1770. *December* 18.

JAMES YEAMAN of Murie, *against* PATRICK CRAWFORD of Auchinames.

No. 40.
Whether there may be a servitude of astriction to the smithy of a barony?

BY the old investitures of the barony of Errol, the proprietors were, above a century ago, infeft in the lands of Kirktown of Errol, and a variety of other lands and tenements, with the mill of Errol, mill-lands, multure, &c. " et cum lie smiddie de Errol, et universis privilegiis, libertatibus, divoriis, et casualitatibus ad easdem pertinen. solit. et consuet." Under the above description, taken verbatim from the old investitures, Mr. Crawford stood infeft in the barony. The Mains of Errol, the property of Mr. Yeaman, formerly made a part of the barony; and though for many years dismembered, it appeared that the astriction to the smithy had been kept up; and that the tenants and possessors of these lands had been in the constant use of carrying their iron-work to it, and of paying certain dues.

In mutual petitions to the sheriff of Perth, the one at the instance of Mr. Yeaman to be relieved from, the other at the instance of Mr. Crawford in support of the astriction, the question, as to the legal constitution and existence of this servitude, came to be discussed; and the sheriff, upon advising a proof, found, " The possessors of the Mains of Errol astricted to the smithy of Errol for the manufactory of the iron-work belonging to their husbandry, and liable to the smith of Errol in the ordinary and accustomed boll or quantity of victual for each plough. A bill of advocation having been refused,

Mr. Yeaman, in a reclaiming petition, contended, That this question could not be determined by any of the rules that were admitted in questions of thirlage to a mill. The last was a servitude well known and established in law, but the first was not; and though Craig, Lib. 2. Dieg. 3. § 19. did mention a clause in charters, " *cum fabrilibus*," such clause only gave a right to the grantee to have smithies on his grounds, and to exclude others from erecting them; but did not thereby establish any obligatory servitude upon the tenants to have their work performed there. Though there were examples in Scotland of a person binding his own particular tenants to a smithy situated upon the proprietor's own grounds, yet it was a very different case where an attempt was made to tie down the proprietor and tenants of one estate, to have their work done by the barony smith of another.

There was no sufficient title in this case to found the prescriptive right; for though Mr Crawford had by his charter a right to the smithy of Errol with the pertinents, it did not follow that the work of the petitioner's estate was any pertinent thereof. It could not have been the view of the original parties to establish a perpetual servitude in this case, as no such contract could have been introduced without some writing. No such agreement appeared upon, or could be inferred from the titles to the petitioner's lands; for, as in these, the astriction to the mill of Errol was expressly mentioned, this to the smithy would have been as positively reserved, if it had been thought to exist.

No. 40.

Mr. Crawford answered:

Although the servitude claimed in the present instance had never before been known or heard of, no reason occurred why, upon the general principles of law, it should not be made effectual, if constituted by any of the known modes in which servitudes were established. Voet. Lib. 8. tit. 3. § 12. The servitude of seaware was not mentioned in any of the books, and had yet been repeatedly sustained upon prescription alone. But this astriction to a smithy was not a servitude unknown in the laws and practice of this country; it was established, like all others of that nature, upon account of the necessities of an early period; it naturally grew up into an exclusive privilege; and, in fact, was very common in several parts of Scotland, particularly in the northern counties. A particular account of this servitude was given by Sir Thomas Craig, L. 2. Dieg. 8. § 25. whose words did by no means admit of the interpretation, either in sense or spirit, that the petitioner had endeavoured to give them.

The respondent's title, in the present instance, was unchallengeable, not only to the smithy itself, but to all the duties and privileges which the proprietor had been in use to receive out of any lands liable to the servitude. The alienations made since the servitude first obtained could not dissolve the obligation, unless it had been lost by immemorial disuse, or by express liberation given up. There was therefore a good prescriptive title; and the immemorial possession that had followed, which was proved not only by parole testimony, but by express mention made of the astriction in the tacks to the petitioner's tenants 57 years back, must unalterably establish the right.

The Lords remitted to the Lord Ordinary to pass the bill.

Lord Ordinary, *Hailes*. For Yeaman, *H. Dundas*.
Clerk, *Gibson*. For Crawford, *Ilay Campbell*.

R. H. *Fac. Coll. No.* 61. *p.* 186.

1779. *January* 14.

SIR ARCHIBALD HOPE *against* ANDREW WAUCHOPE.

No. 41.

An *opus manufactum*, in an inferior coal-pit, by the proprietor, to prevent the water of a higher coal-pit from flowing down upon it, how far legal?

THE lessee of Niddry coal, in working it, left a wall of a certain breadth, stipulated by the lease, betwixt it and the coal of Woolmet, which is a continuation of the same seam, but lies higher than that of Niddry. The coal of this wall being of a porous nature, the water which came down from the coal of Woolmet pierced through it, and was carried off by the level of the Niddry coal to the sea. Mr. Wauchope, proprietor of the Niddry coal, in order to prevent the water from piercing the wall, caused make downsetts, or pits in the wall, which he was proceeding to fill up with clay, when Sir Archibald Hope, lessee of Woolmet coal, obtained a suspension, which was conjoined with a process, at the instance of Mr.