No 1. tude, separable therefrom either by consent or custom, and found that the town should enjoy their head rooms, excluding Haining therefrom.

Stair, v. 1. p. 524.

1724. *January* 31.

LORD POLWARTH and HOG of Harcarse, *against* The EARL of HOME and TROTTER of Mortonhall.

No 2.
Heritors, who had a servitude upon a common, of which they obtained a division, were pursued by the superior of the lands, and a wadsetter from him, who insisted, that besides their shares, they should be allowed a fourth part as a *præcipuum*, because the property was theirs, and the others had only a servitude. The Lords allowed the fourth as a *præcipuum*.

The proprietor was likewise found entitled to a share in the division, corresponding to his lands, whereof the tenants had a promiscuous possession with the heritors of the dominant tenement.

IN the process of division of the common muir of Fogo, commenced at the instance of the Lord Polwarth and Hog of Harcarse, who had a servitude on that common; the action was sustained, though they had not a joint property, 31st December 1723. *See* TITLE TO PURSUE.

Thereafter the Earl of Home the superior, and Mortonhall who had a wadset from him, *insisted*, That beside the share effeiring to their lands, the tenants of which had been in possession of the common with the other adjacent heritors, they should be allowed a fourth part of the common as a *præcipuum*, because the property was theirs, and the other adjacent heritors had only rights of servitude.

It was *answered* for the other heritors, That there was no law for giving such allowance, as a *præcipuum*, to one who has the property of the common; that such property is fruitless while the common continues undivided, on account of the use the other heritors make of it; so when it is to be divided, the law has made no provision to the heritor for his property; but the rule laid down by the 38th act 1695 is simply, 'That the interest of the heritors having right in the 'common shall be estimate according to the valuation of their respective lands 'or properties.'

It was *replied* for the proprietor, That the said clause concerned only the case where a common belongs in common property equally to the adjacent heritors; which is very different from the present, where the superior is proprietor of the muir, and the other heritors have only a servitude upon it, which is a much less right; for the proprietor would have the sole right to mines, minerals or marl, if such were found in the common; yea, he might plough part of it, providing he left out what was sufficient for the other heritors their servitude, as was found 21st June 1667, Watson *contra* Feuars of Dunskennan.* And the Lords of Session are, by the said act, directed 'to determine upon the rights and interests of 'all persons concerned, and to value and divide the same according to the va-'lue of the rights and interests of the several parties.' From this it was inferred, that there could be no doubt but the superior ought, in a division of the common, to have an allowance or *præcipuum* upon account of his property, as well as a share corresponding to the valuation of his other adjacent lands, the tenants of which had a promiscuous possession with the other heritors.

* Stair, v. 1. p. 463. *voce* SERVITUDE.

No 2.

THE LORDS found, That the proprietor ought to have a fourth part of the muir allocate to him, *tanquam præcipuum*, as the value of his property; and that the remainder ought to be divided proportionally, conform to the act of Parliament 1695, among the neighbouring heritors who have possessed the same as commonty; allowing the proprietor likewise a share in that division effeiring to his lands, whereof the tenants had promiscuous possession with the heritors of the dominant tenements.

Act. *H. Dalrymple, sen.* Alt. *Ja. Graham, sen.* Clerk, *Mackenzie.*

Fol. Dic. v. 3. *p.* 137. *Edgar, p.* 16.

*** Lord Kames reports the same case:

HOG of Harcarse having a servitude of feal and divot, and common pasturage in the muir of Fogo, belonging in property to the Earl of Home, insisted in a division upon the act 1695; which the LORDS sustained, though he had only a a servitude, and not a joint property. And it being *pleaded* for the proprietor, That in the division he ought to have a *præcipuum*, in competition with the other parties, whose rights were only servitudes of *common pasturage, feal and divot, &c.* which servitudes, though possibly entitling them to as great a quantity of of each kind, as the property gives to the proprietor, the property does yet carry a right to all mines, minerals, &c. within the surface, which those having only servitudes, have no pretence to;

'THE LORDS found, the proprietor ought to have a fourth part of the muir allocate to him, *tanquam præcipuum*, as the value of his property, and that the remainder ought to be divided proportionally, conform to the act of Parliament 1695, amongst the neighbouring heritors, who have possessed the same as commonty; allowing the proprietor likewise a share in that division, effeiring to his lands, whereof the tenants have had promiscuous possession with the heritors of the dominant tenements.' *See* TITLE TO PURSUE.

Fol. Dic. v. 1. *p.* 155. *Rem. Dec. v.* 1. *No* 42. *p.* 83.

1724. *November* 27.

RATTRAY of Rannagulian, *against* GRAHAM of Balgowan and RAMSAY of Tulliemurdoch.

No 3.
A person infeft upon a charter, granting him *totas et integras terras de Rannagulian cum partibus, pendiculis et pertinentiis quibuscunque*

RANNAGULIAN being infeft upon a charter granting him, 'Totas et integras 'terras de Rannagulian cum partibus, pendiculis lie sheilings, gleanings, et aliis 'suis pertinentiis quibuscunque usitat. et consuet. jacen. in foresta et baronia de 'Alyth, et Vicecomitatu de Perth, ac totas et integras terras de Corb et Drum-'turn, cum molendino, *&c.* domibus, *&c.* lie grasings, sheilings, et aliis suis 'partibus, pendiculis et pertinentiis quibuscunque, usitat. et consuet. jacen. 'itidem in dict. baronia et foresta de Alyth, et Vicecomitatu prædict.' raised a