

SECT. IV.

Servitude may be restricted to the necessary Use.

1624. July. FRANCIS BAIRDIE against SCARTSONSE.

FOUND, That the water might not be diverted *in proprio fundo, in prejudicium ejus qui habet aquationis, et piscationis commoda.*

No. 30.

Kerse, fol. 240.

1667. June 21. JOHN WATSON against FEUERS of DUNKENNAN.

JOHN WATSON, being superior of a number of tenements and roads about the town of Kirkaldie, pursues a declarator against the vassals, to hear and see it found and declared, that he might rive and plough the muir of Dunkennan, leaving as much of the muir as would be sufficient and convenient for the use of the vassals, their roads and tenements, for fail and divot, clay and stone, to the use foresaid. It was alleged for the feuers, That they had raised a declarator of the right of their servitude through the bounds of the muir, which they repeated by way of defence, and alleged, that wherever a servitude was constituted, it affected the *prædium serviens* wholly, and every part thereof capable of the servitude, and could not be restricted, without the consent of the parties having right of the servitude; as, if any person had right of pasturage, albeit limited to so many goods, or to the goods of such land, which is the *prædium dominans*, beyond which it could not be reached, a declarator of this nature would never be sustained, to astrict him to a portion of the muir, that would be sufficient for the goods of that town, or of that number; or if he were infeft with the liberty of fuel, though there were two mosses, that could not be exhausted within the bounds, he could not be restricted to the one; so here, the vassals being infeft, with the privilege of fail, in this muir, they may take it out of any place of the muir they please, and can be restricted to no particular place. It was answered, That this servitude, being limited to the use of the roads and houses, could not be thought to be so constituted as to make useless the whole property of the muir, the pasturage whereof is worth nothing; and the only use is liming and labouring; that it was hurtful to the common utility, and improvement of land, so to extend such a servitude; and that, if there were a servitude of a way through the constituent's

No. 31.

A servitude of fail and divot being constituted in a muir, it was found, that the proprietor had power to restrict it to such part of the muir as might be sufficient for the use.