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.
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.

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.

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

No 15. their possession goes no farther than to pasturage, feal, and divot, their right of course resolves into a servitude for these purposes. It is every where laid down in our law-books, that a servitude of pasturage, feal and divot, may be acquired by prescription; but, how can this be done but by possession such as that of the pursuers.

It is a rule in such cases, 'that, if one of the parties has exercised all the acts of property of which the subject is capable, while the possession of the other has been confined to particular and inferior acts, as to pasturage only, or to casting feal and divot, the first is to be deemed sole proprietor, and the other to have merely a right of servitude;' Erskine, B. 2. tit. 6. By this rule, the Duke's having wrought the coal, seems decisive in his favour. Indeed, in the case of common property, it seems impossible that any one can have a right to work coal; for, as all have a right, *pro indiviso*, to each part of the common subject, no one can exercise his property in such a way as to consume the subject.

Answered for the pursuers; A right of servitude over the property of another is not to be presumed. Where there is no limitation in the grant, the possession of any particular subject, as part and pertinent of another, must be attributed to a title of property, provided the possession has been such as is consistent with the idea of a right property.

The meaning of the rule laid down by Mr Erskine is this; that, where one has had full possession of the subject, and the possession of another has been limited to particular acts which fall short of the common and ordinary use of the subject, then the last is presumed to have only a right of servitude; and justly, because such possession is in some measure inconsistent with the idea of property. But the subject in question being wild and uncultivated, and no part of it having ever been ploughed by any person interested, the pursuers, while they pastured their catle and cast feal and divot upon it, exercised all the common and ordinary acts of possession incident to property of that kind. That being the case, they must be understood to have a right of property; and it cannot have the effect to deprive them of this right, either that they themselves have not exercised it in every possible way which they might have done, or that some extraordinary acts of possession have been exercised by others.

It does not follow from this, that a servitude of pasturage, or of feal and divot, may not be acquired by prescription upon a clause of part and pertinent; for, wherever the acts of possession have been so limited in their nature, as not to amount to the common and ordinary use of the subject, there the right will be construed to be a servitude only.

The Duke likewise *contended*, That, supposing the pursuers should be understood to have a right of property, yet that ought to be with exception of the coal, upon this ground, that their rights being established merely by possession, they could not acquire a right to the coal, which they never possessed.

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-