No 8. which seemed to suppose instances of giving a *præcipuum* to the superior, prior to the case of the muir of Fogo; and it was proposed that inquiry might be made, whether any such had been.

Notwithstanding all which, the LORDS upon the 21st December 1739, found, 'that the pursuer was not in this case entitled to insist in a division upon the act of Parliament 1695.'

This judgment was given by seven votes against five, the President also with the majority, and was again adhered to, 21st February 1740; but as it only determines that in this case, where there was no common property, the action did not ly, it is still a point to be settled, In what cases and to whom it does ly.

It is indeed admitted in the above argument, that although there can be no division, where there are not common proprietors *pro indiviso*; yet, if there be common property, whereby there are habile terms for a division, and that there are also servitudes, in that case as the action lies, so the rights of servitude will, on the construction of the act of Parliament, be entitled to a share of the property in lieu of their servitude: The natural consequence of which would be, that the holders of the rights of servitude should be no less entitled to pursue the division than any of the common proprietors; which would seem no less contrary to principles, than it would be to allow them the action and a share of the property, where there is no common property.

But as this proposition was only thrown out as matter of argument, it remains a point still to be settled, Whether, even in such a case, those having rights of servitude will be entitled to more, than to have their servitudes ascertained upon the divided property, to the same extent as when the property was held *pro indiviso*; for the decision between the Earl of Wigton and his Vassals, 23d January 1739, where those having servitudes were found entitled to a proportion of the common, proceeded of consent, at least without opposition.

Kilkerran, (COMMONTY.) *No* 5. p. 126.

1740. *February* 2. DUKE of DOUGLAS *against* BAILLIE of Littlegill.

No 9.
In dividing a common, the valuation of the dominant tenements was held to be the rule of fixing the proportions, notwithstanding that each had, for a long time, possessed the common pastur-

THE Duke, as heritor of the lands of Meddingcoats, brought a division of the common of Hartonhill, against Baillie of Littlegill, as heritor of Mott, &c. And a proof having been allowed of the manner how it had been possessed *pro indiviso*, and that for many years past; by an agreement among the tenants, the number of the bestial was according to a fixed proportion or souming; and when it was found by experience, that the ground was overstocked, a reduction was made; particularly in the 1719, the possessors of the dominant tenements, in order to preserve an equality, resorted to that kind of jury called a birley-court, who adjusted the number of the soums to which each of the dominant tenements was to be restricted.

No 9.
age, according to a stated proportion or souming, fixed by a jury of the tenants themselves.

Pleaded for the Defenders, That the proportion of the interest of each of the dominant tenements in this commonty being fixed by long possession, the pursuer could not be allowed to insist for a division, according to the valuation of the respective lands in the books of supply, as it would be most unjust that he should have a larger share of the commonty after the division, than he ever possest before; that the design of the act 1695, was to give every dominant tenement his share in property distinct from the rest, in order to prevent discord which communion is apt to beget; and however just and expedient the valuation of the dominant tenement may be as a general rule, where things are otherwise equal, yet this could not take place where the interest of the dominant tenement was differently established by the consent of parties; and that the case here was the same as where a moss lies betwixt the lands of different heritors; which, if the portion of each shall appear by boundaries that have been observed immemorially, this will be presumed and held equal to a contract of division in writing betwixt the heritors. And the words of the act ought to be taken *civiliter et cæteris paribus*, and not *judaice*, as strictly confining judges by the letter of the statute, which upon no consideration can be neglected.

Pleaded for the Duke, That the common fell to be divided according to the valued rent of the lands interested in the common, in the terms of the act, which is a rule founded on reason; for the law concerns only common property, where the parties are joint proprietors of the subject to be divided. And as property is a right known in law, importing a right to take the full use and benefit of the subject that it is capable of; so one is equally proprietor of his lands, whether he constantly make the full use of it or not. For instance, if one has five acres of pasture grounds, and his neighbour the like number of acres of the same quality; suppose the first holds but five cattle and the other ten, the right of property to the first will not thereby be diminished. And therefore, where a large hill is common to several heritors, and it is only proper for pasture; suppose likewise their interest equal, and it happens that one of them uses a part of his property lands in pasture, whereby he has less occasion to pasture on the common than his neighbours, this however will not deprive him of his share of the common property. Hence it is, that where several heritors have an interest in a common, the law has presumed that their interest is proportioned to their valued rent, and upon that account has directed the division to be made by that proportion, without regarding extrinsic circumstances, such as the possession of the several heritors: Nor is it any objection to this doctrine, that, in a servitude of pasturage, the possession is the rule; for that arises from this consideration, that servitude cannot exceed *prædii dominantis utilitatem*.

The Lords found the division must proceed according to the valued rent.

Fol. Dic. v. 3. p. 138. C. Home, No 144. p. 247.

*** Kilkerran reports the same case:

No 9.

THE LORDS found, That the rule of dividing a commonty was by the valued rent, notwithstanding it was submitted, that by a long usage, the proportion and number of soums allowed to each heritor had been fixed and ascertained, conform whereto they were each year restricted.

Kilkerran, (COMMONTY.) *No 6. p.* 129.

1748. *June* 3. SIR GEORGE STEWART *against* JOHN MACKENZIE.

No 10.
Two persons having each a distinct property in the *solum* of a common, and each having a servitude of pasturage over the whole; it was found that such a mode of property was a competent subject of division.

JOHN MACKENZIE of Delvin, writer to the signet, set a tack of part of the muir of Thorn, having built houses upon it, in order to an improvement by tillage; whereupon Sir George Stewart of Grandtully insisted in a declarator of property, at least of his having a right of servitude over the whole muir; and that it could not be ploughed, to the exclusion of his cattle from pasturing: And in this process it was found, they were each of them proprietors of a distinct part, Mr Mackenzie's improvement being comprehended within his own property; but that each had a servitude of pasturage over the share which belonged to the other.

It was not disputed that a proprietor could labour part of a servient tenement, leaving what was sufficient to satisfy the servitude; but it being *alleged* there was not that left here, Mr Mackenzie offered to withdraw his cattle from pasturing on Sir George's part of the muir; and so Sir George's cattle, by finding more pasture on his own muir, would not need so much on his; and this would answer the servitude upon him, without losing his improvement.

THE LORDS, 21st July 1747, 'found that John Mackenzie of Delvin, the proprietor of the servient tenement, having *bona fide* laboured and improved a small part of the muir of Thorn, found to be his property, was entitled to maintain the same, notwithstanding of Sir George Stewart's servitude of pasturage, the proprietor leaving a due proportion of the muir for the use of the dominant tenements, answerable in value to their right of pasturage established therein, and restraining his cattle from pasturing in the pursuer, Sir George Stewart's adjacent muirs, or in those parts of Delvin's muir which should be allocate to the said Sir George Stewart.'

On bill and answers, the LORDS were generally of opinion, that they could not adhere to this interlocutor; as instead of Sir George's enjoying his full right of servitude upon the servient tenement, which he was entitled to, it was really making for him an excambion; and in lieu of what was taken from him of his right, freeing him from a servitude on his own property; which it was not in the power of the Court to do without his consent: And, therefore, they directed the parties to argue this question, how far, in a case where there was no