No 15.

Answered; Supposing the pursuers were here founding upon a prescriptive right, they would notwithstanding have a right to the coal. Where one has acquired a prescriptive right to the property of land, he, of course, acquires a right to the coal and all minerals, though none of these may have been sought for during the currency of the prescription.

But the pursuers do not found upon a presoriptive right; their rights flowed *a vero domino*. The possession, which is proved to have been immemorial, and which, of course, presumes *retro* to the date of the original grants, is only founded on, to show what was conveyed by those grants. This, it has been shown, was a right of property, which must also imply a right to the coal. It is of no consequence that the family of Hamilton have wrought coal. Since the possession of the pursuers has been such as both to prove and preserve a right of property, it cannot alter the nature of their right, that another having interest in the commonty has exercised more acts of possession than they.

'THE LORDS found, That Robert Johnston, James Beveridge, and John Gibb, and their predecessors and authors, had immemorially possessed the said muirs as part and pertinent of their lands; and therefore found, that they had a right of common property in said muirs, and were entitled to a share in the division, effeiring to the valued rent of their respective lands; and found, that, after the division, they should, in all time coming, have the sole and exclusive right of working coal within the limits of the shares of the muir to be set off to them; and that the Duke should have no power of working coal, or other minerals therein.'

Act. *M'Queen.* Alt. *Sir A. Ferguson.*

A. R. *Fol. Dic. v.* 3. *p.* 138. *Fac. Col. No* 80. *p.* 142.

1769. *June* 28.

CHARLES BARCLAY MAITLAND, and Others, *against* LAMBERT, BARENGENS, and Others.

No 16.

A divison may proceed so as to affect servitudes, although there be but one, or one and a nominal proprietor.

CERTAIN parts of the barony of Tillicoultry had been feued out to many different vassals, with a right of pasturage upon the commonty of Tillicoultry, which was possessed by the feuars, in common with the baron their superior.

Sir Robert Stewart of Tillicoultry having pursued a division upon the statute 1695, it was objected, that the pursuer was sole proprietor, the vassals having only servitudes; and the Lords found in 1740, that the division could not proceed, No 8. p. 2469.

Charles Barclay Maitland acquired the estate of Tillicoultry, and brought a new process of division, founded not only upon the statute, but also upon common law. The greater part of the vassals concurred in the process; but others opposed it, upon the same grounds, as in the former action; with this addi-

No 16. tion, that the matter was now a *res judicata*, by the judgment pronounced in that case.

It is unnecessary to resume the argument upon the general point, which was pretty much the same as in former cases of the same kind.

With respect to the plea of *res judicata*, the pursuers *observed*, That the decree in the former case had not been extracted, and that, at any rate, it could not be pleaded against a singular successor. Indeed, here the parties are altogether different, Sir Robert Stewart having been opposed by the whole feuars; whereas a great majority of them concur with Mr Barclay. The original summons concluded only upon the act of Parliament, but the present pursuers libel upon common law also.

Answered, The exception *rei judicatæ* is equally effectual against a singular successor, as against the original party: *Exceptio rei judicatæ nocebit ei, qui in dominium successit ejus, qui judicio expertus est. L.* 28. *D. de except. rei jud.* And it makes no difference, that a conclusion upon common law has been thrown into the summons; for though, at common law, a division may be made where the whole commonty is possessed by proprietors *pro indiviso*, yet it is not competent in the case of servitudes. Stair, II. 7. 14.; Bankton, II. 7. 32. and 33.

There is reason to believe, that the Court was of a different opinion from their predecessors, and that, had the point been open, they would have repelled the objection to the division; for, notwithstanding the plea of *res judicata*, upon the former judgment, in the case of this very commonty, they appointed parties to be heard *in præsentia*.

There was no occasion, however, to give judgment; for, before the diet fixed for the hearing, a petition was presented by James Erskine, Lord Barjarg, one of the feuars, setting furth, 'That he had lately obtained a disposition from Mr 'Barclay Maitland, of all and hail a proportional part of the hills of Tillicoul-'try, corresponding to the valued rent of the third part of the lands of Drim-'mie, part of the said barony of Tillicoultry, belonging in property to the pe-'titioner, in proportion to the said Charles Barclay Maitland's property lands in 'the said barony, entitled to a common property of the said hills, and with the 'burden of the servitudes belonging to the feuars, corresponding to the share of 'the property thereby disponed to the said James Erskine.'

This disposition contained a declaration, that the disponee should have no share in the division corresponding to the interest of the feuars having only servitudes, and that the part allotted to the lands of Drimmie should be relieved of any servitude of pasturage acclaimable by the other feuars.

Upon this new *species facti*, it was *contended*, That, without impugning the judgment in the case of Sir Robert Stewart, the division was competent, there being now an undoubted common property.

Answered, This is clearly an *alienatio judicii mutandi causa facta*, a nominal and fictitious property, created with the avowed purpose of prejudicating the

No 16.

question in dependence. And it has been decided, that an assignation, *pendente lite*, could not put the other party in a worse situation than he was before. Newbyth, 14th July 1666, Sharp *contra* Brown, *voce* LITIGIOUS.

Independent of these objections, it was maintained, That the disposition to Lord Barjarg could, at any rate, go no further than to enable him to insist to have a proportion of the property set off to himself, and to Mr Barclay Maitland, but without impinging upon the servitudes, which could not be affected by this contrivance.

A person having a right of servitude cannot insist upon the maxim, *quod unaquæque gleba servit*, emulously, and where his right would not be hurt by being restricted to a particular spot. But, in this case, the servitudes would become of little or no value, were they so restricted. The greatest part of the commonty is unimproveable, and only fit for pasture; and were those who have a servitude of pasturing a few cows, or a score of sheep, reduced to a particular spot of the muir, in proportion to that right, the expence of herding would more than exhaust all the advantage, so that they would be obliged to sell their right to the superior at an under value.

Nevertheless, 'THE LORDS having considered the production now made for Lord Barjarg, found the division may proceed.'

Reporter, *Auchinleck*. Act. *Lockhart*. Alt. *Maclaurin*.

G. F. *Fac. Col. No 95. p. 348.*

1772. *August* 11.

CHARLES BARCLAY MAITLAND, *against* JOHN TAIT, and Others.

No 17.
Feuars had rights of servitude of pasturage on a commonty, followed by possession. The rule of division was found to be, not the valued rent, but the number of sheep and bestial in use to be pastured on the commonty; except where the feuars' rights limited them to a less number of sheep.

IN a process of division of the commonty called the Hill of Tillicoultry, at the instance of Mr Barclay Maitland, against certain feuars of part of the estate of Tillicoultry, it had been contended *in limine* for the defenders, that a division was not competent, there being here no common property, the whole being the property of the pursuer, subject only to servitudes of pasturage. However, a right of common property having been conferred upon one of the feuars, it was found, that the division might proceed; and a proof was allowed of what tenements had been in possession. A proof being accordingly led, the pursuers, *insisted*, That the division of the commonty should be in proportion to the valued rent.

Objected, That the valued rent could not be the rule of division; but that the defenders, who had rights of servitude disponed to them, and had possessed in consequence thereof, must have as much of the common set apart to them as was sufficient for the pasturage of the numbers of cattle and bestial they had proved to be in use of pasturing upon the common; and the remainder only to be left to the pursuers, and others claiming rights of property.