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,

No 5. and that they were entitled to a proportion of the whole commonty sufficient for their servitude, THE LORDS 'found the superior not entitled to a *præcipuum*, and that those having servitudes were entitled to a proportion of the property of the common sufficient for their servitudes.'

Vide December 21st 1739, and February 1st 1740, Sir Robert Stewart of Tillicoulty *contra* The Feuars of Tillicoultry, No 8. *infra.*

Kilkerran, (COMMONTY.) *No* 2. *p.* 125.

*** Lord Kames mentions the above case in this manner:

IN this case, the pursuit was at the instance of a feuar. But in a process of division of the commonty of Biggar, at the Earl of Wigton's instance against his feuars, some of whom were conjunct proprietors of the muir, others had only servitude of pasturage upon it; it was *objected* against the *præcipuum* by those who had servitudes, That the rights were derived from the pursuer's predecessors, and were a burden upon his property; that there was no foundation upon the act 1695, for pursuing a division, unless in the case ef common property; that the defenders must be allowed to enjoy their servitudes as stipulated to them; that the proprietor was empowered to confine them to ground that might be sufficient for their servitude, but further he could not go. THE LORDS found the defenders having rights of servitude, are entitled to have a proportion of the commonty set apart to them, equivalent to their right of servitude. *See* No 40. p. 2287.

Fol. Dic. v. 1. *p.* 155.

1739. *February* 1.

No 6.
The rule of division found to be, not the value of the tenements that ly contiguous to the commonty, but only of the tenements which have been in use to pasture there.

EARL of Wigton and LOCKHART of Carnwath *against* FEUARS of Biggar and Quotquam.

IN the division of a common muir, where one of more farms of a barony had only been in use to pasture and cast turf upon the common muir, the proprietor of the barony was allowed a share in the division conform to the valuation, not of the whole tenement or barony, but of the particular farm that had been in use to pasture, &c. upon the common muir; although there were other parts of the tenement or barony lying contiguous with the muir and particular farm, which had only been in use to pasture, &c.

Kilkerran, (COMMONTY.) *No* 3. *p.* 125.