

Community of Goods.

Community of Goods, is a Contract, by which two or more persons falling without express Agreement to have the same Things in common are under several Obligations to one another.

The first Engagement is to come to a Partition or to divide the common Thing when any one of the Parties desires it. l. ult. c. common. divid. l. 29. in fin. ff. cod. l. 43. ff. Fam. or id. Tho' they may all of them leave the joint Enjoyment of the Thing which belongs to them in common and this undivided Enjoyment be agreeable to them, and exit with their consent: yet if any one of them is desirous to have his Portion to himself, it would be contrary to Justice and to good Manners to force him to have it always undivided which would be a perpetual Occasion of Strife and Contentions or falling out among them. The Action for dividing in Inheritance among Heirs to whom it belongs in common, is termed in the civil Law actio Familiae eriscunda. And the Action for dividing other common Interests as Gifts or Legacies or other Rights of the same Thing is called actio communi dividundo. To both which our Book of Division is directed forth of the Chancery to the Judge of the Jurisdiction where the Lands lie in common by both answers. Which is of the Tenor following &c. Saltem mandamus &c. ut & precipimus, quatenus totas & integras terras &c. cum pertinentiis patentibus intra Balciam vestram inter A. ex parte una & B. ex parte altera portionariis dictarum terrarum iuste & securum apud nos tunc in nos iungentem partem faciatis. Tantum inde facere quod pro vestro defectu amicus inde iustitiam quoniam non iudicamus teste meipso &c. But now for preventing Disorders that arise about Commonities and for the more easy and expeditious deciding thereof all Commonities not belonging to the King in Property, or to royal Burrows in Burgage, may be got divided at the instance of any having Interest, by Calling of Summons against all concerned before the Lords of Session who discuss the Relevancy, determine upon the Rights and Interests of all concerned, value and divide the same proportionally, and grant Commissions to Sheriff Stewards Bailies of Regalities and their Justices or Justices of Peace or others for perambulating and taking all other necessary Proof to be reported to the Lords who finally determine the Process. When Messes happen to be in such Commonities, they may divide them among the several Parties having Interest, or if it appear that these cannot conveniently be divided, they are to be left common with free Pasture and Entry thereto, whether divided or not. The Interest of Heritors having Right in the said Commonities will be estimated according to the Valuation of their respective Lands or Properties, and the Divisions made of that Part of the Commonities that is next adjacent to each Heritor's Property Act 30. Sept. 5. Stat. R. W. Processing Heritors as Community by Services of common Pasturage, Feald and Divot, was sustained at the Instance of one of these who had only a Service of Feal and Divot and common Pasturage in the Mair, and was not a joint

The writ in the English Law that lies for the division of lands or tenements pro indiviso, and would answer to every one of them is in the English Law for a party

of them is in the English Law for a party

joint Proprietor. But in regard the Property did carry a Right to all Mines Minerals &c. within the Surface, which the other Parties by Virtue of their Services had no Pretence to, therefore in the Competition between the Proprietor and them; the Lords found that the Proprietor might have a fourth Part of the Mair allocated to him tanquam prelapsion, as the Value of his Property, and that the Remainder should be divided proportionably conform to the Act of Parliament 1695 amongst the neighbouring Heritors who had possession the same as Community, and the Proprietor offering to his Lands whereof the Tenants have had possession of a portion with the Heritors of the dominant Tenements 7 January 1724 King of Hercul contra E. of Home To promote Planting and Policy, Lands belonging to several Heritors lying variously except Ayr, Aberdeen may be divided at the Suit of any of the Parties or of all of all having Interest by a Justice of Peace or other Judge ordinary, who are to have special Regards that the Division be conformable to the Manner of the respective Acts and Act 23. Sept. 5. Stat. R. W.

Division of Lands possessed by discontinuous Parcels contained to by both Parties was found not to be hindered by a Tenant having a Task of some hundred Years he getting no Prejudice but as much Land together jointly in Value equal to what he had in Parcels of January 1693. Sterling of Cambel contra Heritors. If a common Thing be indivisible, such as an Office or a House which cannot be divided without great Loss or great Inconvenience, it may be left to one of the Proprietors alone for a Price, which shall be divided among them all, in which Case the Thing is to be sold by Way of Cont or Auction. For even Strangers may be admitted to bid for it, if any of the Proprietors who either is not willing or perhaps is not able to bid for it himself desires that it may be so. If the Things which are to be shared cannot be divided into equal Portions the Copartners may make their Portions equal by Returns of Money or otherwise l. 30. common. divid. l. 55. ff. Fam. or id. He to whom the greater Share is adjudged may be burdened to give some Equivalent to the other for what he wants. Where in a Partition of Land it is necessary to subject one of the Portions to some Service for the Use of the other, as a Passage, a Draught of Water or the like, the Service may be imposed: and the Condition of the Copartners is to be made equal some other Way, either by Return of Money, or by giving a greater Share of the Land to the Person burdened with the Service, or by other Ways l. 72. §. 3. ff. Fam. or id. After Partition of Things which were in Community each of the Copartners is in Place of a Seller to the other. For they estimate among themselves that which they are to divide, and every one of them takes a Share of the Goods in Proportion to the Share which he had in the Price set upon all the Goods. Thus for Instance, when in a Partition between two Heirs the one takes an Estate in Land for his Share, the other a House, he who takes the Land retains the Right of which