

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.

Duplied for the defenders ; Their exclusive privilege is no monopoly, being granted by the sovereign conform to law, whereas a monopoly is entered into by private parties without authority ; so both in Scotland and England, certain trading societies and companies enjoy privileges exclusive of all others, which are not reckoned monopolies. Crafts were erected into deaconries and incorporations, for the improvement of their manufactures, and that the members thereof might be the more enabled to pay their proportion of taxes laid on the burgh ; and though a right or thing destined to public use, cannot be acquired *usucapione*, and markets belong to the public policy, yet they differ in their rules and privileges in different places, which may be regulated by long custom. *2do*, There is indeed an equal communication of trade by the union through all the united kingdom ; all the subjects thereof are brought upon an equal foot ; that is, an Englishman may import into a royal burgh in Scotland, whatever a Scotsman could import, but that doth not derogate to the privileges of royal burghs, and incorporations ; so that where the Scots are under a restraint by the special regulation of a market, introduced by prescription, the English cannot plead immunity from it. Thus the grant of two pencies upon the pint of ale in favours of the Town of Edinburgh, lyeth equally upon all the lieges Scots and English, notwithstanding the union ; whereas the twelve pence imposed in favours of the good town, upon the pint of ale or beer imported from abroad, doth not now since the union affect English ale or beer, though it did before.

No 160.

THE LORDS repelled the defence founded upon prescription, and sustained the declarator.

Fol. Dic. v. 2. p. 111. Forbes, p. 474.

1713. July 9. DUKE OF MONTROSE *against* M'AULAY.

No 161.

AN heritable bailie of an Earldom, having, under the colour of that title, acted also, for above forty years, as heritable bailie of a regality, which also belonged to the Earl, his constituent ; this possession, as wanting a title, was not found to make a prescription as to the bailiary of regality, even in the person of a singular successor, who purchased the office of bailie of the Earldom.

Fol. Dic. v. 2. p. 111.

* * * This case is No 21. p. 2266, *voce* CLAUSE.

1714. February 5.
Brigadier PRESTOUN, and the other CREDITORS of Valleyfield, *against* Colonel JOHN ERSKINE of Carnock.

No 162.

IN the mutual declarators of property and servitude betwixt Brigadier Prestoun and the other Creditors of Valleyfield, and Colonel Erskine, it being

A person having been in the immemorial pos-