

* * Colvil reports this case :

No. 42.

THE Laird of Knockdolian warned the tenants of Parthick to flit and remove from the wood of Parthick. It was alleged, That they had the land of Parthick, as rentallers of the Bishop of Glasgow, whereof the wood was a part and pertinent, in so far as they had common pasturage of the wood, and their beasts pastured ay in the wood at their pleasure. It was answered, That they ought not to allége the wood to be part and pertinent of the lands by reason of pasturage, *quia aliud est servitus et jus pascendi, aliud fundus*; and without they would allege themselves to be rentalled in the wood, and the wood haily to be a part and pertinent of the lands, the allegiance ought to be repelled. To this was answered, That as to the wood, and trees of the same, they acclaimed no right to appertain to them; but, as to the servitude, *et jus pecoris pascendi, ita inhæret fundo, et fundum sequitur*, that they could not remove from the wood, except they remove from the same; *nam jus servitutis (aut ait Bartol.) totum est in toto, et totum in qualibet parte totius*; and so, in respect of the said servitude, *pecoris pascendi*, they could not be decerned to remove from the wood. The Lords, after reasoning *in præsentia Regis*, admitted the exception, and found, by interlocutor, in respect of the servitude of pasturage, they might not be decerned to flit and remove from the wood.

Colvil MS. p. 386.

1716. July 28. LD. MELDRUM *against* FEUERS of OLD MELDRUM.

No. 43.

THE Lords found, That parties whose charters carried them to the privilege of digging stones in the quarry of a commony belonging to the superior and his tenants, had thereby also right to cast feal and divot, and to pasture there, they proving that they were in use so to do, though within the years of prescription.

Fol. Dic. v. 2. p. 375. Bruce.

* * This case is No. 291. p. 12152. *voce* PROCESS.

1748. June 8. SIR GEORGE STEWART of Grandtully *against* MACKENZIE.

No. 44.

THE muir of Thorn belongs partly in property to Sir George Stewart, subject to the servitude of pasturage to John Mackenzie of Delvin's adjacent lands of Bridieston, and partly in property to Mackenzie, subject to the like servitude of pasturage to Sir George's adjacent lands of Arntully and others; and the limits of these several properties are known and distinct, so that there was no part of the muir common property.

Where a party has the property, and another a servitude of pasturage, is a division competent?

No. 44.

Mr. Mackenzie, a few years ago, began to improve the muir, by burning and liming, upon that part of it which belonged to him in property; and, having reduced it to tillage, he built houses thereon, and set the same, with some more of the muir, in tack, in order to further improvement; to which Sir George Stewart put a stop, by a process of declarator of right of servitude of pasturage, whereof John Mackenzie could not deprive him, by appropriating to himself the lands set in tack.

It is unnecessary to recite the proceedings had in this case. It is enough to observe, that Mr. Mackenzie, the defender, repeated a process of division; which brought on the very same debate that occurred between Sir Robert Stewart of Tillicoultry and the Feuers of Tillicoultry, No. 8. p. 2469. *voce* COMMONTY; and as the Court was then much divided, so they remained no less so still, and appointed parties to be heard in presence, "How far, in a case where there was no property, but a sole property subject to a servitude, there lay action for division of the subject either by statute or common law."

Parties were accordingly heard; and as the case was here again argued much to the same purpose as in the above case between Sir Robert Stewart and his feuers, it shall serve to refer thereto.

The Lords avoided a special determination of the point, but fell on somewhat of a middleway: They found, "That, without prejudice to the defender's right of property, the surface of the muir in question might be divided between the parties according to their several interests on that surface;" which seems rather to be a judgment upon the common law than upon the statute.

Kilkerran, (COMMONTY), No. 7. p. 129.

1775. December 20. JOHN BROWN *against* JOHN KINLOCH.

No. 45.

Import of a servitude of casting turf, feal, and divot, constituted by possession.

THE Court approved of the Lord Ordinary's interlocutor, finding, "That the use of the servitude is not to be extended farther than what is sufficient to answer the purposes of those who possess and have their actual residence upon the grounds found entitled to the servitude;" on this ground, that the servitude is acquired *pro radio*.

Act. *Rae*.Alt. *Nairne*.Clerk, *Ross*.

Fol. Dic. v. 4. p. 281. Fac. Coll. No. 209. p. 157.

No. 46.

The extent of the servitude of a right to fuel is to be regulated by the proper and ordinary uses of the dominant tenement.

1793. November 27. ALEXANDER LESLIE *against* ROBERT CUMMING.

By a contract, entered into in 1723, between the fathers of Cumming of Logie and Leslie of Balnageith, on which infeftment followed, it was stipulated, that "the tenants, occupiers, and possessors," of the lands of Balnageith, resident thereon, should be entitled to take, "for their own proper use, accommodation, and conveniency," peats and other feul from the mosses of Mr. Cumming, on