſhealings, to milk her father's cows, A
which paſtured there along with thoſe of the other tenants
of Trochry, as before mentioned. And depones, That ſo far
as ſhe remembers, there was no other perſon beſide the
Trochry people ſhealing at Riebeg during the aforeſaid two B
years. *Cauſa ſcientiæ patet, &c.*

Anne Robertſon in Dilator, widow, aged 82 years or there- Wit. 4. cited for both parties.
by, depones, That when ſhe was about twelve years of age, C
ſhe entered to the ſervice of the purſuer's father as herd, and
continued therein for about three years: That during the
ſaid ſpace, ſhe had occaſion to ſee the tenants of Ballacla-
chan ſheal there with their beſtial yearly, a little be-weſt
Blairnabuiag, and be-weſt the burn of Auld-darg: That du- D
ring the ſaid three years ſpace, ſhe herded the beſtial of a
ſhealing in the neighbourhood belonging to the town of Bal-
linluk, where the purſuer's father then reſided; and that this
ſhealing lay a little ſouthward of the ſaid ſhealing belonging E
to the Ballaclachan tenants. Depones, That it was the prac-
tice for all the beſtial in the neighbourhood, as well thoſe of
Ballaclachan as others, to paſture weſt from their own head-
dikes of Ballaclachan to their aforeſaid ſhealing, lying on the F
weſt of Blairnabuiag, and that promiſcuouſly, without any
interruption. Depones, That that ſpace of ground which
goes under the name of *Blairnabuiag* extends from Loch-
ſkiach, on the north-weſt, ſouth to the burn of Pitroch, and G
on the eaſt, to the hills of the biſhoprick. Depones, That
during the aforeſaid three years, there were no ſhealings built
at Riebeg, at leaſt that there was no perſon that ſhealed
there. And being interrogate for the defender, depones, H
That her father and mother reſided in Tullich, one of the
towns incloſed by the family of Grandtully many years ago:
That ſhe heard her mother ſay, that ſhe has called down the
goats from Riebeg to the Tullich. And further depones, I
That ſhe never heard that Riebeg was the ſhealing of any
particular town in the neighbourhood, either of Carſtormy,

or

A or Tullich, or Ballaclachan; but that the tenants of Ballaclachan paſtured their beſtial thereon, along with thoſe of their neighbours. *Cauſa ſcientiæ patet, &c.*

Wit. 6. Thomas Gow in Little Town of Inchmagrannach, wi-
B dower, aged 70 years or thereby, depones, That ever ſince he was ten years of age, he has known the ſhealing of Riebeg, and was herding in the neighbourhood thereof for many years. And depones, That from that time till the town
C of Riebeg was laboured by John Duff, he knows the tenants of Ballaclachan were in uſe to ſheal at Riebeg yearly, and had their ſheal-bothies upon the eaſt ſide of the burn of Riebeg. Depones, That the ſaid John Duff was
D tenant in Ballaclachan before he entered to the poſſeſſion of Riebeg, which was about forty years ago, as he thinks; and that he and his ſon have continued to poſſeſs the ſame as tenants to the family ever ſince. And further depones,
E That the tenants of Strathbrane paſture their beſtial promiſcuouſly without their head-dikes, from one end of the country to the other; and that they have done ſo ever ſince the deponent was a herd as before mentioned. *Cauſa ſcientiæ*
F *patet.* And this is truth, *&c.*

Wit. 7. cited for both parties. John Murray in Borlick, aged 68 years, depones, That he was born in Meikle Trochry, and lived there till within theſe twenty-four years paſt; and ſince that time has reſided in the.
G neighbourhood thereof, in Borlick, where he now lives. Depones, That when he was about eight years of age, he herded the beſtial of Trochry on the ſhealing of Riebeg; and remembers, that the tenants of that town ſhealed there for four
H or five years about that period; and that their ſheal-bothies were upon the eaſt ſide of the burn of Riebeg. Depones, That during the time the Trochry people ſhealed at Riebeg, as before deponed to, Alexander Macduff tenant in Ballacla-
I chan alſo ſhealed there, and had his ſheal-bothies upon the weſt ſide of the burn of Riebeg; but does not remember whether

ther any more of the tenants of Ballaclachan herded there or not. *Cauſa ſcientiæ patet, &c.* A

Donald Macintoſh ſmith in Deriulich, aged 74 years, depones, That he was born and lived at Ballaclachan till he was about thirty-four years of age, except one ſummer that he herded to the tenants of Trochry: That he remembers the time of the purſuer's birth; and it is now ſixty years bypaſt, in the month of January laſt. And further depones, That he remembers of the tenants of Ballaclachan, when he the deponent was about ſix years of age, having their ſheal-bothies at Riebeg; and that none elſe had bothies there; and that theſe bothies ſtood upon the eaſt of the burn of Riebeg. Depones, That when he was about ten or twelve years of age, the tenants of Meikle Trochry came and ſhealed alſo at Riebeg, where they continued ſhealing for about two years, and afterwards left the ſame: That their ſheal-bothies ſtood upon the weſt ſide of the burn of Riebeg. Depones, That after this the tenants of Ballaclachan continued to ſheal at Riebeg till the deponent left that country; and that his father's beſtial always ſhealed there, he being a tenant in Ballaclachan. And upon the defender's interrogatory, depones, That during the aforeſaid ſpace that the Ballaclachan tenants ſhealed at Riebeg, they had no ſhealing at Blairnabuiag; but that their beſtial paſtured weſtward from Riebeg to Blairnabuiag; and that the reſt of the beſtial in the neighbourhood alſo did the ſame. Depones alſo, That if the cattle had gone over to the hills of Grandtully, or other hills in the neighbourhood, no perſon would have ſtopped them, the paſture above the head-dikes being promiſcuous to the whole tenants in Strathbrane. *Cauſa ſcientiæ patet, &c.* Wit. 8. B C D E F G H

Donald Macduff in Tomnagairn, aged 67 years, depones, That he has reſided in the neighbourhood of Riebeg ever ſince he was nine years of age, except for two years and a half that he was in the low country. Depones, That from that period, till Riebeg was laboured by John Duff, the tenants of Wit. 9. I

A Ballaclachan were always in uſe of ſhealing there, and had their ſheal-bothies upon the eaſt ſide of the burn of Riebeg, within the preſent incloſures and corn-fields of Riebeg. De-
B pones, That he remembers the aforeſaid John Duff began to labour Riebeg in the year 1725. *Cauſa ſcientiæ patet, &c.*

DEFENDER's PROOF.

Wit. 1. C John Steill in Shanks, being called as a witneſs, the purſuer objected to his being received, for the following reaſons: 1*ſt*, Becauſe he is a common beggar, and not worth his Majeſty's unlaw; and, *ſecond*, He is a perſon of bad fame, having been
D ſuſpected of ſeveral theftuous practices; and, particularly, he was ſuſpected and accuſed ſome years ago, when he lived in this country, of ſtealing ſome of his neighbours ſheep, or the chain of a boat, belonging to ſome perſon in his neighbour-
E hood, which obliged him to leave the ſame; and he has never returned to this country ſince to reſide. Anſwered by James Stewart for the defender, That there is nothing in the firſt objection, as in all diſputes concerning marches, particu-
F larly hill-marches, herds, and other poor people of the loweſt condition, are the only perſons who generally have acceſs to know the facts concerning marches. And as to his not being worth the King's unlaw, that is a fact that cannot be aſcer-
G tained until the man's death, as it often happens that great ſums of money have been found in their cuſtody. As to the ſecond objection, it is only ſaid, That he is ſuſpected of theft; it is not ſaid that he was regularly convicted thereof, nor de-
H clared infamous; and the ſuſpicion is entirely without foundation. Further, That in caſes where a proof of facts that have happened at leaſt eighty years ago, it is ſingular to find a man of the age of this witneſs; and that in caſes of penury, wit-
I neſſes have been allowed of, and their depoſitions received when they were in the neareſt relation to the parties. Theſe objections come with a very bad grace from the preſent purſuer,

ſuer, as the long delay has been occaſioned by himſelf; by which means there muſt be a great penury in this caſe; whereas had this proceſs been brought in due time, there could not have been any diſpute, as every perſon in the country muſt have known the true ſtate of the fact. Further, That he poſſeſſed a mailing of ground along with his grandſon: That he has been adduced in many proceſſes concerning marches of late, and no objections ſtarted. To which the purſuer replied, That the objections ſtated by him againſt the witneſs, he apprehends, are ſufficient to caſt him from being received as an evdience in the cauſe; and he craves the commiſſioner will allow him a proof thereof, he having cited witneſſes for proving the ſame. Replied, That no proof can be allowed at preſent: That there is no warrant for taking a proof concerning the characters of any of the witneſſes: That in this caſe it would be extremely hard, as the objections were not known to the purſuer till juſt now: That in all caſes where objections are ſtarted to witneſſes, and a proof taken by commiſſioners, the commiſſioner takes the depoſition of the witneſſes, reſerving the relevancy of theſe objections to the determination of the court from whence the commiſſion was iſſued. The commiſſioner having conſidered the foregoing debate, he refers the ſtrength and effect thereof to the determination of the court; and in the mean time allows the witneſs to be examined. And the ſaid John Steill, aged 100 years and upwards, depones, That he was born in Meikle Logy, in the neighbourhood of the ſhealings in diſpute, where he lived till he was about eight years of age, when he went to ſome little diſtance to herd, and continued to herd during the ſummer-ſeaſon for ſeveral years thereafter, ſometimes to tenants in the neighbourhood of ſaid ſhealings, and ſometimes to others at a diſtance therefrom. Depones, That during this period he had occaſion to ſee the tenants of Tulloch, belonging to the eſtate of Grandtully, *viz.* James Maniter, Robert Fleming, and Alexander Duff, and likewiſe Thomas Fleming, Alexander Dow, and John

A John Machemiſh, tenants in Carſtormy, alſo a part of the eſtate of Grandtully, their beſtial paſturing upon the ſhealing of Riebeg; and that the tenants of the ſaid towns had ſheal-bothies built thereon, thoſe of Carſtormy being built on the B eaſt, and thoſe of Tulloch on the weſt ſide of the burn of Riebeg. Depones, That about ſeventy-ſeven or ſeventy-eight years ago, ſo far as he remembers, the ſaid two towns of Tulloch and Carſtormy were incloſed, and have ever ſince C been called the *Park of Strathbrane*. And further depones, That after the ſaid incloſure was made, there was no perſon that built ſheal-bothies upon the foreſaid Riebeg for ſeveral years: That the firſt he obſerved do ſo was the tenants of D Meikle Trochry, who built bothies thereon, and ſhealed thereon during two or three weeks in ſummer for the ſpace of five or ſix years. Depones, That the ſheal-bothies of Trochry were built upon the eaſt ſide of the burn of Riebeg. And depones, E That during the poſſeſſion of the Trochry people as aforeſaid of the ſaid ſhealing, there was no other perſon that ſhealed there, ſo far as he knows: That the aforeſaid Thomas Fleming built a ſmall ſteading of houſes, and tilled ſome ground F a little north-weſt of Tulloch and Carſtormy, towards the place where the town of Riebeg now ſtands; but he only occupied the ſame for a year, his crop not having ripened, owing to the badneſs of the ſeaſon; whereby he loſt the G ſame, and was thereby reduced to beggary; and no body has ever ſince poſſeſſed it; and that this happened two years after the ſaid park was finiſhed. And further depones, That the tenants of Ballaclachan had a ſhealing a little be-weſt Blair- H nabuiag, and were in uſe of building their ſheal-bothies hard by the burn of Ald-darg as far back as he remembers, and before the aforeſaid parks or towns of Tulloch or Carſtormy were incloſed: That the beſtial belonging to the te- I nants of Ballaclachan likewiſe, as far back as he remembers, were in uſe, at all ſeaſons of the year, of paſturing their beſtial, in common with the beſtial belonging to the tenants

in

in the neighbourhood, on the eſtate of the barony of Strath- A
brane, weſtward from Ballaclachan, without the head-dikes,
towards Riebeg, and from thence weſtward to the aforeſaid
ſhealing, near the burn of Auld-darg, without any interrup-
tion; and they always paſtured in this manner their beſtial, B
except when they were feeding within the head-dikes. And
what he has deponed is truth, *&c.*

Alexander Macfarlane in Meikle Trochry, aged 80 years, Wit. 2.
or thereby, depones, That he was married about forty-eight C
years ago: That before, and moſtly ſince that period, he
has reſided in Meikle Trochry. Depones, That he remem-
bers, that ſome few years before his marriage, the tenants
of ſaid Meikle Trochry ſhealed four years, as he thinks, D
upon the grounds of Riebeg, their bothies being upon the
eaſt ſide of the burn of Riebeg. And being interrogate,
Whether or not he knows who occupied Riebeg before the
tenants of Meikle Trochry took poſſeſſion thereof as afore- E
ſaid? depones, He does not know. Depones, That the rea-
ſon the Meikle Trochry people deſerted that ſhealing was,
becauſe their beſtial did not thrive there, and went in a-
mong their neighbours corns, ſeeking homeward to Trochry F
on the other ſide of the water of Braan. Depones, That du-
ring the four years the Trochry people ſhealed at Riebeg,
there were no other perſons that ſhealed there, ſo far as he
knows; but has heard there was a hut on the weſt ſide of the G
burn; but who poſſeſſed the ſame, knows not; nor did he
ſee ſaid hut, being very ſeldom at ſaid ſhealing. *Cauſa ſcien-
tiæ patet, &c.*

John Scrymgeour in Tombain, married, aged 64, depones, H Wit. 3.
That he lived in the neighbourhood of the ſhealing of Rie-
beg in the year 1716, and for ſeveral years thereafter. De-
pones, That he knows the tenants of Ballaclachan ſhealed
at Riebeg in the ſaid year 1716, and from that time till the I
year 1725; and that their ſheal-bothies ſtood upon the eaſt
ſide of the burn of Riebeg. Further depones, That in the

A year 1725, the grounds of Riebeg were laboured by John Duff, tenant to Sir George Stewart of Grandtully; and that the ſame has been ever ſince poſſeſſed by tenants of the family of Grandtully. And being interrogate, depones, That B during the aforeſaid period that the tenants of Ballaclachan ſhealed at Riebeg, the tenants in the neighbourhood paſtured their beſtial upon the grounds of Riebeg promiſcuouſly with theirs; and the tenants of Ballaclachan's beſtial alſo paſtu- C red promiſcuouſly with thoſe of the neighbours upon their ſhealings. And further depones, That during the above ſpace, betwixt the 1716 and 1725, the tenants of Ballaclachan did not ſheal at Blairnabuiag, on the weſt ſide of the D burn of Auld-darg; neither did any other perſon ſheal there during that period. Depones, That he has heard, that before the tenants of Ballaclachan ſhealed at Riebeg, the tenants of Meikle Trochry had ſhealed there; and that before the te- E nants of Meikle Trochry ſhealed there, he has heard the tenants of Tulloch and Carſtormy had ſhealings there, before the ſaid towns were turned into graſs, and made a graſs-park. Further depones, That, ſo far as he knows, none of F the towns in Strathbrane have but one ſhealing belonging to them, at leaſt more than one place where their huts are built; as they generally reſide at one place during the ſhealing-ſeaſon. *Cauſa ſcientiæ patet, &c.*

Wit. 4. G Walter Stewart in Meikle Tombain, widower, aged 79 years, depones, That he was born in the neighbourhood of the ſhealings of Riebeg and Blairnabuiag, and has reſided there all his life. And depones, That he remembers the te- H nants of Meikle Trochry many years ago ſhealing at Riebeg; which the deponent thinks was about the year 1712 or 1713 years: That they continued to ſheal there for three years, or thereby. Depones, That after the Trochry people left the I ſaid ſhealing of Riebeg, the tenants of Ballaclachan ſhealed there till the year 1725; but that after the Trochry people left the ſhealing as aforeſaid, there was two years that there was

was no body ſhealing at Riebeg. And further depones, A
That during the time the Trochry tenants poſſeſſed the ſaid ſhealing, the people of Ballaclachan, and others in the neighbourhood, paſtured their beſtial promiſcuouſly upon the grounds thereof with theirs; and that when B
the Ballaclachan tenants poſſeſſed it, the beſtial belonging to the tenants in the neighbourhood likewiſe paſtured promiſcuouſly with theirs on ſaid ſhealing; and the Ballaclachan beſtial again paſtured upon their ſhealings. And being fur- C
ther interrogate, depones, That during the moſt of the years that the Ballaclachan tenants poſſeſſed the ſhealings of Riebeg, as aforeſaid, they were in uſe, in the beginning of ſummer, to go weſt to the ſhealing lying be-weſt of Blairna- D
buiag, and on the weſt edge of the burn of Auld-darg, where they ſtaid for ſome time, and thereafter came eaſtward to Riebeg, where they ſhealed till the ſhealing-ſeaſon was over. Depones, That the ſheal-bothies of Riebeg were E
upon the eaſt ſide of the burn of Riebeg, both when the Trochry tenants poſſeſſed it, and when it was poſſeſſed by the tenants of Ballaclachan. Further depones, That he has heard that the ſhealings of Riebeg was poſſeſſed by the F
tenants of Tulloch and Carſtormy, before their poſſeſſions were incloſed; but that he never ſaw them there. Depones, That Riebeg was laboured about forty-three years ago; and that it was ſome time after that Blairnabuiag was built. G
Cauſa ſcientiæ patet. And this is truth, *&c.*

John Black in Meikle Trochry, aged 60 years, depones, Wit. 5.
That he was born in Meikle Trochry; where he has continued all his lifetime: That he remembers, when he was about H
ſix years of age, of the tenants of that town going to ſheal at Riebeg; and that they continued to do ſo for about three or four years. Depones, That he thinks part of their ſheal-bothies, if not the whole, were upon the eaſt ſide of the burn I
of Riebeg, being ſo young that he cannot remember diſtinctly about the matter. And depones, That he heard it from

an

A an old man, one Michael Steel, in Meikle Trochry, who was ſaid to be about ninety-ſix or ninety-ſeven, that Riebeg was the ſhealing of Tulloch and Carſtormy, now incloſed. *Cauſa ſcientiæ patet.* And this is truth, *&c.*

Wit. 6. B John Macleiſh, in Kirktown of Logieallachy, aged 60 years, depones, That he was born at Ballaclachan, in the neighbourhood of Riebeg; and has reſided there, and in that neighbourhood, ever ſince. Depones, That ſo far as he the C deponent can remember, the tenants of Ballaclachan always poſſeſſed the ſhealings of Riebeg; and that part of their bothies were upon the weſt ſide of the burn of Riebeg, but moſt of them were upon the eaſt ſide thereof. Depones, D That he has heard the tenants of Meikle Trochry ſhealed at Riebeg; but does not know if any others ſhealed there at the ſame time. And further depones, That his father told him the deponent, that he his father had heard, that the E ſhealing of Riebeg was formerly poſſeſſed by the tenants of Tulloch and Carſtormy; but that he never heard any body beſides his father ſay ſo: That his father lived all his life in the town of Pitleoch, the next town to Riebeg; and that F long before the towns of Tulloch and Carſtormy were incloſed. Depones, That Riebeg was firſt laboured about forty-one or forty-two years ago; and that it was four or five years after this before Blairnabuiag was incloſed and labour-G ed. *Cauſa ſcientiæ patet.* And this is truth, *&c.*

With all which great aviſandum was made, upon the 17th and 22d days of July 1767.

GEO. BROWN.

Unto the Right Honourable the Lords of Council and Session,

THE

PETITION

OF

Sir JOHN STEWART of Grandtully, Bart.

Humbly Sheweth,

THAT in the proceſs at the inſtance of Archibald M'Duff of Balinloan, againſt your petitioner, concluding to have the property of certain grounds aſcertained to him, which had long ago been incloſed and improved by the petitioner's predeceſſors, your Lordſhips, of this date, pronounced the following interlocutor: July 14. 1768.

"The Lords having adviſed the ſtate of the proceſs, teſtimonies of the witneſſes adduced, writs produced, and heard parties procurators thereon, find, That the defender is intitled to continue in the excluſive poſſeſſion of the ground called *Riebeg*, as now incloſed and improven; and that, in caſe any action is brought for dividing the ſame and the grounds adjacent, as a commonty, he ſhall be intitled to get the ſaid farm of Riebeg adjudged to him as a part of his ſhare, computing its value at what it may have been worth before any improve-

A "ment

" ment or incloſing; reſerving always the queſtion, Whether, " upon ſuch diviſion, the purſuer is intitled to a ſhare as having " a right of common property, or only as having a right of ſer- " vitude therein? And ordain memorials *hinc inde* to be given " in on this queſtion, *&c.*"

Aug. 5. 1768. And, upon adviſing memorials, your Lordſhips, of this date, pronounced the following interlocutor: " Find, That the pur- " ſuer has a right of common property in the *common of Strath-* " *brane*, correſponding to his lands of Ballachlachan; and de- " cern and declare accordingly, ſuperſeding extract till the " fourth ſederunt day of November next."

It was not perhaps attended to by the Court, when the above interlocutor was pronounced, that the barony of Strathbrane is a very extenſive tract of country, conſiſting chiefly of hills and muirs, all of which may in one ſenſe be conſidered as common, the tenants of the low grounds having generally been permitted to drive their cattle upon the hills next adjacent to them, where they could find any paſture, without moleſtation from the proprietor; ſo that the general words of the interlocutor, if not explained, might give a pretence to Mr M'Duff to maintain, that he is intitled to a proportional ſhare, effeiring to his valued rent, of the whole high grounds of Strathbrane, whether near him or at a diſtance, and whether he has had any connection with them or not.

It will be remembered, that Mr M'Duff has two little feus, viz. Balinloan and Ballachlachan. On the firſt of theſe there is a mill with certain aſtricted multures, and by reaſon of this mill and multures, tho' the arable lands belonging to the feu are not above thirty acres, and that of Ballachlachan about as much, his valued rent of Balinloan amounts to no leſs than L. 200 Scots, and Ballachlachan to about L. 30 more, which is above a fifth part of Sir John Stewart's valued rent of the whole barony of Strathbrane, his valuation of ſaid barony being no more than L. 1000 Scots. Your Lordſhips therefore have by your interlocutor given the purſuer a handle to contend, that a fifth part of the whole hills, muirs, and paſturages of Strathbrane muſt belong to him in property upon a diviſion, altho' the arable ground of both his feus is not above 60 acres, as already mentioned; whereas the petitioner's arable lands conſiſt of many

hundreds

hundreds of acres, and are at leaſt thirty times the extent and value of Mr M'Duff's.

What will render this plea the more extraordinary is, that the river of Brane divides one part of the barony from another, and that Mr M'Duff's is juſt as much detached from many of theſe hills and muirs, as if they were in a different kingdom.

And what makes the caſe ſtill harder is, that your Lordſhips, (with great ſubmiſſion) have proceeded to aſcertain this right in his favour without any proof, in a proceſs containing no ſuch concluſion, and where he himſelf demanded no ſuch right.

For theſe reaſons the petitioner hopes he will be excuſed for laying this matter once more before the Court, in order to obtain at leaſt an explanation, if not a total alteration of the interlocutor laſt above recited.

The predeceſſor of the purſuer obtained in 1628 a feu-right from Sir William Stewart of Grandtully the petitioner's predeceſſor, of "all and haill the town and lands of Ballachlachan, "with houſes, biggings, yards, houſes, toſts, croſts, annexis, "outſets, cottages, connexis, graſings, ſheallings, fiſhings, "meadows, paſturages, muirs, mires, moſſes, common pa-"ſture, commonty, parts, pendicles, and pertinents whatſom-"ever, pertaining, or that juſtly may appertain thereto, by all "right meiths and marches thereof, uſed and wont, and as "largely in all reſpects as the ſamen has been bruicked and joy-"ed of before by the tenants and occupiers thereof, and as now "preſently occupied and poſſeſſed by Thomas M'Duff, James "Black, David M'Gilchriſt, and John Moir-M'Farlane, and "their cottars, pertaining to the ſaid Sir William by right he-"retable, lying betwixt the town and lands of Balinleik on the "eaſt, and the town and lands of Carſtormie on the weſt, with-"in the barony of Strathbrane and ſheriffdom of Perth, to be "holden of the ſaid Sir William, his heirs, aſſignees and ſucceſ-"ſors foreſaids, in feu-farm and heretage for ever."

The purſuer himſelf ſtands infeft upon a precept of *clare conſtat* from the late Sir George Stewart of Grandtully, of date 5th May 1732, "in all and haill the town and lands of Ballachlachan, "with houſes, biggings, yards, orchyards, toſts, croſts, out-"ſets, graſings, ſheallings, fiſhings, meadows, common paſtu-"rage, muirs, marſhes, moſſes, liberties, freedoms, eaſements,

"privileges,

" privileges, parts, pendicles, and haill pertinents whatſoever, " uſed and wont, pertaining to the ſaid lands of Ballachlachan, " be all rights, meiths, and marches thereof, as the ſame was " firſt occupied and poſſeſſed by the tenants and poſſeſſors " thereof."

The petitioner, as heir of his predeceſſors, ſtands infeft upon a charter under the great ſeal, in all and whole the lands and barony of Strathbrane, containing a number of towns, farms, villages, *&c.* and among others the lands of Balinloan and Ballachlachan, with foreſts, graſings, parts, pendicles, pertinents, *&c.* of the ſaid lands and barony.

The general cuſtom of the barony is, that the tenants and feuars ſend their cattle in the ſummer time to the hill which lies next contiguous to them; and upon this hill or high ground each town or ſteading has been in uſe to have a ſhealling. Mr M'Duff, for his town of Ballachlachan, is in poſſeſſion of a ſhealling called Blairnabuiag upon the hill of Blairnabuiag, at a little diſtance to the north-weſt of his feu; and he has been allowed to paſture upon that hill without interruption in the neighbourhood of his ſhealling. This was all that was meant by the general clauſe above mentioned in his feu-right of " ſheallings, " graſings, common paſturages, commonties, parts, pertinents, " *&c.* uſed and wont, by all right, meiths and marches, and as " formerly enjoyed by the tenants and poſſeſſors thereof." Theſe words give him no indefinite right, but a limited right, according to *uſe and wont*: And if it ſhall appear that he never poſſeſſed any thing more than a right of paſturage in the neighbourhood of a ſhealling, with the uſe of thoſe huts called the ſhealling, for the conveniency of his herds in the ſummer time, and for paſturing ſuch a number of cattle as he could maintain on his feu in the winter; it is with ſubmiſſion thought, that your Lordſhips will not incline to extend or conſtrue this into a more ample right, ſo as to make him a joint proprietor of theſe grounds where he has been in uſe to paſture; far leſs will you give him a fifth part of the whole high grounds of Strathbrane, even thoſe which are disjoined from him by rivers, which, however, he will contend to be the meaning and import of the laſt interlocutor.

What

What occaſioned the preſent proceſs at his inſtance againſt Sir John Stewart, was the following circumſtance, and by attending to it, and to his own allegations in the cauſe, your Lordſhips will ſee that he never once dream'd of the ample right, which he will now ſay is implied in the interlocutor.

About the year 1690 or 1692, Sir George Stewart of Grandtully, incloſed two of his farms or towns, called Tulloch and Carſtormie in the neighbourhood of Ballachlachan, and converted them into a park, which he called the park of Strathbrane. The tenants of theſe two towns, had been poſſeſſed of certain ſheall-bothies at a place called Riebeg, upon the burn of Riebeg, lying between the low grounds and the ſhealling abovementioned of Blairnabuiag, which laſt was the ſhealling of Ballachlachan. The ſheall-huts of Carſtormie were on one ſide of the burn, thoſe of Tulloch on the other, and they were in a manner one ſhealling, though belonging to two towns.

The tenants of Tulloch and Carſtormie having been diſpoſſeſſed, and their grounds converted into a park, their ſheall-huts became unoccupied, and were entirely waſte for ſome years, till about the 1698, or beginning of this century, the tenants of Meikle Trochry, another town belonging in property to Sir John Stewart, ſent their cattle to theſe ſhealings, and continued in the cuſtom of ſo doing till about the 1710 or 1712, when finding this ſhealling inconvenient for them and at too great a diſtance, they gave over making uſe of it, and the huts being once more empty, Mr M'Duff's tenant of Ballachlachan naturally took poſſeſſion of them, as they were juſt in the way in paſſing to his own ſhealling of Blairnabuiag.

Mr M'Duff continued this poſſeſſion in a ſort of precarious way, ſometimes going to Riebeg, ſometimes to Blairnabuiag till the year 1725, when Sir George Stewart thought proper alſo to incloſe what had been the ſhealling of Riebeg, and it did not occur, that there was any thing to hinder him from ſo doing, any more than from incloſing the two farms of Tulloch and Carſtormie, by the tenants of which, this ſhealling had been occupied. Sir George at the ſame time, incloſed another ſmall ſpot or pendicle of the hill of Blairnabuiag, which he called the farm of Blairnabuiag, but no way encroaching on Mr M'Duff's

ſhealling

ſhealling of Blairnabuiag, which lyes indeed on the ſame hill, but further to the north.

The purſuer, who was then a young man, and had been accuſtomed from his infancy to ſee his herds and cattle occupy the ſhealling of Riebeg without any hindrance, imagined perhaps *bona fide*, that the incloſing this ſhealling was an incroachment upon him, and therefore, took a proteſt againſt Sir George, ſetting furth that he had a right by his feu to ſhiellings and graſſings, "and that paſt memory of man, there never had "been any ſtop or interruption made againſt his tenants for "poſſeſſing the ſaid ſhiellings and graſſings by the ſaid Sir "George Stewart, his authors, or predeceſſors, or their or-"der;" he therefore made interruption, *&c.* and proteſted againſt labouring or taking in any part of the ſhealling in queſtion: This proteſt, which bears date 11th July 1726, was only taken with regard to Reibeg, but no challenge was made of the other little incloſure called Blairnabuiag.

Mr M'Duff did not carry his challenge even with regard to Riebeg any further. He was probably adviſed, upon enquiry and more mature deliberation, that there was no foundation whatever for his pretenſions to that ſpot; he acquieſced in Sir George's excluſive poſſeſſion, and that of his ſucceſſors from the year 1726, down to the commencement of the preſent proceſs, being more than 40 years, and the poſitive preſcription has only been ſaved by his having been minor for a few months after the 1726.

However, at ſo great a diſtance of time, did he think proper to commence this action, and your Lordſhips will obſerve the concluſions of it.

After ſetting furth his feu-right, the ſummons proceeds, "And in conſequence of his ſaid infeftment, and the other "rights and infeftments of the ſaid lands of Ballachlachan, the "ſaid purſuer, and his predeceſſors and authors, have poſſeſſed "and enjoyed, as part and pertinent of the ſaid lands, paſt "memory of man, the property of the ſhealling of Riebeg, or "at leaſt, the ground on which the ſame is built, being on the "eaſt ſide of the burn of Riebeg, as alſo another ſhealling called "Blairnabuiag, both lying in the hills betwixt the ſaid lands of Bal-"lachlachlan, and the other lands adjacent thereto; and the "march in the ſaid hill, betwixt that part of the country of

"Strathbrane

" Strathbrane and the biſhoprick of Dunkeld ; with the whole " graſſings and paſturages, and others belonging to the ſaid " two ſhealings, until ſeveral years ago, that Sir John Stewart " of Grandtully, the deceaſt Sir George Stewart his uncle, or " others his predeceſſors or authors did violently incroach upon " the ſaid purſuer's property, by entering into the poſſeſſion " of the ſaid two ſhealings, and graſſings belonging thereto ; " and the ſaid Sir John Stewart violently continues the ſaid vi- " olent poſſeſſion, thinking thereby to exclude the ſaid purſuer " from the ſaid ſhealings, and eſtabliſh the property thereof in " his own perſon."

He therefore concludes, that it ought, and ſhould be found and declared, " That the property *of the two ſhealings* above- " mentioned, with the whole graſſings and others belonging " thereto, does pertain and belong to the ſaid purſuer as part " and pertinent of the ſaid lands of Ballachlachan, and the " ſame being ſo found and declared, the ſaid Sir John Stewart " ought and ſhould be decerned and ordained by decreet fore- " ſaid, to make payment to the ſaid purſuer of the ſum of L. 20 " Sterling yearly, as the rent of the ſaid ſhealling, from and " ſince, he and his predeceſſors entered to the poſſeſſion there- " of, and in time coming, during the continuance thereof, " with the ſum of L. 100 Sterling in name of damages."

This is a concluſion merely to have the *two ſhealings* with the graſſings belonging to them, aſcertained to him in property. With regard to Blairnabuiag, *i. e.* the little ſpot of ground which was incloſed under that name ; he declared in a condeſcendence given in to the Lord Ordinary, that he was *little anxious about it*, and even as to Riebeg, he ſignified that he was willing to confine his claim upon it to a right of *common paſturage*, for after admitting that the tenants of Meikle Trochry did once paſture their cattle upon a part at leaſt of ſaid ſhealling, he adds, " but " ſuppoſing the poſſeſſion ſhould come out on proof to have been " promiſcuous, the purſuer ſubmits to the Lord Ordinary, if " he muſt not ſtill be found to have a *right of common paſturage* up- " on ſaid ſhealling of Riebeg, and that it cannot be converted to " a farm, in regard the defender has no right thereto by charter, " and has acquired none by preſcription, *&c.*" He concludes in this manner, " he therefore humbly hopes, that if the fact of

" excluſive

" excluſive poſſeſſion previous to the 1726 be admitted, the " Lord Ordinary will find the ſame relevant to infer *property*; " and, if promiſcuous poſſeſſion ſhall be allowed, that the ſame " will infer *common paſturage*. He truſts much to the candour of " the gentlemen employed for the defender; and he is perſwa- " ded, if not much miſinformed, they will admit the firſt: But " *ſhould they yield the ſecond* to avoid further expence and troble, " *he will put up with it*, and either betake himſelf to the *common pa-* " *ſturage* upon this farm, or will accept of the juſt and equal half " thereof."

The cauſe having gone to proof, the ſame was confined ſolely to the pendicle of Riebeg, the other ſpot of Blairnabuiag having been given up, and therefore, ſcarcely mentioned by any of the witneſſes.

With regard to Riebeg, the fact came out preciſely as above ſtated; that it had been anciently the ſhealling of Tulloch and Carſtormie, and afterwards poſſeſſed for a few years by the tenants of Ballachlachan. It is a part of that high ground immediately to the north of Ballachlachan, and of other towns and farms on that ſide of the river Brane, which is known by the general name of the hill of Blairnabuiag, and as it lies between Ballachlachan and the ſhealling of Blairnabuiag, the cattle of Ballachlachan had occaſion to paſs by or near that ſhealling in going to Blairnabuiag; and during the time that the ſhealling of Riebeg was empty, they very naturally ſtopt and grazed there, in place of going further on to their own ſhealling of Blairnabuiag.

John Steel, a very old witneſs, and who has known the grounds from his infancy, depones, That he herded at different times to
p. 19. l. the tenants in the neighbouring ſhiellings. Depones, " That " during this period, he had occaſion to ſee the tenants of Tul- " loch belonging to the eſtate of Grandtully, *viz.* James Maniter, " Robert Fleming, and Alexander Duff, and likewiſe Thomas " Fleming, Alexander Dow, and John Machemiſh, tenants in " Carſtormie, alſo a part of the eſtate of Grandtully, their beſtial " paſturing upon the ſhealling of Riebeg; and that the tenants " of the ſaid towns, had ſheall-bothies built thereon, thoſe of Car- " ſtormie being built on the eaſt, and thoſe of Tulloch on the " weſt ſide of the burn of Riebeg. Depones, That about 77 or " 78 years ago, ſo far as he remembers, the ſaid two towns of

" Tulloch

" Tulloch and Carſtormie were incloſed, and have ever ſince " been called the park of Strathbrane ; and further depones, " That after the ſaid incloſure was made, there was no perſon " that built ſheall-bothies upon the foreſaid Riebeg for ſeveral " years : That the firſt he obſerved do ſo, was the tenants of " Meikle Trochry who built bothies thereon, and ſhealled there- " on during two or three weeks in ſummer, for the ſpace of five " or ſix years. Depones, That the ſheall-bothies of Trochry " were built upon the eaſt-ſide of the burn of Riebeg : And de- " pones, That during the poſſeſſion of the Trochry-people as " aforeſaid of the ſaid ſhealling, there was no other perſon that " ſhealled there, ſo far as he knows."

The ſame witneſs further depones, " That the tenants of Bal- p. 20. H. " lachlachan likewiſe, as far back as he remembers, were in uſe " at all ſeaſons of the year, of paſturing their beſtial in common " with the beſtial belonging to the tenants in the neighbour- " hood, on the eſtate of the barony of Strathbrane, weſtward " from Ballachlachan, without the head-dykes towards Riebeg, " and from thence weſtward to the aforeſaid ſhealling near the " burn of Auld-darg, without any interruption; and they always " paſtured in this manner their beſtial, except when they were " feeding within the head-dykes. And what he has deponed is " truth, *etc.*"

It is needleſs to recite the depoſitions of the other witneſſes: They in general concur, and it is clear in ſhort from the whole proof which is in your Lordſhips hands, that Riebeg was the ancient ſhealling of Tulloch and Carſtormie, that it was only poſſeſſed for a certain time by the people of Ballachlachan: That from the year 1726 downwards, the purſuer has acquieſced in the incloſure which was made of that ſhealling, and in the excluſive poſſeſſion of the defender and his predeceſſors, which was the conſequence of that incloſure, and that the tenants of Ballachlachan have their own particular and ſeparate ſhealling upon the hill of Blairnabuiag, and which is called the ſhealling of Blairnabuiag. It is likeways proved by ſundry of the witneſſes, particularly by John Scrimzeour, p. 22. D. and F; and Walter Stewart, p. 23. D. that none of the towns in Strathbrane have more than one ſhealling belonging to them.

As to what is ſaid in the depoſition above recited, that the tenants of Ballachlachan paſtured their beſtial in common with the beſtial in the neigbourhood, from Ballachlachan without the head-dykes towards Riebeg, and from thence to their own ſhealling near the burn of Auld-darg. This is a circumſtance which was much taken hold of in the pleading, but, in reality, when enquired into and explained, it turns out to be greatly in favour of the petitioner in the preſent argument. The ſame thing is mentioned by ſome of the other witneſſes, and the petitioner has no occaſion to controvert the fact. The cattle of Ballachlachan did certainly paſture along the hill in going to and coming from their own ſhealling; and, when at their own ſhealling of Blairnabuiag, they naturally paſtured for a little ſpace round the huts of the ſhealling. But, 1*mo*, This goes no further than a paſturage, and does not infer a common property. 2*do*, Whether paſturage or common property, it goes no further than giving the purſuer a right upon that hill, from his feu north-weſt-ward over the ſpace where he has thus paſtured, in common with the towns in the neighbourhood of him.

Your Lordſhips, upon looking at the plan, will ſee that there is a conſiderable burn or water which runs from Loch-Skeoch on the north-weſt into the river of Brane on the ſouth, and that the feus of Ballachlachan and Ballinloan, ly to the eaſt of that burn and to the north of the river Brane. Immediately to the north of Ballachlachan, and from that all the way northward to Loch-Skeoch, on the eaſt-ſide of the ſaid burn or water, bounded on one ſide by the burn, and on the other by the hills of the Biſhoprick of Dunkeld, lies the hill or high ground called Blairnabuiag; and this is the utmoſt extent of the ground, which the purſuer, for his feu of Ballachlachan and ſundry other tenants and poſſeſſors of towns in the neighbourhood have exerciſed their right of paſturage.

P. 15. F. Ann Robertſon, one of his own witneſſes, depones, "That "the ſpace of ground, which goes under the name of Blairna- "buiag, extends from Loch-Skeoch on the north-weſt, ſouth to "the burn of Pittoch, and on the eaſt to the hills of the Bi- "ſhoprick.

This

This is precisely the fact; and it is the space of ground here described, bounded on the one side by the burn or water, running from Loch-Skeoch into the river Brane, on the other side by the hills of the Bishoprick, upon which the shealling of Blairnabuiag and some other shealings stand, and upon which the pursuer and the tenants and possessors of some neighbouring towns have been in use to pasture. And indeed the pursuer's pasturage has been confined to a very small space of that hill as already mentioned, *viz.* to the ground between his property lands and his shealling, over which the cattle naturally pasture, coming and going, and a little space around the shealling.

Such being the fact, the question is, What right falls now to be ascertained to the pursuer? Your Lordships have found, that he cannot evict from the petitioner those spots of the intermediate ground, consisting of a very few acres, which were inclosed as far back as the 1726, and for which the pursuer can have no manner of occasion, as the remaining pasturage of the hill is much more than sufficient for him; but your Lordships were desirous to ascertain what sort of right he had in the remaining ground, whether of pasturage or of common property.

Now, in the 1*st* place, it is humbly submitted to your Lordships, that in the present process there are not *termini habiles* for ascertaining this point, the only conclusions being to evict the two little spots which have been inclosed, and either to find them to be the property of the pursuer, or at least to throw them open as a common pasturage, neither of which your Lordships have thought proper to do, and indeed with regard to one of them, the pursuer himself seemed to pass from his claim by not insisting upon it.

But 2*dly*, Supposing the conclusions to be proper for ascertaining the point now under consideration, it is, with great submission, thought that the pursuer has established nothing further, than a servitude of pasturage *according to use and wont*. His original feu-right contains the general words used in such cases, of grazings, shealings, common pasturages, commonties, muirs, parts, pertinents, *etc.* but these general words are explained and limited by what follows, *viz.* " used and wont, pertaining to the

" said

" ſaid lands of Ballachlachan, by all right, meiths and marches " as the ſame was firſt occupied and poſſeſſed by the tenants and " occupiers thereof." And in the after-titles made up by the purſuer himſelf, the word commonties is entirely left out. But, at any rate, this general clauſe of ſtyle limited and explained in the way which has been mentioned, can go no further than the poſſeſſion has gone. The poſſeſſion, or uſe and wont, is the criterion by which it muſt be judged what ſort of right the purſuer has. He muſt either ſhew what he was poſſeſſed of at the date of the feu-right, or what he has ſince been poſſeſſed of.

It is not diſputed, that the whole of theſe lands, including the purſuer's feu, and whether conſiſting of hill or low ground are a part of the barony of Strathbane, belonging originally to the petitioner's predeceſſors, and ſtill belonging to him, unleſs in ſo far as the purſuer can ſhow that he has acquired a right to them. He has ſhown that he has exerciſed a right of paſturing his cattle upon a certain part of the hill of Blairnabuiag, but as to any thing further, he has not ſhown.

The petitioner cannot therefore, with deference, think that the purſuer's right amounts to any thing more than a ſervitude of paſturage on the hill of Blairnabuiag, if not confined to the particular ſpace where he has been in uſe to paſture, at leaſt extending no further than the hill known by that name, bounded on the weſt by the water above-mentioned, and on the eaſt by the hills of the biſhoprick. He has ſhown no evidence either of caſting feal and divot, cutting peats, or performing any other act whatever of property upon the ſaid hill.

Your Lordſhips will remember the late queſtion which occurred about the diviſion of the Mearns muir: Sir Robert Pollock, whoſe lands had been a part of the barony of Mearns, and were given off with the ſame general clauſe of parts, pertinents, muirs, moſſes, paſturages, &c. was with difficulty admitted to a ſhare of the common property of ſaid muir; and he only at laſt prevailed upon his bringing a very long and full proof of exerciſing all acts of common property, not only paſturing cattle and ſheep, but committing them to the charge of the muir-herds, and paying part of their fee, caſting feal, peats, divot, cutting ſtar, bent, raſhes, &c. upon the commonty. At the

ſame

same time, certain other farms adjacent to the muir, belonging to different proprietors, with parts and pertinents, *viz.* Bannochbank, Langton, Floak, Cairn, *&c.* were only found to have a servitude of pasturage, because they had performed no other acts but that of pasturing so many soums of cattle and sheep upon the muir.

3*dly*, Even if your Lordships were still to continue of opinion that the pursuer's right amounts to a common property, and not merely to a servitude of pasturage; the interlocutor certainly falls to be varied and explained, so as to limit him in this right of common property, to the particular hill or high ground where the right has been exercised. This hill is indeed pretty extensive, it reaches about three miles from north to south, and about a mile and a half from east to west; but the interlocutor, as it stands, might give him a handle to maintain, that the whole extensive range of hills on the west side of the foresaid water, reaching westward for several miles, are comprehended under the name of common. Nay, he may also possibly contend, that his right of commonty reaches across the river Brane, to that part of the barony which lies to the south of it; for this barony of Strathblane lies on both sides of the river, and there are extensive hills on both sides, on which hills there are shiellings; but surely it was not the intention of the Court to extend the pursuer's right to all the hills and muirs of the barony, however disjoined from him, and tho' he has had no connection whatever with any hill or ground, which can come under the notion of a commonty, except the space above-mentioned, called the hill of Blairnabuiag, in as far as his pasture extended therein.

Lastly, as his summons concludes for evicting from the petitioner the little spot of inclosed ground called the farm of Blairnabuiag, as well as Riebeg, tho' he afterwards passed from any right to the former, by not insisting in it. Th petitioner falls of course to be assoilzied from this conclusion [e]of the process, which has not yet been done by any of the interlocutors pronounced.

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May it therefore pleaſe your Lordſhips, to alter your laſt interlocutor, And either 1mo, *To find that the parties are not in a proper action for aſcertaining, Whether the purſuer's right in the hill adjacent to his feu, is a right of property, or tonly a ſervitude of paſturage*: Or 2do, *If this ſhall be though a proper action for that purpoſe, to find, that he has no more than a ſervitude of paſturing the cattle belonging to his feu of Ballachlachan on the hill called Blairnabuiag, in the ſummer time, in common with Sir John Stewart's tenants and poſſeſſors of the ſeveral towns and poſſeſſions, in the neighbourhood of ſaid hill, and who have been in uſe to ſend their cattle thither ; and in caſe of any difficulty on this head upon the proof as it ſtands, to allow the parties a further proof : At leaſt,* 3tio, *To limit his right, whether of common property or ſervitude, to the ſaid hill of Blairnabuiag, and not to extend it over the whole high grounds of Strathbrane. And laſtly, To aſſoilzie from the concluſion, with reſpect to the little incloſure called Blairnabuiag.*

According to Juſtice, *&c.*

ILAY CAMPBELL.

ANSWERS

FOR

ARCHIBALD MACDUFF of Ballinloan,

TO

The PETITION of Sir John Stewart of Grandtully, Baronet.

THE petition under your Lordſhips conſideration, endeavours to ſupport four different propoſitions: That the proceſs in which your Lordſhips have pronounced judgement, is not a proper one for aſcertaining the reſpondent's right; That it is only a right of ſervitude; That it falls to be limited to a certain ſpace, which the petitioners call *Blairnabuiag*; and, That they fall to be altogether aſſoilzied as to any concluſion with reſpect to a little incloſure called *Blairnabuiag*, confeſſedly upon the abovementioned ſpace of that name.

The two laſt of theſe propoſitions, the reſpondent muſt be pardoned for obſerving, in paſſing, are not very conſiſtent with one another, and the laſt of them ſeems to be intended more with a view to perplex and haraſs the reſpondent, than from any intention to throw light on the cauſe.

The reſpondent does not mean to complain of what is not properly before the court; but he cannot help feeling the diſagreeableneſs of his ſituation, and expreſſing what he feels.

A ſmall proprietor compared with his more powerful antagoniſts, he has of late been haraſſed, not only with private incroachment, but with judicial proceeding. The farms of Blairnabuiag and Reebeg, as they are called, have, within theſe fifty years paſt, been taken off a ſubject, by the petitioner's own argument confeſſedly common, and appropriated to himſelf, without order of law, right, or ſhadow of title to ſuch excluſive property. They were the very beſt ſpots in this hill; and, without further culture or improvement than tillage, ſow near ſixty bolls between them, beſides ley, and excluſive paſture, which they comprehend.

This was an incroachment of ſome conſequence, which the petitioner had only oppoſed by inſtrument of interruption as to one, and the remonſtrances of Mr Menzies of Culdares. Yet, notwithſtanding this paſſive obedience upon his part, the reſpondent had the mortification to be proſecuted, and found liable in damages before the ſheriff of Perth, for taking a few ſtones from the petitioner's ground, to help his mill-dam, although it was proved, that double the quantity, the purſuer's property, had been formerly taken to build a factor's houſe with.

In the preſent proceſs, the petitioners have been allowed to continue theſe obvious incroachments *in re communi*, attended with the utmoſt inconvenience to the reſpondent, and he has acquieſced without murmuring; but it ſeems he is to receive no quarter on the other ſide.

He is conſidered, and indeed repreſented to your Lordſhips, as an inconſiderable feuer, whoſe property is of no conſequence, compared with that of his more powerful antagoniſts, conſiſting of towns, farms, villages, *&c.* and who are ſaid to poſſeſs thirty times more land than him; and the glaring injuſtice to be done the petitioner is repreſented in ſtrong colours, as ariſing from an over-valuation of the reſpondent's lands, being more than a fifth of the petitioner's.

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The reſpondent has no intention to inquire into the value of the petitioner's eſtate, though he believes the comparative extent of it is greatly exaggerated: what ſort of towns, villages, *&c.* may be within his dominions, is ſubmitted, with this obſervation, That ſome of them have but half-ploughs and quarter-ploughs of land annexed to them; and no leſs than ten ploughs of land are let in this neighbourhood for 100 merks yearly rent.

Neither has the reſpondent any vanity for family; nor does he think, before your Lordſhips, whatever may take place in other parts of the country, the name of *feuer* will be attended with any diſgrace: but he muſt be pardoned for obſerving, that his anceſtors have poſſeſſed their ſmall property of Ballinloan as long as the family of Grandtully have done their more extenſive eſtate. They were induſtrious as well as ancient: Their poſſeſſion being ſmall, was eaſily, and conſequently might be early improved. Perhaps, too, they had vanity to court a high valuation: And thence ariſes the fact ſo much founded on in the petition, and which has drawn the reſpondent into this digreſſion, *viz.* That the lands of Ballinloan are valued at L. 200; for there is no mention of the mill in the ceſs-books.

But this inquiry as to the valuation of Ballinloan, and the cauſe thereof, or the extent of its territory, is altogether a digreſſion, and merely intended to perſuade your Lordſhips, that great injuſtice will be done the petitioner, in a diviſion upon the footing of the interlocutor, as it ſtands; for your Lordſhips will obſerve, that there is not one word contained in the ſummons, or decided by the interlocutor, concerning the reſpondent's valuation of Ballinloan, or the rights conſequential thereto; ſo that any argument which is merely derived from expediency, as to it, flies entirely off. The late purchaſe of Ballachlachan, and the valued rent of it, is the only thing that could be objected to in this proceſs; and the court will take particular notice as to that, that it is only

L. 30

L. 30 of valued rent, although, upon a ſurvey, it is found to conſiſt of ſixty-ſix acres of well-improved arable land, beſides ley, meadow, and other paſture ground; and ſurely this cannot be reckoned a high valuation in any part of the country; or, if it is ſo, the petitioner has his predeceſſors to blame, whoſe property it probably was at the time of this valuation.

It may indeed be true, that upon a diviſion the lands of Ballinloan, which have likewiſe enjoyed a common paſturage, and caſting of feal and divot, &c. *pro indiviſo*, upon the commonty of Strathbran, may be intitled to a property effeiring to the valued rent. But this is not the queſtion preſently before the court; that ſolely relates to the lands of Ballachlachan; and therefore your Lordſhips cannot take into your view any conſequences drawn from the ſituation of Ballinloan.

The reſpondent having thus endeavoured to remove ſome obſervations in the petition, which he apprehends are altogether extraneous to the iſſue, ſhall now endeavour to conſider thoſe concluſions of it to which the argument ought more properly to have been confined. And,

Firſt, As to the nature of the proceſs, the reſpondent cannot conceive upon what grounds it can be maintained, that in an action of declarator of property, your Lordſhips could not find he is intitled to a common property. The greater certainly includes the leſſer. Property includes common property.

It may indeed be true, that in the courſe of the proceedings the reſpondent did apprehend, that on account he and his predeceſſors had built and poſſeſſed huts, called *ſhealings*, upon certain parts of the commonty of Strathbran, he was intitled to the excluſive property of theſe ſpots; and therefore that upon the footing of the interdict *unde vi*, your Lordſhips would order the incroachments which had been made upon theſe particular ſpots to be thrown open. But as to the graſings, which are likewiſe mentioned in the ſummons,

mons, from the nature of them it was obvious that they must have been common property.

And indeeed, even as to the ſhealings, to avoid expence, he offered either to take the half of the farms incloſed; which ſhews, by the by, he contended that he had at leaſt a right of common property therein; or if the dike ſhould be thrown down, to betake himſelf to the common paſturage thereon, *pro indiviſo*; which is ſo far from being inconſiſtent with a right of common property, that it is the very ground upon which ſuch right falls to be declared.

Neither of theſe offers were accepted of; ſo the matter went to proof, and the reſpondent proved clearly by one poſitive witneſs, *viz.* Donald Macintoſh, That ſo far back as the year 1699, the tenants of Ballachlachan enjoyed the excluſive poſſeſſion of Riebeg. This witneſs was born in the 1693, and depones, "That he remembers of the tenants of "Ballachlachan, when he the deponent was about ſix years "of age, having their ſheal-bothies at Riebeg, and that "none elſe had bothies there; and that theſe bothies ſtood "upon the eaſt of the burn of Riebeg. Depones, That "when he was about ten or twelve years of age, the tenants "of Meikle Trochry came and ſhealed alſo at Riebeg; where "they continued ſhealing for about two years, and afterwards left the ſame: That their ſheal-bothies ſtood upon "the weſt ſide of the burn of Riebeg. Depones, That after "this the tenants of Ballachlachan continued to ſheal at "Riebeg till the deponent left that country; and that his "father's beſtial always ſhealed there, he being a tenant in "Ballachlachan." p. 17. C.

This poſitive teſtimony as to the poſſeſſion of Ballachlachan being previous to that of Trochry, is not properly contradicted by any other, but quite conſiſtent with them. It is true one witneſs of no great fame, John Steel, depones likewiſe to its being the ſhealing of Tullich and Carſtormy; and there is a hearſay evidence that it was ſo; which, joined

to the promiſcuous poſſeſſion after that, it may be acknowledged was a ſufficient ground for your Lordſhips judgement, finding, That the reſpondent had no more than a right of common property, even in the ſhealing. And there can be no doubt that your Lordſhips could do ſo, both as to it, and the graſing upon the common of Strabrane, conſiſtent with the concluſions of the ſummons, and the after proceedings. For the reſpondent, aware of promiſcuous poſſeſſion in ſubjects of this kind, had prayed the Lord Ordinary to find it relevant to prefer common paſturage; that is, while it remained undivided; and which muſt neceſſarily infer a right of common property upon a diviſion.

So the petitioner ſeems to have underſtood the reſpondent's meaning in the following paſſages in the anſwers to the condeſcendence, and his memorial; and, indeed, it was impoſſible to miſtake the reſpondent, after demanding the half of the farm, which he had no right to do, upon the footing of a ſervitude.

p. 8. F. In the firſt of theſe papers, ſays the petitioners, "The queſtion preſently depending betwixt Mr Macduff of Ballinloan and Sir John Stewart of Grandtully, being, How far the former has a right of excluſive property, at leaſt of *common property*, along with the defender, in two ſhealings, lying in the *hill* of *Strathbran*, Riebeg, and Blairnabuiag?"

p. 2. And in the memorial he ſays, "Which concluſion, in the courſe of the proceſs, the purſuer afterwards reſtricted to that of having only *a right of common property*," &c.

But a very good anſwer to the whole of this argument ariſes from your Lordſhips interlocutor of the 14th of July, which is now final; for as your Lordſhips thereby appointed memorials to be given in upon the queſtion, Whether the purſuer was to have a right of common property, or of ſervitude, upon the diviſion? your Lordſhips undoubtedly thereby decided the relevancy of determining that queſtion

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in this proceſs: and in doing ſo, your Lordſhips proceeded *optima fide*, upon the petitioner's above admiſſions; and the judgement being now final, cannot be altered.

The *ſecond* point, Whether the reſpondent is intitled to a right of common property, or of ſervitude? is indeed ſo far open to the petitioners, that your Lordſhips might yet find he had not a right of common property. But as from what is above ſaid under the preceding article, it muſt be obvious to the court, he never meant to limit his right to a right of ſervitude only, he ſhall not repeat what is already obſerved in anſwer to the criticiſms upon the words of the condeſcendence; which, though ſtrictly taken, imply no ſuch limitation. And it is obvious from the whole taken together, it was never dreamed of, till this petition was preſented.

As to the argument in law upon this head, it was already deliberately determined by the court, upon memorials on the point; and the judgement was but the other week repeated, in the queſtion betwixt his Grace the Duke of Hamilton againſt certain feuers, in the proceſs of the diviſion of the muirs of Reddingrig and Whiteſiderig.

It was there well obſerved, that feuers muſt be ſuppoſed to enjoy what they poſſeſs, as part and pertinent of their feu *tanquam optimum maximum*; and that the finding the poſſeſſion in conſequence of ſuch title would infer only a right of ſervitude, would unhinge the whole diviſions that had proceeded before this court.

The reſpondent ſhall only add, that it might likewiſe pull up all thoſe diviſions which have proceeded by arbitration, at leaſt he believes there are none in which the above rule has not been obſerved; which, as it ſhows the ſenſe of the country, proceeding upon the faith of your Lordſhips former judgements, he is in no apprehenſion the law will be altered in this particular caſe.

With regard to what is alledged in point of fact, the reſpondent, if denied, ſhall be able to prove, That he has caſt peats,

peats, cut turf, and pulled bent, heather, and ruſhes, upon this commonty, time immemorial.

As to the *third* concluſion of the petition, in which it is prayed "to limit the petitioner's right, whether of common "property or ſervitude, to the hill of Blairnabuiag, and not "to extend it over the whole high grounds of Strathbran:"

The reſpondent muſt, in the *firſt* place, obſerve, That there is properly no ſuch hill as Blairnabuiag, as appears from the etymology of the word; *blair* ſignifying, in the Iriſh language, a plain in the middle of a hill, and *buiag*, a daiſy: ſo that it is properly a ſpot upon a hill in which daiſies grow; and might be the name of a ſtance for a ſhealing; as Riebeg, which ſignifies the *little ſhealing*, is the name of another; but none of them are names of hills. The hills upon which the reſpondent's cattle have been in uſe to graſe, are called the *hills of Strathbran*; and ſo the petitioner calls them in a paſſage above referred to; and theſe, he ſhall now proceed to ſhow, from the nature and ſituation of his and the adjoining property, as well as the proof adduced, have been poſſeſſed in common, *pro indiviſo*, by the whole tenants and proprietors upon the ſide of the Bran, and perhaps too by the tenants of the Biſhoprick, who, it is believed, though they do not appear in this proceſs, have not relinquiſhed their claim of commonty upon theſe very hills which the petitioner pretends belong excluſively to his tenants and feuers in the barony of Strathbran.

As to the nature of the property along the ſides of the Bran, your Lordſhips had occaſion to be informed, in the courſe of the pleadings, that they are in part arable, and in part paſture farms, lying along the ſide of that river. The arable land is indeed inconſiderable compared with the paſture, producing only for the moſt part as much grain as is ſufficient to maintain their families, and fodder ſuch cattle as they keep upon their farms in winter. Their chief riches and wealth conſiſt in cattle; and without ſummer and winter graſings

grafings to them, as they reſpectively require, their farms are altogether uſeleſs.

Their cattle conſiſt partly of milk-cows, horſes for the uſe of the farm, and horſes and cows, which, being fit for ſale, they keep upon their farm in winter and ſpring, and which in ſummer they feed upon the grafings in the commonty.

But beſides theſe, they have numbers of what are called hill-horſes, yeld cattle, and goats, which are allowed to run the whole winter without the head dikes or boundaries of the farms through the whole commonty-grounds, all along the head-dikes of Strathbran, and from thence to thoſe of the Biſhoprick and Grandtully; ſo that however they may be kept off the reſpective head-dikes by the tenants, it is in the nature of things impoſſible to circumſcribe them upon what is properly commonty, by any boundaries whatever, far leſs by ſmall ſtripes of water or ideal lines. And the only diſtinction that can take place is, that a tract of hills and land is conſidered as the commonty of one country, not of a few particular farms in a country, and another tract of land is held to be the common and promiſcuous property of a different ſet of tenants and feuers in a different country.

With regard even to the cattle which in ſummer paſture along the commonty to the ſhealings, and for the conveniency of milking, and taking care of which, ſhealings are erected, it is obvious from the proof, that theſe ſhealings are at different times occupied by the tenants of different farms, who change their ſituation according to their convenience or caprice. Their materials are but of mud; and in ſhort, from their nature, they differ but little from the tents or temporary erections of the wandering Arabs, whoſe property and way of life ſeems very nearly to reſemble that of the inhabitants of the ſhealings: ſo that it is in vain to ſay, that poſſeſſing a ſhealing upon this or that place, limits the property in a common; for it is certain, that not only are their ſituation changed, but that the cattle paſture many miles round them; and tho'

the huts are ſituated at ſome diſtance from one another, the cattle paſture all promiſcuouſly without confinement of burn or boundary. So that here is evidence *ex rei ipſius natura*, that not only as to the hill-cattle, but even as to thoſe graſed in ſummer, the right cannot be limited to a particular hill: and it is apprehended, that as it ſeemed to be the opinion of the court at adviſing this cauſe, that the poſſeſſing a ſhealing could give no right of excluſive property; ſo it would be contradictory thereto, now to find that any temporary poſſeſſion thereof, contrary to the nature of the thing, ſhould infer a limitation of the right upon what is evidently the commonty of a whole barony. However hard the conſequences may be, and there will be none ſuch in the preſent caſe, the valuation of Ballachlachan amounting to but L. 30 Scots, the diviſion of this commonty muſt be governed by the ſame general rules that have hitherto taken place in that of other commonties.

After having ſaid ſo much, which ſeems to carry demonſtration with it from the nature of the thing, that no limitation can be here made, and no diſtinction betwixt this and other commonties, the reſpondent ſhall content himſelf with reciting one or two of the witneſſes who have depoſed to this promiſcuous poſſeſſion.

State, p. 16. E, F. The firſt is Thomas Gow, aged 70, who depones, "That "the tenants of Strathbran paſture their beſtial promiſ- "cuouſly without their head-dikes, from *one end of the coun-* "*try to the other*; and that they have done ſo ever ſince the "deponent was a herd, as before mentioned." Donald Mac-

— p. 17. G, H. intoſh, aged 74, depones, "That if the cattle had gone over "to the hills of Grandtully, or other hills in the neighbour- "hood, no perſon would have ſtopped them, *the paſture a-* "*bove the head-dikes being promiſcuous to the whole tenants in*

— p. 22. B, C. "*Strathbran.*" John Scrymgeor, aged 64, depones, "That "during the foreſaid period that the tenants of Ballaclachan "ſhealed at Riebeg, the tenants in the neighbourhood pa- "ſtured

" ſtured their beſtial upon the grounds of Riebeg promiſcuouſ-
" ly with theirs, and the tenants of Ballachlachan's beſtial
" alſo paſtured promiſcuouſly with thoſe of the neighbours
" upon their ſhealings." Walter Stewart, aged 79, depones, State, p. 23. A,
" That during the time the Trochry tenants poſſeſſed the ſaid B.
" ſhealing, the people of Ballachlachan paſtured their beſtial
" promiſcuouſly upon the grounds thereof with theirs; and
" that when the Ballachlachan tenants poſſeſſed it, the beſtial
" belonging to the tenants in the neighbourhood likewiſe
" paſtured promiſcuouſly with theirs on ſaid ſhealing, and
" the Ballachlachan beſtial again paſtured upon their ſheal-
" ings." Anne Robertſon, aged 82, depones, " That ſhe — p. 15. I,
" never heard that Riebeg was the ſhealing of any particu- & 16. A.
" lar town in the neighbourhood, either of Carſtormy, or
" Tullich, or Ballachlachlan, but that the tenants of Ballachla-
" chan paſtured their beſtial thereon along with thoſe of their
" neighbours."

The reſpondent is hopeful your Lordſhips will be ſatisfied with the evidence above ſtated. The nature of additional proofs, in queſtions of this kind, are too well known to the court to be raſhly indulged. He has from the beginning anxiouſly avoided every proof, though it has in the event turned out in his favour. He made every conceſſion in his power. He is ſorry he can make none as to this article, conſiſtent with the idea of his right, and almoſt exiſtence of his property: And he hopes your Lordſhips juſtice, after a proof has been concluded, and the cauſe adviſed, will not involve him in a new litigation, which muſt prove ruinous to his ſlender circumſtances.

The reſpondent is ſomewhat at a loſs to comprehend the intention of the laſt prayer in the petition, to be aſſoilzied from the concluſion with reſpect to Blairnabuiag. He has not indeed ſtrenuouſly inſiſted to have the mud-walls of this incroachment turned down, though it was made equally

fine

ſine titulo as that of Riebeg, and is as hurtful and deſtructive to the paſturage upon that part of the commonty where it lies. He was aware, that the argument with regard to it, as there was no legal interruption within the years of preſcription, would be ſtronger than with regard to Riebeg: and provided he got the mud-dikes of Riebeg turned down, he declared himſelf little anxious with regard to it. But altho', if the reſpondent may be allowed the expreſſion, it is one of that chain of forts which the family of Grandtully have had ſome time in view to erect upon this commonty, and thereby to incroach upon it, the reſpondent never meant to give up his right thereto, or to inſiſt that it ſhould be allocated to the petitioner as a part of his proportion therein upon a diviſion.

It is evident that it falls to be ruled by the ſame principles upon which your Lordſhips gave judgement with regard to Riebeg; and that it muſt remain in the excluſive poſſeſſion of Sir John till ſuch diviſion is made, and be then adjudged to him as a part of his ſhare. So that he cannot with any propriety, conſiſtent with that judgement, be aſſoilzied from the concluſions with regard to it: And though nothing is mentioned in the interlocutor concerning it, his intereſt is in no ſhape thereby hurt. So that the reſpondent hopes, upon the whole, your Lordſhips will have no difficulty to refuſe the deſire of the petition, and adhere to your former interlocutor.

In reſpect whereof, &c.

ALEX. MURRAY.