

No 2. selling of such furniture ; and also there were divers decreets *in foro contentioso* betwixt these parties upon the same subjects.

Aft. Nicolson & Stewart.

Alt. Aiton, Mowat & Craig.

Clerk, Gibson,

Durie, p. 489.

1677. November 22.

The FLESHERS of the CANONGATE *against* The TOWN of EDINBURGH.

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A burgh of barony was erected in a baron's charter, with the incorporation of several trades. These were found entitled to make laws for themselves, without prejudice to the baron's acts ; who might appoint visitors, but could not fine.

THE TOWN of Edinburgh did, by an act of council, appoint their cordiners and skinners, to visit the skins and hydes of beasts slain in the Canongate, or brought in to the market, and to punish those who had the same holled or tarleathered : Whereupon some of the fleshers in the Canongate were fined and imprisoned, and gave in a bill of suspension ; upon which the LORDS ordained the cause to be discust ; and *alleged*, That the Canongate is a burgh of regality, erected by the King, in the Baron of Broughton's charter, whereby they have the privilege of Bailies and trades ; likeas the Baron of Broughton has, by his seal of cause, produced his privilege to the fleshers of the Canongate, as a free trade and corporation, and hath given them power to make their own acts, to punish transgressors thereof, and to apply the fines to their own box and poor ; and therefore the town, who have succeeded in place of the Baron of Broughton, after these privileges, cannot alter the same ; and though they might appoint a Baron Bailie as the Barons did, yet they cannot appoint visitors with power to fine, especially citizens of Edinburgh, who concur with their neighbours to disquiet the trades of the Canongate, to draw the whole trade to the fleshers of Edinburgh ; which is a public prejudice.

THE LORDS found the privileges granted to the suspenders valid, and that no visitors could punish their transgressions but their Baron Bailie, who might appoint visitors to sight, report, and be witnesses, but not judges ; but would not limit the Bailie in his choice of those in the Canongate ; and found, that the fines imposed by the Bailie, and not by the trade, by their own acts, were not comprehended in their privilege, and so belonged not to their poor.

*Stair, v. 2. p. 563.*

1732. November 22.

FEUERS of DUNSE *against* HAY of Drummelzier.

No 4.

The nature of a burgh of barony.

A burgh of barony not a good title for acquiring a servitude of pasturage by prescription.

THE village of Dunse, belonging in property to Hume of Aiton, was, by a charter from the Crown, erected into a free burgh of barony, ' with power to the inhabitants to buy and sell, to have markets and public fairs, to have burgesses ' who should chuse their own bailies and other officers : With power to the said ' burgesses and inhabitants, to have and hold the said town of Dunse, with its ' pertinents, for ever in a true and free burgh of barony, with privileges, &c.'

By a second charter, the town of Dunse is again 'erected into a free burgh of barony in favour of Sir Patrick Hume of Aiton, with all and sundry lands, cottages, tenements, houses, yards, tofts, crofts, acres belonging to the same, with every other of its pertinents; with power to the inhabitants and free burgesses of the same, received and admitted by Sir Patrick Hume of Aiton, and his foresaids, to sell and buy, &c. with power to the said Sir Patrick to name bailies and other officers, and of having a public market and yearly fair, and of gathering the customs and duties of the same, he always applying them to the common good of the burgh; and with power to him to admit baxters, butchers, &c.'

In a declarator of servitude of common pasturage upon the commonty of Dunse, at the instance of the burgesses and inhabitants of the town, as an incorporated body, against Alexander Hay of Drummelzier, now proprietor of the same; a proof was admitted before answer; and it came out, that they had been in possession of the servitude past memory of man, by keeping a common town-herd, and pasturing their horse, nolt, and sheep, promiscuously over the commonty. When a proof came to be advised, the question occurred, whether a burgh of barony, *qua* such, can acquire a servitude of pasturage by prescription? Several objections and answers were made; to clear which, two things were premised. *Imo*, What is the true nature of a burgh of barony. *2do*, What legal foundation there can be for such a servitude.

With respect to the *first*, burgage is a species of feudal holding well known in our law; the burgh is the subject or fee held; the incorporate body of burgesses and inhabitants, hold it of a superior: where the King is superior, it is a burgh royal; where a subject is superior, it is a burgh of barony. The incorporation then, or politic body, is the *vassal* which *holds*: the burgh is the *subject* held; and, in this case, it is held of *Drummelzier* who is superior, who again holds of the Crown. And here lies the difference betwixt a barony and a burgh; a barony is a feudal subject held directly and immediately by the baron as the vassal: a burgh is a complex term, comprehending the body politic of the inhabitants, and the burgh properly so called: the body politic is the vassal who holds; the burgh properly so called is the subject held, and the baron is no other than over-lord, or superior, of the politic body.

As to the *second* point, The possession was *nec vi, nec clam, nec precario*, which, by the principles of the Roman law, and of ours, makes prescription in cases of servitude, as presuming a title by grant or otherways, though after long possession the evidence be lost. And in this a servitude of pasturage goes hand in hand with a servitude of dry multure, and with many other servitudes: long possession of a servitude of dry multure presumes a title, though now lost; as no man will pay dry multure voluntarily. In the present case, the immemorial possession of such a large pasturage will never be interpreted *voluntatis* of the proprietor, but *necessitatis*. In this view, prescription of a common pasturage, stands upon the footing of an actual grant from the proprietor of the land; and

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therefore, whatever arguments can be moved against the prescriptibility of such a right by an incorporation, must equally conclude, that an incorporation cannot acquire such a servitude, even by a grant from the proprietor.

A title upon long possession, is presumed from circumstances less pregnant than those mentioned. It is established, that a vassal cannot burden his fee so as to prejudice the superior: yet servitudes burdening the fee by prescription, are effectual. Why? Because of the superior's consent, inferred from suffering possession for forty years without interruption. Now, if a superior's consent be presumed from a forty years possession of common pasturage upon his vassal's property, how much stronger must the presumption be when the possession is upon his own property?

It was added for the pursuers, that they have charters of their burgh of Dunse, their property, *cum pertinentibus*; which is a sufficient title to acquire even property by prescription, much more a servitude upon property.

Now, as to the particular objections in their order. And *imo*, It was *objected*, 'That the town of Dunse is erected into a burgh of barony in favour of the baron; the burgh is his property, and any servitude acquired to the burgh, must belong to him, and not to the inhabitants, to whom the burgh belongs not.'

*Answer*: The burgh incorporated, and united into a feudal subject, held as such by the inhabitants, must be distinguished from the particular houses, yards, &c. which are the constituent parts of the burgh. These particular houses, yards, &c. belong to Drummelzier; but the burgh, *qua* incorporated subject, belongs to, and is held by the body-politic; that is, it belongs to them as far as the use and possession goes, and so far only they hold it: for the feudal holding is not confined to the property of land, but is extended to burdens upon property, witness infeftments in security; and even to *jura incorporalia*, such as jurisdictions, offices, &c. This being so, nothing bars the inhabitants of Dunse, to acquire such a servitude to their own town, as far as their interest in the town extends; just as a tacksman may acquire a servitude to his possession, of which he has the benefit while his tack endures, and the proprietor, when the tack is at an end.

*Objection II.* A corporation such as that of Dunse, erected solely for merchandize, manufactures, &c. cannot acquire property or servitude by prescription, not being the end for which they were erected; and an example was given of the new bank.

*Answer I.* A burgh is *nomen universitatis et dignitatis*: it is a feudal holding, implying a vassal and fee; and therefore the vassal may acquire by consent or prescription, as well as any other proprietor. Thus it was found, that a burgh is equivalent to a barony, so as even to acquire salmon-fishing by prescription, 26th January 1665, Heritors of Don, *contra* Town of Aberdeen, Stair, v. 1. p. 255. *voce* SALMON FISHING; 6th December 1678, Brown *contra* Town of Kirk-

cudbright, Stair, v. 2. p. 652. *voce* PRESCRIPTION; and this without any title but the town's charter, containing a clause *cum piscationibus*; upon which it was found, that such a clause granted to an incorporation, or community of a burgh, with immemorial possession, is sufficient.

*Answer 2.* Though Drummelzier, and not the incorporation, were the vassal, according to the supposition, yet such an incorporation may still acquire by consent or prescription. By consent it cannot be doubted; for colleges, universities, hospitals, hold property; banks, *qua* such, are proprietors; and even this incorporation of Dunse holds property, having a common good, as above set forth: that it can acquire by prescription, can as little be doubted, because prescription rests ultimately upon consent. Our countryman, Craig, foresaw no difficulty in this doctrine: In his Treatise of Feus, l. 2. dieg. 8. § 33. treating of common pasturage, he has these words: 'Hæc autem pascua vel sunt publica vel privata; pascua autem ea sunt publica, quæ sunt alicujus collegii aut universitatis; neque tamen promiscue omnibus ea permittenda, sed eis qui sunt ejusdem collegii aut universitatis.' 'Tis true, that this pasturage can only be a personal, not a real servitude. But of this hereafter.

*Objection III.* Pasturage is a real servitude, which presupposes a dominant as well as a servient tenement. But, in this case, the body-politic of the inhabitants of Dunse hold, *qua* such, no dominant tenement to support the servitude.

*Answer 1.* The dominant tenement is the burgh of Dunse, erected *cum omnibus et singulis terris, cotagiis et tenementis, domibus, ædificiis, hortis, toftis,croftis, acris ejusdem, et singulis aliis suis pertinent.*

*Answer 2.* What if there were no dominant tenement? If a college, or other incorporation, can acquire such a right by consent, they may also acquire it by prescription, as above observed. Upon this supposition, indeed, it will only be a personal, not a real servitude; but though a right is not a real servitude, it does not follow that it can be nothing at all. Personal servitudes, in all the different shapes that can be contrived, are received, and well known in our practice; and the instances are without number of their being acquired by prescription. 'A claim was sustained, at the instance of the minister of Leith, against some merchants in Edinburgh, importers of herring, dry-fish, &c. at Leith and Newhaven, to pay 20 shillings the last of herrings, and the twentieth part of killing and ling; he having proved forty years possession of the said servitude; 10th February 1666, Minister of North-Leith *contra* Merchants in Edinburgh,' Stair, v. 1. p. 354. *voce* PRESCRIPTION. 'One, who had some burgh acres, refusing payment of the second minister's stipend, because he paid his whole teind to the first minister, was found liable, in regard that the heritors of the burgh acres had been in use, past memory of man, to pay the second minister's stipend over and above the teind paid to the first minister; 22d July 1668, Boswell *contra* Town of Kirkcaldy,' Stair, v. 1. p. 558. *voce* PRESCRIPTION. Again, in a process against feuers holding of a town, concluding against them to bear a proportion of the private stents of the town, 'the Court

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' sustained immemorial possession, as relevant to make them liable in time coming, though their charters from the town bore a feu-duty, *pro omni alio onere*; 14th July 1674, Town of Inverness *contra* Feuers of Drakies, Stair, v. 2. p. 275. *voce* PRESCRIPTION. This case, by the bye, is extremely similar to that in hand, being a personal servitude acquired to a community by prescription. Upon the same principle, ' 40 years possession was found to give right to a Sheriff to ride a fair, and to exact so much for the Sheriff-gloves, and for the price of the best staig in the fair; 11th July 1672, Earl of Callender *contra* Town of Stirling.' Stair, v. 2. p. 99. *voce* PRESCRIPTION. 18th July 1665, Douglas *contra* Town of Jedburgh, Newbyth, MS. *voce* PRESCRIPTION. The Sheriff of Inverness pursued a declarator, that he had right to three days salmon-fishing in the water of Ness under the bridge, every summer, as a casualty of his Sheriffship, which was sustained upon 40 years possession; for, since this was but a servitude upon fishing, it was found it might be constituted by long possession, as Sheriff-gloves and other casualties of offices are; 13th December 1677, Earl of Murray *contra* Town of Inverness, Stair, v. 2. p. 579. *voce* PRESCRIPTION. These and many more that may be given, are all of them examples of personal servitudes acquired to offices and communities, by prescription alone. At the same time, they serve as an additional answer to the second objection: Here we have communities acquiring servitudes by prescription, though not the end for which they were erected; and here we have servitudes acquired to offices by prescription, though less connected with these offices, than common pasturage is with the community of a town.

*Objection IV.* Supposing there were no dominant tenement, yet this real servitude cannot be acquired by prescription, not being of that nature to be *utile prædio*, which is the characteristic of a real servitude.

*Answer 1.* Properly speaking, no servitude is useful to the *prædium*, but to the proprietor of the *prædium*. But more directly, whatever may be the notion of the Roman lawyers, from whom this objection is borrowed, neither reason nor later writers are so strict in the definition of a real servitude. It is enough, if it can be a pertinent or accessory of the *prædium dominans*, so as, in the main, to make it *præciosius*. Thirlage, which is a most proper servitude, is a good example, which makes the miln *præciosius*, but in no proper sense can be said to be *utile prædio*.

*Answer 2.* Though the objection should be sustained to take this claim off the footing of a proper real servitude, it will still be a good personal servitude; and, if so, it must be effectual as long as the person or community subsists; and also must be effectual against purchasers; because, though but a personal servitude, it is however a real right.

*Objection V.* If such a servitude be sustained, it will be inexplicable. The extent of real servitudes is in proportion to the extent of the dominant tenements; but here there is no dominant tenement whereby to measure the extent of this real servitude.

*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.*