1707. *March* 4. The CREDITORS and DONATAR of ESTATE of the DUNFERMLINE *against* The Laird of INNES.

No. 158.
Found that although the tenants of a particular estate had been past memory in use to be employed in curing the salmon fished in the river, the proprietor was under no obligation to continue them.

IN the reduction, improbation and declarator, at the instance of the creditors and donatar of the estate of Dunfermline, against the Laird of Innes, the pursuers having insisted to have it declared that they, their tacksmen and kenners, have the sole right to fish in the water of Spey, belonging to the estate of Dunfermline, and to employ what persons they please to fish the same, and to dress and pack the fish, and make barrels for that end;

Alleged for the defender, That the King, by a charter in the year 1587, erecting the defender's town of Garmouth into a burgh of barony, gave to the inhabitants (besides the ordinary powers) omnimodam potestatem esse piscatores, & piscium mactatores, &c. cum potestate salmones aliosque id genus piscium condendi (lie pack salmond) saliendi, & in dolia solita committendi, &c. And the family of Dunfermline had past all memory subjected themselves to make use only of the fishers of Garmouth, who for that end have always been bred up and disposed into regular bands, each consisting of eight men, who orderly succeed one another every twelve hours, and get their wages in fish, in a certain proportion to the number taken. Whereby the inhabitants of Garmouth having acquired a servitude, and the sole right of being fishers and macktaters, salters and packers of all kinds of fishes upon the water of Spey.

Replied for the pursuers: No instance in our law and practice can be given of such an extraordinary servitude as this, which doth not consist with the property of the fishing, and debording from the rules of all predial or real servitudes, resolves in a temporary and personal *locatio operarum*. For it cannot be understood a real burden to affect singular successors, being neither of the number of the ordinary servitudes, nor contained in the infeftments of the servient tenement, but must be considered as a personal obligement upon the contractor. And, if it were otherwise, purchasers might be ruined by old pactions, restrictions and limitations upon their property, Quæ oriuntur ex variis causarum figuris. Now what purchaser in this case could dream, that a fishing originally constituted with full freedom could be thus burdened, as that the proprietor should only employ his servants out of a certain sort of people. As to the defender's charter 1587, though it gives the inhabitants of Garmouth the privilage of fishers, macktaters, curers and packers, it doth not mention the water of Spey, nor doth it give them the sole power to hinder others without the liberties of their burgh to do the like, but only *omnimodam potestatem*, which is not exclusive. 2*do*, The pursuers and their authors making use of the Garmouth men to fish their water was *actus meræ facultatis*, like a man's going in a common road, or going to another's mill, or making use of shearers out of his neighbour's land, &c. for 40 years, which doth not hinder him to alter his course, and use his liberty thereafter.

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Duplied for the defenders: Omnimodam potestatem esse mactatores piscium, &c. can only be understood of a special privilege upon the adjacent water: For otherwise no liege is barred from being a fisher. Which, with the pursuers constant landing their boats, drying their nets, and having their corf-house upon the defender's territory, and his admitting the same only in contemplation of their employing his regular bands of fishers, doth clear it to be *actus necessitatis*, and not *meræ voluntatis*. This is fortified by decisions, March 11. 1634, Sheriff of Galloway *contra* Earl of Cassilis, No 44. p. 10888; July 22. 1634, Forrester *contra* Feuars, *infra h. t.*; July 10. and 15. 1623, M'Kay *contra* L. of Skelmorly, No 43. p. 10887; where a general title, and 40 years possession, without any legal compulsion intervening, was found to infer the most grievous servitudes, and, which comes directly up to the parallel of the present case of a circumstantiate and circumscribed possession The paying of dry multure during the years of prescription (like the pursuer's paying of salmon for fishing wages) obliges the servient tenement for ever to remain in the same state; Stair, Institut. Lib. 2. Tit. 7. N. 16; July 23. 1675, Kinnaird *contra* Drummond, No 123. p. 10862. And, as my Lord Stair observes, there is no more requisite to preserve servitudes of that kind, than that the tenants were caused to do the same any manner of way 40 years, though without a process.

The Lords found the pursuers making use of the people of Gormoch in their fishing during the years of prescription, not relevant to constitute the servitude libelled, and therefore declared and decerned in terms of the libel.

Fol. Dic. v. 2. p. 111. Forbes, p. 149

1707, *March* 13.—Fountainhall reports this case:

The Countess, the donatar, and creditors of the estate of Dunfermline, pursue a reduction and declarator against Sir Hary Innes of that Ilk, that they have the sole right of fishing on the water of Spey, and to employ whom they please therein; and to dress, cure, and pack the fish, and to make barrels for that end; and that they are not astricted to employ the Garmouth men, except for their own conveniency, and as they pleased. *Alleged* for Innes, That the inhabitants of this burgh of barony of Garmouth have been in the perpetual and immemorial use and possession of being employed in that fishing, and to be paid their wages in salmon, and to debar and exclude all others, and which privilege was contained in Innes's charters in 1587, and since, giving them omnimodam potestatem esse captores, mactatores, salitores, conditores in dolia, et consarcinatores omnis generis piscium, to be takers, killers, makers, salters, coopers, packers of salmon, &c. This fishing on Spey belonged to the abbacies, of Pluscardie and Urquhart, and were disponed by King James VI. in 1591, to Alexander Seaton Earl of Dunfermline, though the Laird of Innes alleges, they were his predecessors' by an old confirmation of King Alexander, confirming a charter of King Malcolm's, but it makes no mention of this fishing. See Craig, feud. p. 366. * The Lords granted a conjunct probation, for

* Edition 1655.

Innes to prove, that his Garmouth men were always in use to fish that water, and no others; and the creditors to prove, that the employing of the Garmouth men was only for their own convenience, and that on several occasions they brought in strangers; and the probation coming to be advised, it was *alleged* for Innes, That he had proved a clear continued possession of upwards of 40 years of his men being the sole fishers on that river, and their debarring all others; of which he has the liveliest characters imaginable of a regular establishment of a servitude, and of a general acquiescence therein, that the subject matter is capable of; and that all these general privileges are explained and enlarged by possession, as was found, 18th July 1676, the Earl of Kinghorn *contra* the Town of Forfar, *voce* PUBLIC OFFICER; and 9th Dec. 1679, Lord Hatton *contra* the Town of Dundee, No 83. p. 10272. both in the case of constabulary fees; 22d July 1634, Forrester *contra* Feuars, *infra*, *h. t.* in victual payable for the office of forrestrie; 11th March 1634, Sheriff of Galloway *contra* the Earl of Cassilis, No 144. p. 10888. in the services of bailiary in shearing and tilling; and 10th and 15th July 1623, Mackay *contra* Laird of Skelmorly, No 143. p. 10887. in the dues of meal and lamb payable to the crownry of Arran. In all these the Lords sustained immemorial possession to infer more grievous servitudes than any now acclaimed, prescription being the *magna charta* and security of all the lieges. *Answered*, There were some servitudes known in law, as thirlage, pasturage, highways; but this had neither name nor vestige in any law; nature has left us free to employ any persons we please to serve us, and of this liberty we cannot be deprived without our own consent. Law makes every man *arbiter rei suæ, dominus et moderator*, and it is *actus meræ voluntatis*, and arbitrary, whom I choose to fish my rivers, and is only a personal contract of *locatio conductio operarum*; and when I am not pleased with their work I may take another; and one might as well allege, that I were obliged to make use of the inhabitants of such a village or town, and no others, because I and my predecessors for a long time employed them to shear my corns, or cut down my meadows; shall my employing the smiths, wrights, or masons of such a town, for the space of 40 years, lay a perpetual obligation on me, in all time coming, to employ them and no other? What loose, foolish, and absurd reasoning would this be thought? And yet it is just the same with what Innes claims. Mankind will go where they are best served in any sort of trade; but if it be served up to a constraint and restriction of my natural liberty and freedom, we will serve ourselves elsewhere as we best can. It was lately attempted to make fishers *cymbæ ascripti*, as much as salters and colliers are by special acts of Parliament, but the Lords rejected it with indignation, as a slavery unknown by law; and this demand of Innes's is as debording and irregular every whit. The Lords found no servitude here, but what the neighbourhood had done in employing them to fish was *actus meræ facultatis* for their own accommodation and conveniency, and did not oblige them to continue to employ the Garmouth men for the future. If the Lords had entered on the probation of the prescrip-

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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.

Fountainhall, 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 Balmblay, 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 Mucduffs, 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 repledging, 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; 2*do*, The servitude of casting fail and divot on it for upholding of their milldam; 3*tio*, The liberty of upholding their yearly fairs on that ground; and, 4*to*, 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. 2*do*, 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*, 20th 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. 2*do*,