

*Answer 1.* *Esto* a servitude, upon which there has been possession past memory of man, were attended with this difficulty, it will not follow that a right so well established must be cut down *in toto*: What else upon that supposition can follow, but that the pursuers should be continued in their possession as formerly: Craig, in the fore-mentioned place, upon this very question, has the following words: ‘ Si nihil in pastura constituenda cautum sit, tunc aut proportionibus fundorum, quibus pascua coherent, exerceri debent; aut ex usu et consuetudine præscripta in communibus pascuis, pascendi modus potest præscribi.’ Here he gives his opinion, and a very just one, both where there is a dominant tenement to measure the extent of the servitude, and where there is no dominant tenement; having his eye upon the case mentioned by him immediately above, of a common pasturage belonging to a college or university, or such an one as this in dispute.

*Answer 2.* This servitude is by no means inexplicable, at least *quoad* the defender and the neighbouring heritors: The extent of the servitude is fully and distinctly ascertained by the proof. And, therefore, were there a division of the common, by act of Parliament, the pursuers would be entitled to a share of the common, in proportion to their extent proved. It is a different question, were a division to be instituted among the inhabitants themselves, what share should fall to each of them? But in this the defender has no concern. At the same time, it is believed such a question can never occur, there being no law extant for dividing the common property or servitudes belonging to a burgh or body politic.

‘ Found, That the erecting Dunse into a burgh of barony, doth not afford a title to acquire a servitude of pasturage by prescription. In the same cause it was found, that the infestment of a house, with or without a yard, is a sufficient title to prescribe a servitude of pasturage, 24th November 1732.’ See SERVITUDE. See PRESCRIPTION.

*Rem. Dec. v. 2. No 4. p. 6.*

1739. February 2. BURGH OF KELSO against JAMES HUTCHISON.

FOUND, that a burgh of barony had power to debar every one from exercising merchandize in the burgh, in home as well as foreign commodities, until they should be admitted to that privilege by the corporation.

*Fol. Dic. v. 3. p. 98. Kilkerran, (BURGH OF BARONY.) No. 1. p. 99.*