18 soums grass; and albeit a servitude may be constituted without a sasine, and that the same will be sustained, being clad with possession before a subsequent right in favours of third party, but Dolphington cannot instruct, that ever he or his predecessors, did exercise the servitude upon the pursuer's lands of Millrig prior to the pursuer's public infeftment in the year 1619; and therefore, any right that the defender has before that time, being either base or uncompleat, cannot be sustained, as the constitution of a servitude, and the sasine granted by the superior *propriis manibus*, is but the assertion of a notary, which is not sufficient, unless the warrant were produced; and any possession the defender had, was unwarrantable, and cannot be sustained to give him the right of that servitude, unless he had been 40 years in possession without interruption; and any gratuity paid to him by the tenants, which may be done by collusion, cannot prejudge the pursuer, and they always paid their full rent without craving of any abatement upon that account; and albeit Major Cockburn, who is known to be a mere soldier, and knows nothing of law, had taken the tenant obliged by the tack to relieve him of the servitude, yet that will not get the defender a right to the servitude, unless it were otherwise legally constituted. THE LORDS assoilzied the defender from the declarator; but in respect the pursuer's tenant of Millrig had made payment of 8 merks for the soums grass contraverted, and that both parties had acquiesced thereto for several years; therefore, the LORDS modified the 8 merks to be the rate of the soums grass reclaimed yearly out of the lands, in all times coming. No 51.

Sir P. Home, MS. v. 1. *No* 110. *p.* 167.

*** This case is also reported by Fountainhall:

IN the debate between Brown of Dolphingston and Major Cockburn about a pasturage, "the LORDS found the servitude of pasturage proven: But in regard it appeared, that for 30 years together, the parties had always transacted it, and taken 10 merks by year in lieu thereof, therefore the LORDS modified and liquidated it to that price yearly, in all time coming." So that these customs of a voluntary conversion are not safe, because they may be afterwards obtruded as an acquiescence.

Fountainhall, v. 1. *p.* 170.

1735. *February* 7. GRAHAM of Douglaston *against* DOUGLAS of Barloch.

No 52.
A servitude of pasturage, though engrossed in the rights both of the dominant and of the

A PROPRIETOR of two adjacent tenements, sold the one, granting the purchaser a servitude of pasturage upon the other tenement. Having thereafter feued out that other tenement, the said servitude of pasturage was mentioned in the disposition, and excepted out of the warrandice; by which it came, that this servitude was ingrossed in the rights of both dominant and servient tene-

No 52. servient tenement, was found liable to the negative prescription.

ments. The proprietor of the dominant tenement having neglected to use this servitude for 40 years, the question occurred, If it fell by the negative prescription. That it could not fall, was argued from this consideration, That in feuing out the second tenement, it behoved to be the same, whether the superior reserved the pasturage in favour of himself, or of the purchaser of the first tenement; that in the one case it is a branch of the superiority, and can no more suffer the negative prescription than the right of superiority itself; that in the other, it is a branch of the purchaser's property, which must preserve it equally from the negative prescription; 2*do*, The servitude being established in the right the vassal has to his lands, he can prescribe no right or immunity contrary to the tenor thereof. *Answered* to the 1*st*, There is a wide difference betwixt the cases; a right to pasturage, reserved by a superior, is considered in law as a reservation of the property *pro tanto*, which therefore cannot be discharged nor fall *non utendo*; but where the servitude is reserved in favour of a third party, as in the present case, it becomes indeed an accessory of his property, but by no means a part or branch of it. 'Tis an accession the property once subsisted without, and may so subsist again; thereby it is, that a real servitude may be discharged, and of course may fall by the negative prescription. To the 2*d answered*, The reservation of a right in an infeftment will support the right against the positive prescription, because no man can acquire by prescription more than his title carries him to; but it will not save from the negative prescription, which is founded upon the negligence of the person to whom the reserved right belongs. The Lords sustained the defence of prescription.—*See* Appendix.

Fol. Dic. v. 2. *p.* 100.

1774. *January* 25.

Colonel Robert Skene of Halyards *against* James Simpson of Maw.

No 53. The plea of the negative prescription, founded upon only a partial possession by the dominant tenement, not admissible to limit the extent of a thirlage of *omnia grana crescentia*, constituted by writ, where the obligation of thirlage, as

By a feu-charter, granted by Sir William Bruce of Kinross, to John White, in 1677, of the lands of Maw and Carse, now belonging to James Simpson defender, these lands were astricted to the mill of Kinross, as to the *gana cresentia*. In the renewed charters granted to the owners of these lands, they were astricted to another mill erected by Sir William Bruce, called the mill of Burngrange, likewise for *omnia grana crescentia*. The estate of Burngrange was afterwards sold by the family of Kinross; and Colonel Skene having lately acquired right to the property of this estate and the mill, insisted that Simpson's lands were astricted for the whole growing corns, and brought a process of abstracted multures against him and several others.

There was produced by the defender Simpson, the original feu-charter, granted by Sir William Bruce to John White; and, 2*dly*, A precept of *clare con-*