

SERVITUDE.

1776. *July 19.* The BURGH of ANNAN *against* The MAGISTRATES of ANNAN-DALE, &c.

IN a declarator of the exclusive property of the common muir of Annan, free of servitudes, the Lords pronounced this interlocutor:—"Find, That the Magistrates, Town-Council, and community of the burgh of Annan have the sole and exclusive right of property in the common muir of Annan: And, with respect to any servitude thereon, claimable by the defenders, having considered the proceedings in the divisions of the commonties of Creea and Dornoch, carried on at the instance of these defenders, wherein the community of Annan was not found entitled to any servitude, nor even made a party to the division, but any possession had by them in said commonties was held to be accidental, and by start and overloup, owing to their contiguity, and not *animus* of acquiring a servitude; find that the same is the case as to the defenders their claim of servitude on the common of Annan; and therefore find, That the pursuers are entitled to hold the property of said common free of such servitudes."

1776. *August 2.* The MAGISTRATES of GLASGOW *against* PATRICK BELL.

IN the construction of a servitude, a servitude may be regulated, so as to be least hurtful to the servient tenement, if equally convenient for the dominant. See the case of *Wardlaw of Abden*, with regard to a kirk-road at Kinghorn, observed by Kilkerran. In the same way, if I have a servitude of a road through my neighbour's field which he intends to inclose, if he offers to put on a gate at the end of the road, but to give me a key to it, I cannot hinder him. The opposition would be in vain. But, though this is the case of a servitude, yet the case of a property is different: in this, no man has right to interfere with the proprietor, unless he use it emulously. This is the only restriction; but no law will entitle any other than the proprietor to meddle with it. These points occurred in a case decided 2d August 1776, Patrick Bell, merchant in Glasgow, *against* The Magistrates of Glasgow. The Lords decided against Bell upon this principle.

1769. PORTEOUS, &c. *against* JOSEPH ALLAN and ALEXANDER MORTON.

BESIDES the public and private roads for the use of travellers through Scot-

land, there are other roads, called cattle or drove roads, which have received the sanction of the Supreme Court. Porteous of Carnicoupe, and other storemasters in the parishes of Lesmahagow, Douglas, and Muirkirk, claimed right to a drove road through the grounds of Joseph Allan of Castlebroket, and Alexander Morton of Chapel, for carrying their sheep to the market of Kilbride: the defenders interrupted them in this possession, and insisted that they should drive their sheep by the common highway; but, in a process, the Lords first granted them an interdict, *uti possidetis*, and then, upon proof of immemorial possession, found them entitled to the road demanded, and gave judgment accordingly.

1777. August . CAMPBELLS against CAMPBELLS.

THE same question occurred in Summer 1777, between certain gentlemen, dealers in cattle, whose grounds lay in the lower or southmost parts of Cowal, against Sir James Campbell and Others, whose grounds lay to the northward, and through which these gentlemen drovers insisted that they had right to certain drove roads, and even to resting and feeding places for their cattle, in bringing them from the Western Isles.

The Lords, in the first place, pronounced an interdict *uti possidetis*, with a reserve as to ground under crop, or inclosed, unless the inclosures were recently made, and stopt up the roads altogether.

The possession went to proof.

SESSION-CLERK.

It is fixed, by two decisions, that the nomination of the Session-clerk, Keeper of the Register of Baptisms and Marriages, is in the Kirk-session, 4th December 1740, *Magistrates of Elgin* against *The Kirk-Session*; and, 19th November 1761, *Kirk-Session of Dundee* against *The Magistrates*. Both these cases were in royal burghs, where the Magistrates paid the salaries, and yet, in both, the Lords found, That the Magistrates had no right to interfere in the election. In Edinburgh the case is different; there is only one session-clerk, and he is named by the Magistrates. See also case of Glasgow, 1756, *Harvie*.

See petition, *Kirk-Session of Paisley*, dated 7th February 1763.

In the case of the West Church, *Sir John Nisbet* against *The Session*, 2d July 1773, adhered to 17th November 1773, the Lords were of opinion, That the election of the session-clerk belonged to the Session. They differed, however, in opinion, chiefly on this ground, that, by the Act 1696, for establishing