

SECT. IV.

Servitude may be restricted to the necessary Use.

1624. July. FRANCIS BAIRDIE against SCARTSONSE.

FOUND, That the water might not be diverted *in proprio fundo, in prejudicium ejus qui habet aquationis, et piscationis commoda.*

No. 30.

Kerse, fol. 240.

1667. June 21. JOHN WATSON against FEUERS of DUNKENNAN.

JOHN WATSON, being superior of a number of tenements and roads about the town of Kirkaldie, pursues a declarator against the vassals, to hear and see it found and declared, that he might rive and plough the muir of Dunkennan, leaving as much of the muir as would be sufficient and convenient for the use of the vassals, their roads and tenements, for fail and divot, clay and stone, to the use foresaid. It was alleged for the feuers, That they had raised a declarator of the right of their servitude through the bounds of the muir, which they repeated by way of defence, and alleged, that wherever a servitude was constituted, it affected the *prædium serviens* wholly, and every part thereof capable of the servitude, and could not be restricted, without the consent of the parties having right of the servitude; as, if any person had right of pasturage, albeit limited to so many goods, or to the goods of such land, which is the *prædium dominans*, beyond which it could not be reached, a declarator of this nature would never be sustained, to astrict him to a portion of the muir, that would be sufficient for the goods of that town, or of that number; or if he were infeft with the liberty of fuel, though there were two mosses, that could not be exhausted within the bounds, he could not be restricted to the one; so here, the vassals being infeft, with the privilege of fail, in this muir, they may take it out of any place of the muir they please, and can be restricted to no particular place. It was answered, That this servitude, being limited to the use of the roads and houses, could not be thought to be so constituted as to make useless the whole property of the muir, the pasturage whereof is worth nothing; and the only use is liming and labouring; that it was hurtful to the common utility, and improvement of land, so to extend such a servitude; and that, if there were a servitude of a way through the constituent's

No. 31.

A servitude of fail and divot being constituted in a muir, it was found, that the proprietor had power to restrict it to such part of the muir as might be sufficient for the use.

No. 31. ground, it would not import a liberty to make as many ways as could be made through the ground, or to change the way at the dominant's pleasure. It was answered, That the nature of the servitude of a way or passage is ordinarily limited by bounds, and is always understood to be one way, as is most convenient for the dominant, which, having chosen, he cannot thereafter change; but it is not so in the servitudes of fuel, fail, or divot; neither can the consideration of public utility, or that the defenders have no detriment, warrant the Lords to take from him his right, or to limit it without his consent; which were only proper for a parliament, having not only the judicative, but also the legislative authority; and the rights and securities of parties should not be liable to conjecture or arbitration, upon the supposition of conveniency, but should be fully enjoyed according to law.

The Lords found, That this servitude might be astricted to a part of the muir, which might be beyond all question sufficient for the use, and with this quality, in case it failed, they might return to that which was laboured, which behaved to be left lea, as far as would be sufficient.

Fol. Dic. v. 2. p. 374. Stair, v. 1. p. 463.

Dirleton reports this case :

THE said Watson having feued certain crofts, with a servitude in his muir of Path-head to win divots and clay, for building and repairing the houses built, and to be built by the vassals; pursued declarator, that it should be lawful to him to improve the muir, leaving as much as would be sufficient for the use foresaid. It was alleged, that the servitude did affect the hail muir; and that their right flowing from himself could not be restrained, *et sibi imputet*, who did grant it in the terms of the said latitude.

The Lords considering that it was intended that the said servitude should only be for the end foresaid, and it would be a prejudice both to the public interest, which is concerned that the country should be improved, and waste unprofitable grounds laboured, and to the pursuer also, without the least advantage to the defenders, they therefore ordained as much ground to be set apart, as might more than sufficiently serve for the use foresaid; and allowed the pursuer to labour and improve the rest, without prejudice to the defenders to make use even of the rest during the time it continueth in the present condition, and not laboured; and in case it should happen upon any occasion, that what should be set apart for the feuers, use foresaid, should prove short and not sufficient for that use, they reserved liberty to them, to have recourse to the residue; and granted visitation to the effect foresaid. *In presentia.*

Act. Lockhart & Cheap.

Alt. Mackenzie.

Dirleton, No. 86. p. 36.