No 3.

'turn, una cum terris de West Forest et King's Seat, de quibus terris annuat. 'solubilis est dict. Domino Jacobo summa triginta librarum monetæ Scotiæ 'feude-firmæ divoriæ;' which sufficiently evidence that the defender's right extends only to the property of the particular lands of Watershall and Craighead, and in superiority to the pursuer's lands, &c. and shows the difference between the effect of words giving right to sheilings and gleanings *jacen. in foresta*, and those which describe lands to be part of a particular shire or parish; and likewise make it plain, that *infra bondas* of a muir, forest or commonty, are not the only words by which a right of pasturage, or gleaning and shieling can be granted in a muir, &c. but that an infeftment of pasturage or sheiling in the muir, is the same with pasturage, &c. *infra bondas* of the muir.

To the third defence it was *answered*, That the pursuer did not decline proving the extent of his possession of gleanings, &c. in order to fix the quantity of the forest to be allotted to him, but insisted that he was sufficiently founded in his infeftment for sustaining his title to pursue a division, and for obtaining an act for proving the extent of his interest.

THE LORDS found, That the pursuer Rannagulian was infeft in the sheilings and gleanings within the forestry, and was entitled to pursue the division.

Act. *Jo. Fleming* & *Jo. Ogilvie*. Alt. *Jo. Graham*, sen. Clerk, *Gibson*.
Fol. Dic. v. 3. *p.* 137. *Edgar*, *p.* 120.

1738. *November* 17.

ALEXANDER TENNANT of Handaxwood *against* MURRAY of Meadowhead, &c.

No 4.

A number of heritors, joint proprietors of a commonty, having agreed among themselves that it should remain common, each holding a certain number of soums; it was, notwithstanding, found that it might be divided; and the number of soums, not the valuation, was made the rule of division.

IN the year 1663, several heritors having right to a commonty, entered into a contract, whereby they divided part thereof; but, as to the remainder, it was stipulated the same should remain common amongst all the parties, and that ilk one of them should hold their proportional number and quantity of soums thereupon, as set forth in the agreement. Alexander Tennant, one of the heritors, brought a process on the act 1695, against the others, for dividing the part that remained common.

The defence offered was, That the muir could not be divided on the above statute, seeing, by the foresaid contract, the same was already done by the then heritors of the circumjacent lands; so that any new division upon that law would be to recede from that agreement, whereby a right, with consent of all parties concerned, was acquired to each, and could not be taken from them.

Answered for the pursuer; The only design of the contract was to hinder the commonty from being overstocked, and so rendered useless; and therefore it could be no bar to a division on the act, especially as there are no words in it which show the same was intended to stand as a perpetual rule amongst the parties. Besides, nothing was thereby settled but a souming and rouming, which

could never be called a division, so as to answer the intention of the legislature; and that it was material to observe, that a souming and rouming, by use and wont, confirmed by prescription, is surely as strong as when it begins by a written contract; and yet, it is believed, possession in consequence thereof would not be a good defence against the division upon this act; therefore the contract can be no bar thereto, conform to the valued rent, the rule laid down in the statute. No 4.

The Lords found the commonty in question, so far as the same is not divided, (otherwise than by souming and rouming), falls so far under the act of Parliament, that either party may insist to have the same divided in this process, and therefore sustained the pursuer's title; but found, That the rule of division, in this case, must be by setting off a proportion of the commonty to each of the parties, effeiring to the soums, the several parties contractors have agreed to, in the contract betwixt their authors and predecessors.

C. Home, No 102. *p.* 163.

*** Kilkerran reports the same case:

Proprietors of a common muir, having agreed among themselves by contract, *anno* 1663, to divide a part of the muir, and to appropriate to each a certain part in property, and to leave the residue to remain common, but at the same time to declare the particular number of soums which each party should hold on the said common; in an action now pursued, at the instance of one of the common proprietors of the common, it was found, 'That notwithstanding of said contract, action lay upon the act of Parliament for division; but that the rule of division was not to be conform to the valuations, but conform to the number of soums, which, by the contract, each party was declared to hold upon the remaining common.'

Kilkerran, (Commonty). *No* 1. *p.* 124.

1739. *January* 23. Earl of Wigton *against* His Vassals.

No 5.
The superior was not, in this case, allowed a *præcipuum* in the division. *See* No 1. p. 2462.

In a process of division of the common muir of Biggar, at the Earl of Wigton's instance against his vassals, some of whom were proprietors, others had only servitudes, wherein the Earl claimed not only a proportion of the muir according to the valuation of his adjacent property lands, but also *a præcipuum* of a fourth, agreeably to the decision in the case of the division of the muir of Fogo (p. 2462.) the division was not opposed; and if it had, it is believed it would have been sustained, in respect there were common proprietors.

But objection being made to the *præcipuum*, by those having only servitudes, that there was no foundation for any such *præcipuum* in the act of Parliament,