

*Answered* for Mrs Douglas, it appears from the proof, that, of old, the whole farms of the barony possessed this common, whereby their common property in it was established equally with that of the pursuers: and though some of the farms, by being inclosed, had no occasion, for many years past, to send their cattle to the common; yet the possession that has been had is sufficient to preserve the right of common property once established in the proprietor of the barony.

No 13.

'THE LORDS found, That the defender has right to a share in the division of the commonty, in proportion to her valued rent of the whole barony of Kirkness.'

Act. *Advocatus, Lockhart.*

Alt. *And. Pringle, Ferguson.*

J. D.

*Fol. Dic. v. 3. p. 138. Fac. Col. No 62. p. 100.*

1764. *November 15.*

TRUSTEES of Bonshaw *against* The DUKE of QUEENSBERRY.

No 14.

AGREEABLY to the spirit of the statute for dividing commonties, a limestone quarry, like a moss, ought to remain undivided.

*Sel. Dec. No 225. p. 289.*

1768. *July 30.*

ROBERT JOHNSTON, JAMES BEVERIDGE, and JOHN GIBB *against* The DUKE of HAMILTON.

No 15.

THE barony of Kerse, including the muirs of Reddingrig and Whitesiderig, belonged antiently to the abbacy of Holyroodhouse. Prior to 1552, several farms of this barony had been feued out by the abbacy, with part and pertinent. In that year, the remainder were feued to the family of Hamilton, who having afterwards acquired the superiority, again feued out some of them, likewise with part and pertinent.

Possession of an uncultivated commonty by pasturage and casting feal and divot, upon a title of part and pertinent, infers a right of common property.

Robert Johnston, and others, held their rights in this way, partly derived from the abbacy, partly from the family of Hamilton. In a process of division of those muirs at their instance, it appeared, that the possessors of their lands had immemorially pastured their cattle, and cast feal and divot upon the muirs: And that the Duke, besides possessing in the same way by his tenants, had wrought coal in the commonty. The question came to be, Whether the pursuers had a right of servitude or common property?

It was *pleaded* for the Duke, That he is proprietor of these muirs, except in as far as his right is limited by those of the pursuers. What was conveyed to them as part and pertinent can only be known from their possession; and, as