

1785. December 9.

JAMES CHEAP and Others, *against* Mrs. AGNES FERGUSON.

No. 23.

Servitude of pasturage, preserved to one part of a barony, notwithstanding the lapse of the years of prescription, by the possession of the other parts.

THE charters of the lands of Pitcullo, and several other lands, which were erected into a barony, contained the clause, "Cum communi pastura;" and accordingly the pasturage of a neighbouring common was enjoyed by the possessors of all these lands. The use of that pasturage continued uninterrupted, except as to Pitcullo, the right belonging to which had not been exercised for more than forty years.

In a process of division of that common, this question, therefore, occurred, Whether a servitude created to all the different parts composing a barony, but of which possession had ceased in one part for the years of prescription, could yet, from the union which barony implies, be preserved as to that part, by the possession maintained respecting the rest.

On the affirmative side of the question, it was

Pleaded: Possession of one part of a barony would preserve the right of the other parts from being lost by the negative prescription. In the same manner, a servitude belonging to a whole barony indiscriminately, will be saved from prescription by the possession connected with a part; 26th July, 1765, Sir Robert Pollock *against* Syme, (not reported) *Balfour against Douglas*, No. 13. p. 2480. *voce* COMMONTY.

Answered: The rule *Tantum præscriptum, quantum possessam*, is as applicable to subjects that compose a barony, as to any other. Possession, therefore, of a servitude connected with one part of a barony, could not communicate a like right to the remainder. Neither can such partial possession have a different effect with respect to negative prescription; *Moncrieffe against Balfour*, No. 12. p. 2479, *voce* COMMONTY.

The Lord Ordinary repelled the objection founded on the want of possession; and

The Lords adhered to that judgment.

Ordinary, *Lord Justice Clerk*.
Alt. *Rolland, J. Anstruther, junior*.

For Prop. of Pitcullo, *H. Erskine*.
Clerk, *Orme*.

S.

Fol. Dic. v. 4. p. 280. Fac. Coll. No. 244. p. 376.