*** 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

common property, but a sole property, subject to servitude, the subject could be divided, either by common or statute law, the former decisions of the Court having varied in this point. No 10.

Pleaded for Sir George; Division of common property was not competent by the common law of Scotland, Craig, lib. 2. Dieg. 8. § 20. *in fin.* Stair, b. 4. tit. 3. § 12. but was introduced by act 38th Parl. 1695, which gives no title to divide betwixt heterogeneous rights, such as those of property and servitude are: It lays down a rule of division according to the valued rent, which cannot apply to servitudes; nor can it be said, that it is the valued rent of the dominant tenement which ought to be the rule, since the extent of the servitudes may be more or less, according to the necessity of the dominant tenements, and the pactions by which they were constituted, whereby a smaller tenement may be entitled to a servitude of larger extent than a greater one. By this interpretation also, the proprietor would be excluded from a share, unless he had right of pasture, which he might not have, if it were exhausted: At least he would have no share on account of his property; for the method practised in some cases, of allowing him a fourth for a *præcipuum*, has no foundation in law, and is unequal, and the whole procedure would be unjust in some cases to the proprietor, by his losing his right to mines which are wholly his; in others to the dominants, who though they may have exhausted the whole subject by their servitudes, for which alone it may be proper, would be obliged to admit the proprietor to a share of what he had disposed of.

The execution of a division is also inexplicable, according to the nature of land rights; as the servient tenement may be held of one superior, and the dominant of another; and then the part given off can neither be held of the former superior, when it comes to be considered as pertinent of another tenement; nor can the act of division transmit it from the one superior to the other: For all which reasons, the Lords, in the case of Tillicoultry, 1st February 1740, found no division competent. No 8. p. 2469.

Pleaded for Mr Mackenzie; The act of Parliament authorises the division of commonties; and this term, both in ordinary and law language, comprehends rights of sole property, subject to servitudes of common pasturage, Craig, lib. 2, Dieg. 8.; Stair, b. 2. tit. 3. § 73. Dirleton and Stewart, *voce* COMMONTY; 14th February 1668, Borthwick against Borthwick *; and this act of Parliament, which authorising the division of commonties, excepts those belonging to the King and to Royal Burghs, for such can only be common in the sense that servitudes make them so. The act also lays down different rules of division respecting these different cases, to wit, the valued rent where there is common property; or according to the rights and interests of the several parties, when there are servitudes; for which no precise rule could be given; but the Lords may do justice by allowing a *præcipuum*; as in some cases they have done, which may be more or less in different circumstances.

* Stair, v. 1. p. 523. *voce* PART and PERTINENT.

No 10.

Observed on the Bench; The declaring commons belonging to the King and royal burghs indivisible, did not infer they fell under the rule, and would have been divisible, if not excepted; and consequently the act extended to commons belonging to others, which were only so in respect of servitudes affecting the property; for they might be mentioned for greater caution, though they did not fall under the rule; besides, the King might have common property with others, and would have on the forfeiture of an estate in such circumstances, and royal burghs actually had.

THE LORDS found, that without prejudice to the property of the several heritors, the surface of the muirs in question might be divided betwixt the parties according to their several interests in that surface.

Act. *R. Craigie.* Alt. *Lockhart.* Clerk, *Gibson.*

Fol. Dic. v. 3. p. 137. D. Falconer, v. 1. No 251. p. 336.

*** *See* This case from Kilkerran, p. 129. *voce* SERVITUDE.

1748. *June* 16. SHARP of Hoddam, *against* CARLILE of Limekilns.

No 11.
In the division of a common, where one estate had a right of pasturage over another common, which the others had not, by which means the possession of the former, in the common under division, was less extensive than that of the others; the valued rent was, notwithstanding, found to be the rule of division in all.

IN the division of the commonty of Rutherford, the LORDS found, that Matthew Sharp of Hoddam had a right of common property therein, as pertinent to the lands of Hoddamstanes, Trailtrow, and Bowhill.

Pleaded in a reclaiming bill for John Carlile of Limekilns, another heritor, That these lands had right of pasturage upon another commonty, over which the other tenements, to which the common was pertinent, had no right, and therefore were not entitled to an equal share with them, effeiring to their valued rent, as their possession had not been so extensive over this muir, while they also pastured on the other.

Answered, The valued rent is by law the rule of division in common property, as was found in the division of the common of Hartonhill, between the Duke of Douglas and others, No 9. p. 2474. where the soums pastured had not been proportioned to the valued rent, which was disregarded; and, in cases like the present, the possession may be proportional, by the tenements which have right on the other common, keeping a larger stock of cattle.

THE LORDS found, that Hoddam was entitled to a share in the division, effeiring to his valued rent.

For Limekilns, *Lockhart.* Alt. *R. Craigie.* Clerk, *Justice.*

Fol. Dic. v. 3. p. 138. D. Falconer, v. 1. No 259. p. 352.