

1630. *March 11.* TOWN OF EDINBURGH *against* TOWN OF LEITH.

No. 2.

Found in conformity with
Turnbull
against
Blanerne,
No. 1.

THE TOWN of Edinburgh, having acquired from the Laird of Restalrig, baron of Leith, *in anno* 1398, a writ, or bond of servitude, whereby he, as baron and heritor of Leith, for him, his heirs, and successors, renounced, in favours of the Provost, Bailies, Council, and Community of Edinburgh, all privilege of girnelling of victual in Leith, or baking, or keeping booths for selling of wares within Leith, or holding markets, which evident being confirmed by King James, and ratified in Parliament, 1621, and Leith being charged thereon to desist, conform thereto; and they suspending, that writ could not be found a servitude, which was real, to affect their houses, wherein they were infest, with all privileges and liberties, bearing no servitude; and if it should be found obligatory, it was only against the maker and his heirs, and could not strike against them, who were singular successors, to the rights of their dwelling-houses and tenements, whereon they had built kills, cobles, bake-houses, brew-houses, and all other easements, meet for their calling; and which they had used these ten or twelve score years by-past, without interruption, in full liberty, without claim of any such privilege or servitude by the town of Edinburgh; so that, if it were a servitude real, as it is denied, yet, by these ten score years desuetude, and by the contrary using of the liberty of baking, brewing, girnelling of corns, &c. without interruption, the servitude, if any had been, was prescribed; and also, that they were infest in their several lands, with all liberties, by the town of Edinburgh themselves, since that alleged servitude, making no reservation thereof in their infestments, and that not only since the servitude, but also since the time whereat they acquired, from the Laird of Restalrig, the superiority of Leith; by the which acquiring of the superiority; since the servitude, the servitude was in effect confounded with the superiority, and inhabitants of Leith having acquired right of these lands from the town of Edinburgh, since their purchasing of the superiority, thereby the servitude was extinguished, and could not affect their land: Attour, it would not be reputed a servitude, because it tended not to the weal, nor for the good of any *prædium dominans*, without which no servitude can in law affect *prædium serviens*; and this kind of servitude is against the law of nature, and all common law and equity, to prohibit the indwellers at so public a place, the chief port of the kingdom, and where the greatest concourse of the King's subjects are, to use this lawful trade of buying of victual, and selling to the lieges, and tended to prohibit all barons, lords, and gentlemen of the country, to have any dispatch of their victual in Leith, where there is, and ever has been, greatest dispatch; for if the indwellers in Leith may not girnel victual, it is alike to prohibit them to buy and sell, which has ever been their calling; for when it is bought, they may not lay it up in girnels, and the prohibition of girnelling ought only to be extended to such girnelling as is done to keep victual to any dearth, from which they were content to be prohibited; and if any other girnelling should be prohibited to them, and the only power

thereof found to pertain to Edinburgh, it would tend to make a monopoly, and to force the gentry to sell their victual at what prices Edinburgh pleased: The Lords, after that the town of Edinburgh had declared, that they were content that this writ and prohibition should not so extend, but that the indwellers in Leith might set their houses, for girnels, to gentlemen, and all the lieges, and that the whole subjects, except Leith, might girnle victual in Leith, as they pleased, and also, that the indwellers in Leith might buy, and sell, and girnle victual, and bake bread, all for their own use, but no further to block and sell again, after they had girnelled the same, without licence of Edinburgh, found the said servitude to be real, and not personal only; but that it affected all the houses in Leith, disposed since the said servitude; and found the same lawful, notwithstanding of all the above-written reasons, in respect the same was both confirmed by the King, and ratified in Parliament, which being so corroborated, and that it was now questioned and agitated within the years appointed by the act of Parliament 1621, anent prescription, (which took away the prescription of the civil law), and therefore found the letters orderly proceeded; but the Lords declared, that when any action should be pursued by Edinburgh against Leith, for any fact or deed done against that prohibition of the servitude, and against this sentence, that they would consider thereof, if it might import a contravening of the said prohibition, and would judge thereof, according to the quality of the fact and deed, and the extent thereof, if it came under this prohibition.

Item, In this process, it was found, That a servitude so constituted neither needed any *reddendo* to be expressed in the writ whereby it was constituted, neither needed sasine; and, being of date 1398, found it not null for want of witnesses in that time, being sealed and subscribed by the party, and when there was no use of witnesses.

For this question, *vide* L. Si quando, §. Cum in domo, D. Si servitus vindicetur, qui §. sic loquitur de servitude, qua prohibetur quis habere aliquid situm vel positum in loco vel fundo suo, invito Domino. *Item*, *vid.* L. si quis. ult. De pactis inter empt. et debitor. composit. Tit. 54. Lib. 4. C. Qua lege late constituitur pactum valere, quo venditor fundi paciscitur cum emptore, ne liceat emptori monumentum constituere in fundo vendito, vel alio modo, humano juri eum eximere, et *vide* glossam ad hanc legem; *vide* etiam L. Venditor. 50. D. Communia prædior: quæ lex dicit, pactum a venditore, in venditione factum, ne liceat emptori piscari in illa parte maris, tenere emptorem et successores ejus in illo fundo: ubi Bartol, &c. scribunt quod valeat ista conventio, ut obligeris tu et successores tui, non autem ut sit aliqua servitus, cum non sit prædium dominans; unde si tu promittis aliquid te facturum vel non facturum in publico, per quod usus aliorum non impediatur, sed tuus tantum, istud pactum valet.

Act. Advocatus, Nicolson, Stuart, & Belshes. *Att. Mowat & Craig.* *Clerk, Gibson.*

Fol. Dic. v. 2. n. 372. Durie, n. 504.