

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 Balnakeith, on which infeftment followed, it was stipulated, that "the tenants, occupiers, and possessors," of the lands of Balnakeith, 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