

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, effecting 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 souns 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, effecting 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.