

No. 41. the water upon the property and coal of the superior lands of Edmonston and Woolmet.

But, upon advising a reclaiming petition and answers, the Court found,

“ That the petitioner, Andrew Wauchope of Niddry, is entitled to make downsets in the seams of coal upon his own ground, and to fill up the same with clay, stone, or other materials, so as to effectually prevent the water from coming down upon his coal of Edmonston and Woolmet.”

Lord Ordinary, *Kennet*. Act. *D. Rae, Ilay Campbell, M'Laurin*. Alt. *Blair*: Clerk, *Menzies*,

*Fol. Dic. v. 4. p. 282. Fac. Coll. No. 54. p. 96.*

\* \* This case was appealed.—The House of Lords, 21st February, 1780,  
“ ORDERED and ADJUDGED, That the Cases be remitted back to the Court of Session in Scotland, with liberty to each party to reclaim and amend the process, as he shall be advised; and with particular directions to the said Court, to inquire respecting the communications of the level in question.”

## SECT. VII.

Servitude of Pasturage.—Servitude of Feal and Divot.

1583. *February*.

LAIRD OF KNOCKDOLIAN *against* TENANTS OF PARTHICK.

No. 42.  
Effect of a  
servitude of  
pasturage as a  
defence  
against re-  
moving.

THE LAIRD of Knockdolian warned the tenants of Parthick to flit and remove from the wood thereof. Alleged, That they had the lands of Parthick, as rentallers of the Bishop of Glasgow, whereof the woods were a part and pertinent, in so far as they had common pasturage through the same. Replied, That the wood could not be part and pertinent of the lands by reason of pasturage, *quia aliud est servitus et jus pascendi, aliud fundus*; and except they alleged themselves to be rentalled in the wood especially, or that the wood was absolutely a part and pertinent of the lands, the allegiance behoved to be repelled. Duplied, That as to the wood, and trees of the same, *et quod ad superficiem*, they acclaimed no right thereunto; but, as to the servitude, *et jus pecoris pascendi, ita inhæret fundo, et fundum sequitur*, that they could not remove the one from the other; *nam jus servitutis (ut ait Bartol.) totum est in toto, et totum in qualibet parte totius*. The Lords, *in præsentia Regis*, admitted the exception.

*Spottiswood, (SERVITUDES), p. 307.*

\* \* Colvil reports this case :

No. 42.

THE Laird of Knockdolian warned the tenants of Parthick to flit and remove from the wood of Parthick. It was alleged, That they had the land of Parthick, as rentallers of the Bishop of Glasgow, whereof the wood was a part and pertinent, in so far as they had common pasturage of the wood, and their beasts pastured ay in the wood at their pleasure. It was answered, That they ought not to allége the wood to be part and pertinent of the lands by reason of pasturage, *quia aliud est servitus et jus pascendi, aliud fundus*; and without they would allege themselves to be rentalled in the wood, and the wood haily to be a part and pertinent of the lands, the allegiance ought to be repelled. To this was answered, That as to the wood, and trees of the same, they acclaimed no right to appertain to them; but, as to the servitude, *et jus pecoris pascendi, ita inhæret fundo, et fundum sequitur*, that they could not remove from the wood, except they remove from the same; *nam jus servitutis (aut ait Bartol.) totum est in toto, et totum in qualibet parte totius*; and so, in respect of the said servitude, *pecoris pascendi*, they could not be decerned to remove from the wood. The Lords, after reasoning *in præsentia Regis*, admitted the exception, and found, by interlocutor, in respect of the servitude of pasturage, they might not be decerned to flit and remove from the wood.

Colvil MS. p. 386.

---

1716. July 28. LD. MELDRUM *against* FEUERS of OLD MELDRUM.

No. 43.

THE Lords found, That parties whose charters carried them to the privilege of digging stones in the quarry of a commony belonging to the superior and his tenants, had thereby also right to cast feal and divot, and to pasture there, they proving that they were in use so to do, though within the years of prescription.

Fol. Dic. v. 2. p. 375. Bruce.

\* \* This case is No. 291. p. 12152. *voce* PROCESS.

---

1748. June 8. SIR GEORGE STEWART of Grandtully *against* MACKENZIE.

No. 44.

THE muir of Thorn belongs partly in property to Sir George Stewart, subject to the servitude of pasturage to John Mackenzie of Delvin's adjacent lands of Bridieston, and partly in property to Mackenzie, subject to the like servitude of pasturage to Sir George's adjacent lands of Arntully and others; and the limits of these several properties are known and distinct, so that there was no part of the muir common property.

Where a party has the property, and another a servitude of pasturage, is a division competent?