

1679. *January 23.*DUNLOP *against* The LAIRD of DRUMALZIER.

MR. ALEXANDER DUNLOP being infeft in the vicar-land of Drumalzier, with 48 souns pasturage, to be pastured upon the lands of Drumalzier, pursues a declarator of his right; and that the lands of Drumalzier, out of which this pasturage is, may be soumed, that the possessors thereof may keep no more souns than shall be found their proportion, that by over-souming, the pursuer be not prejudged. The defender alleged, *non relevat*, because albeit it be true, that where divers heritors have a common pasturage in one commonty, no part whereof is ever ploughed, the said common pasturage may be soumed and roumed, that all the souns the whole commonty can hold, may be determined and proportioned to each roum having the common pasturage, according to the holding of that roum;—but here the defender having the right of property, burdened with a definite servitude of pasturage granted by him by paction or prescription; the said servitude cannot be made heavier or more burdensome than it was constituted, by limiting the proprietor of the free use of his property, by ploughing more or less as he pleases, and using his discretion in keeping his own goods on his own ground; for it can never be presumed, but the proprietor will be more careful, not to overstock his own ground, upon his own account, than upon the account of this servitude.

The Lords found that member not relevant.

Fol. Dic. v. 2. p. 374. Stair, v. 2. p. 678.

1680. *January 20.*EARL of SOUTHESK *against* LAIRD of MELGUM.

A SERVITUDE of common pasturage and fuelling hinders not the proprietor to rive out the commonty and labour the same, yet so as whatever lies lea must be liable for the promiscuous pasturage, and the most convenient places for fuel must be designed, exempted for labouring.

Fol. Dic. v. 2. p. 374. Stair.

* * * This case is No. 13. p. 7899. *voce* KING'S ADVOCATE.

1751. *February 19.*ALEXANDER ROSS *against* ROSS of Priesthill.

ROSS of Priesthill, proprietor of the lands of Meikle-daan, claimed a servitude of road over the lands of Little-daan, for carrying turf from the muir of Sleeve-kyle, part of the estate of Balnagowan, to his said lands.

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No. 32.

A servitude of pasturage of a certain number of sheep on large muirs, found not to give interest to the heritors or tenants to soum or roum, in order that the ground might not be overstocked.

No. 33.

No. 34.

A servitude of a road was so far restricted, as that an-

No. 34.
 other path
 not unreason-
 ably distant
 was substitut-
 ed.

Alexander Ross of Little-daan, intending to inclose his estate, insisted in a declarator negatory of the servitude.

The defender alleged, and proved a possession of the servitude, past memory of man.

Pleaded for the pursuer: Little-daan is a feu of the estate of Balnagowan; but the defender holds Meikle-daan of another superior; so there is the less probability of his having a servitude on the muir, without which he has no use for the road. His possession is thus accounted for. The proprietor of Meikle-daan obtained from Balnagowan, in 1645, a wadset of Little-daan. Captain Ross, the pursuer's predecessor, purchased the reversion; and, in the year 1710, redeemed the wadset; but set the estate to Meikle-daan, which he possessed till the year 1723; and a part of it called Little-Gleich for some time longer. While the wadset subsisted, and during the tack, he passed through the lands; but this cannot establish to him a servitude, seeing no man has any servitude over his own property.

Pleaded for the defender: He has possessed past memory of man, which affords a presumption backward, of his having possessed from the date of his right. He might have a servitude on the muir of Balnagowan, notwithstanding he does not hold of that estate; and as he has possessed a servitude past memory, he has one, to which no such objection can be made, as that now made to his servitude of road. The presumption carries this servitude backward, and the road must have been of equal age with it.

Replied: Since the memory of his possession cannot be carried back beyond the commencement of the wadset, it cannot be presumed to have begun sooner; and the pursuer knows not what objections Balnagowan might make to his servitude of turf. Possibly it was a servitude due to Little-daan, the use of which the defender communicated to his tenants of Meikle-daan; and the abuse was not adverted to.

“The Lords, 17th January, found it proved, that the defender and his authors, heritors of Meikle-daan, had been in the immemorial possession of casting turf in the muir of Sleevekyle, and of leading them home to Meikle-daan by the road in question; and therefore, in respect of the said immemorial possession, found the defender entitled to the use of the said road.”

On a bill, wherein it was urged, That at least the defender ought not to use his right *inciviliter*; and though the pursuer could not furnish him a road, without encroaching something on the estate of Balnagowan, yet he procured him a tolerance from the Lord Ross, the heritor thereof, for that purpose;—and answers,

The Lords adhered; but found, that if the pursuer furnished the defender with another road, without going any unreasonable length of way about, he behoved to use it.

Act. *Boswell.*

Alt. *H. Home.*

D. Falconer, v. 2. No. 198. p. 24C.