

No 159. tion, it seems that the creditors had likewise proved interruptions, by their employing others to fish, besides the Garmouth men, within these 40 years.

Fountainball, v. 2. p. 360.

1708. February 13. TOWN OF FALKLAND *against* DOCTOR CARMICHAEL.

No 160.

A town having been in constant use past memory to bleach linen upon a loaning belonging to a neighbouring heritor, it was found that a servitude was not thereby constituted, no such servitude being known in our law.

THERE being a loaning at the foot of the Lomonds controverted betwixt the Town of Falkland and Doctor Carmichael of Balmbly, mutual declarators were raised, by which each claimed the property, and the Doctor further *pleaded* exemption and immunity from some servitudes acclaimed by the Town. The Doctor's right was a charter granted by the King in 1602, of that loaning, in favours of Sir David Murray of Stormont, and a sasine, with a connected progress down to himself. The Town founded their right in this manner; the Kings of Scotland, as come in place of the Muceduffs, Earls of Fife, got the right of the whole lordship of Falkland, and finding it a pleasant situation by the adjacent woods and other conveniences, they chose it for one of their residences, which usually occasioned a great repair of the nobility and gentry to their palace there; and therefore, to encourage the burgesses to build for the conveniency of the lieges resorting thither, King James II. in the year 1458, gave them a charter of erection into a burgh, (though I do not find they ever have sent a Commissioner to the Parliament) with power to chuse their own Magistrates, and to sell wine, wax and spiceries, as any other burgh used to do, with a power of replodging, and the clause *cum cummuni pastura*, by which they possessed immemorially the privileges following on the said loaning, viz. common pasturage, and a way and passage through it to the Lomonds of Falkland; *2do*, The servitude of casting fail and divot on it for upholding of their mill-dam; *3tio*, The liberty of upholding their yearly fairs on that ground; and, *4to*, The immemorial use and custom of bleaching their linen-cloth (a great manufacture in that Town) on that piece of ground. *Objected* by Doctor Carmichael, That they could never claim property nor servitudes on his lands; for they had no *prædium dominans* to which it could to due, they being only heritors of some tenements and houses, which being expressly limited to particular bounds, could never prescribe beyond it. *2do*, No sasine having followed on that charter of erection, it can never be the title nor foundation of a prescription, which, by the 12th act 1617, requires both charter and sasine; for *nulla sasina nulla terra*. *Answered*, That a charter to a corporation or society is *nomen universitatis*, and which, with 40 years possession, has been sustained as a sufficient title to prescription, as of the emoluments of a Sheriffship, 13th Dec. 1677, the Earl of Murray *contra* the Feuars of Ness, No 151. p. 10903.; and also of a salmon-fishing, though *inter regalia*, 26th January 1665, Heritors on Don *contra* the Town of Aberdeen, No 107. p. 10840.; and 13th January 1680, Brown *contra* the Town of Kirkcudbright, No 110. p. 10844. *2do*,

At the time of this charter in 1548, instruments of sasine were not in universal use, for being introduced by no statute, but only by custom, that took a long course of time before it became general and binding; and to shew the Town speaks not without book, our learned countryman Craig, *De feudis*, p. 175.* shews, that sasines began only in King James I.'s time, in the year 1430, as borrowed from what he had seen in England; and, in their infancy, there was no more used but the vassal's induction into the feu by the *dominus*, in presence of the *pares curiæ*, with a *breve testatum* framed thereon, which served for charter, precept and sasine; and to quarrel the borough's charters for wanting sasine thereon, would disturb and subvert a multitude of rights derived from them up and down all the kingdom. THE LORDS found the property of this piece of ground, called the loaning, belonging to Doctor Carmichael, by virtue of his special infeftments therein; but found it not inconsistent, but that it might stand burdened with servitudes to the Town; and therefore found it relevant, that they had been 40 years in possession of pasturing and casting fail and divot, and drawing their lead-mill through it, and keeping their yearly fairs on it; and also for the Doctor, to prove, that he had interrupted them; and that, what they enjoyed, was merely by his and his predecessors tolerance and connivance. All the debate arose as to their servitude of bleaching linen-cloth on this spot of ground. Against which it was *objected*, That, amongst all the servitudes mentioned by law, this was never heard of; no not so much as by Barth. Cæpolla, who has wrote most largely *de servitutibus*, of any other Doctor. And, in a late case betwixt the Laird of Innes and the Creditors of Dunfermline, No 158. p. 10913.; though Innes's charter bore the privilege, *condendi et saliendo pisces* in his Town of Garmouth, and that he had immemorial possession thereof, yet the LORDS would introduce no such new servitude on the neighbouring heritors; and though the town of Edinburgh, for their convenience, cause tan their leather, wash their clothes, and bleach their linen at the Canon-mills, Water of Leith, and Restalrig-loch, and lay them out on the adjacent grass; yet that can never introduce a servitude on the neighbouring heritors, to leave out so much of their land entitled for that use, without their consent; and what if, by inundation or speats, the channel make an irruption into another heritors ground, will that subject his land to be abused with your linen-cloth, and render its property useless? *nullo modo*. Put the case, I have trees or bushes growing by the river's side, on which past memory you have been in use to hang your clothes for whitening or drying; can you hinder me from cutting down or rooting up these bushes, when I please, because they were convenient for your accommodation. *Answered*, Linen being very necessary for napery and sheets, to serve those who resort to Falkland, and the use of water being *jure naturæ* common, if I have prescribed the right of bleaching on your ground bounding towards the water, you cannot stop me afterwards; for what was *voluntatis* at first, becomes *necessitatis* after 40 years possession.

* Edition 1665.

No 159.

And why may not bleaching be as well prescribed, as keeping of markets; though the President, and some others, thought it the subject of prescription, as any other, yet the plurality found there was no such servitude known in our law, and that the possession behoved to be held by mere tolerance favour and connivance, and not by way of right.

Fol. Dic. v. 2. p. III. Fountainball, v. 2. p. 430.

1711. January 12.

The INHABITANTS and BURGESSES of Perth *against* The SHOEMAKERS of the said Burgh.

No 160.

Found lawful for all persons to vend in a royal burgh, on market days, all kinds of boots and shoes, although the corporations of shoemakers had been in use beyond the years of prescription, to allow only certain kinds to be sold by strangers.

THE Inhabitants and Burgesses of Perth, having raised a process against the Incorporation of Shoemakers there, for declaring it lawful to all persons upon market and fair days, to import and vend shoes, boots, and slippers of all kinds, without distinction; it was *alleged* for the defenders, That no such declarator could be sustained, because all crafts within that burgh, were anciently erected into deaconries and incorporations, with freedoms, liberties and powers, to make necessary regulations for the good of the respective incorporations; and particularly the defenders have been in immemorial use and custom of debarring all strangers from importing high-heeled shoes, boots, and slippers, upon fairs or weekly market days; and of seizing all shoes so imported or vended, except those that were single soled, or pumps, and of committing the shoemakers or importers to prison.

Replied for the pursuers; The general powers in the defenders' charters, allowing to make laws and regulations concerning their trade, do only respect the members of their own incorporation; and cannot be extended to take away the rights and privileges which the Town and Inhabitants have by their other grants of fairs, and weekly markets. *2do*, Did the defenders' charter expressly carry such an exclusive privilege as they pleaded, it could not be regarded; because, that were a plain monopoly, inconsistent with law, trade, and the freedom of fairs and markets; and our law hath justly taken notice of, and discharged such abuses, under the pain of oppression, act 42d Parl. 4th Ja. IV. Again, fairs and weekly markets are valuable privileges of the town, not liable to prescription, L. 9. D. De usurp. et usucap. et ubi lex inhibet usucapionem, bona fides possidenti nihil prodest. And though prescription might be objected to private persons, who for 40 years have been debarred by the defenders from coming to the public markets and fairs; yet, as to all others it is *meræ facultatis*, who cannot be prejudiced thereby. *2do*, Since the union, commerce is free throughout the united island; and if any trader from England, cannot be hindered to import and sell within any part of Scotland, far less can a Burgesses or Inhabitant there be tied up.