

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 Tillicoultry *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 of 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.

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

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.

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.