

1760. *January 4.*

SIR HARRY MONRO of Fowlis, *against* MACKENZIE of Inchcoulter.

SIR HARRY MONRO, by his charters, and immemorial possession, had right, as proprietor of the lands of Drummond, to a servitude of pasturage on a moor, the property of Mackenzie of Inchcoulter.

In setting aside as much of the moor as might be sufficient for the pasturage of the cattle of the lands of Drummond, Inchcoulter insisted, that the pasturage of the months of June, July, and August, should be deducted; as it was proved, that in these three months the cattle of Drummond did not pasture upon the moor in question, but were always sent to the hills.

Pleaded for Sir Harry Monro, That as his right to the servitude was constituted by writing, he was entitled to it in its full extent. To possess a servitude did not require constant possession, as there are many which, in the nature of things, can only be exercised from time to time. His tenants, who sought to graze their cattle properly, sent them to the hills in the summer-time, because the hill-pasture was better; yet that was *res meræ voluntatis*, and could infer no limitation of the servitude; and as the right of pasturage on the moor was unlimited, it made no difference whether the cattle pastured there for days, weeks, or months.

Answered for Inchcoulter, That he had the undoubted property of the moor, and his tenants constantly pastured thereon, having no other pasture: That both his right of property, and the benefit accruing to his tenants from their possession, would be impaired, if the proprietor of the lands of Drummond was to have allowance for the summer-pastures, which he had never enjoyed: That the value of his servitude ought to be estimated by the actual use which he had made of it.

“The Lords found, That Sir Harry Monro’s cattle, their grazing in the hill for the months of June, July, and August, yearly, imports no diminution of his servitude of pasturage over the moor in question.”

For Sir Harry Monro, *Lockhart.*

Alt. *Sir David Dalrymple.*

Clerk, *Forbes.*

*Fal. Dic. v. 4. p. 280. Fac. Coll. No. 208. p. 373.*

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Where a right of pasturage is duly constituted, it imports no diminution of the servitude, that the cattle, during certain months of the year, are grazed upon other grounds.