

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

payment of six bolls of barley yearly ; but that they should have no right to sell or give away the same to others.

No. 46.

In a process of declarator, Mr. Leslie claimed, under this contract, a right to fuel, for the purpose of burning lime for sale, and also for malting, brewing, and distilling, for sale, grain, not the produce of the lands of Balnageith.

The defender

Pleaded: Servitudes, as being burdens on property, receive a strict interpretation, and are limited to those ordinary uses of the subject which must have been in the view of the parties when they were constituted. Hence, a servitude of fuel cannot be extended to any manufacture which may require an extraordinary supply ; Erskine, B. 2. Tit. 9. § 34.

When a predial servitude is constituted in general terms, its extent is to be regulated by the proper uses of the dominant tenement, and cannot be stretched to a right of selling the object of the servitude to others ; L. 1. § 1. De serv. præd. rust. ; L. 5. § 1. Ibid. ; L. 47. De obl. et act. ; Bankton, B. 2. Tit. 7. § 1. Indeed, such an enlargement of the right cannot even be acquired by prescription ; Kames, 22d November, 1732, Inhabitants of Dunse against Hay of Drumelzier, No. 4. p. 1824. *voce* BURGH OF BARONY ; 1772, Sir John Hall against William Nisbet, (not reported.) See APPENDIX.

The nature of the servitude in question is ascertained by the words in which it is constituted, and by the consideration given for it, which is a reasonable one, if the servitude be limited to the domestic uses, and the manufacture of the produce of the dominant tenement ; but is quite inadequate, if it is to be exercised to the extent now claimed.

Answered : Although servitudes are said to be constituted for the use of the dominant tenement, they are intended for the use of those to whom the dominant tenement belongs, and may be as various in their nature and extent as the uses to which they may have occasion to apply them ; Stair, B. 2. Tit. 7. § 9. ; Voet, § 12. De serv. præd. rust. ; Garden against The Earl of Aboyne, No. 19. p. 14517. The servitude in the present case is not confined to the domestic purposes, but extends to the use, accommodation, and convenience of the inhabitants of the dominant tenement ; its object was to put them in the same situation as if the mosses had belonged to their landlord, with this exception, that they should not be allowed to sell or give them away to others ; and it is intended to apply them, not to any new or extraordinary manufacture, but in a manner known and established at the date of the contract.

The Lord Ordinary, in substance, found and declared in terms of the libel.

Upon advising a reclaiming petition, with answers, the Court, being of opinion that the cause involved an important point of law, ordered memorials on the import and extent of the servitude. At advising which, it was

Observed on the Bench : With us, as in the civil law, the extent of a servitude in favour of a *prædium rusticum*, must, in general, be regulated by the uses proper

No. 46. to the dominant tenement; and there seems to be nothing in the use and wont here to take the case out of the general rule*.

The Lords unanimously found, That the pursuer and the tenants and possessors of the estate of Balnageith were entitled to cast peats and fuel from the mosses and muirs belonging to the defender, for all family purposes, and for drying, malting, or brewing the grain of their own lands, and burning limestone for the use of the lands, and other accommodations of the like nature; but not to burn limestone, for sale, nor to carry on a trade of brewing or distilling for sale.

Lord Ordinary, *Justice-Clerk.* *Act. Cha. Hay.* *Alt. Solicitor-General Blair, Ja. Grant.*
Clerk, *Gordon.*

D. D. *Fol. Dic. v. 4. p. 281. Fac. Coll. No. 76. p. 168.*

* Parties differed as to the possession which had taken place under the contract. As to distilling, at least, there could be no legal possession before the late act of Parliament, allowing small stills to be erected in the Highlands of Scotland.

See APPENDIX.