

*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-

No 162.  
 session of wa-  
 ter brought  
 from a lake  
 along a dam,  
 in his neigh-  
 bour's ground  
 to his own  
 mill and coal-  
 works, and of  
 casting feal,  
 &c. upon the  
 next adjacent  
 ground for  
 repairing the  
 dam, was  
 found to have  
 prescribed  
 a right of ser-  
 vitude there-  
 to.

proved, that the heritors and tacksmen of Valleyfield have been in the immemorial uninterrupted possession of using the water running from the lochs of Carnock and Carneil to the dam of Inzevar in Colonel Erskine's ground, and from thence to Craigmill and coal-works of Valleyfield, and of mending and repairing the dam-heads of Carneil and Inzevar, and of the leads and aqueducts whereby the said water is carried from these dams to the works of Valleyfield, and of casting feal and divots, clay, and other materials necessary for repairing the said dams, leads, and aqueducts, upon the ground next adjacent there;—the LORDS found, That the heritors and creditors of Valleyfield have right to the said water for the use of the said mill and coal-works, and of casting feal and divots, clay, and other materials necessary for mending and repairing the said dams and aqueducts from the next adjacent ground thereto; and that there is a servitude thereby constituted and established in favours of the said heritors and creditors to the said water and others aforesaid, upon the grounds and lands belonging to Colonel Erskine.

Albeit it was *alleged* for Colonel Erskine, That possession without a previous title in writ cannot constitute a servitude. Lawyers distinguish betwixt the power that a proprietor hath, whose ground lies upon a natural river or rivulet, to stop another through whose ground that rivulet comes, from inverting the course of it, and him through whose ground water coming from an artificial pond, or any other water-work, does run. It is agreed, that the course of a natural current water cannot be stopped or inverted, which is the case of the decision, 20th July 1677, L. Gairltoun *contra* L. Stevenson, *voce* SERVITUDE; but where water hath run artificial from a pond, or water-work, into another's ground, though for never so many years, the proprietor of the water-work may alter the course of the water, divert, or destroy it, as he pleases. The reason is plain—that the proprietor's letting in the water from his artificial work upon another's lower ground, is directly for the advantage of the owner of the water-work, and tends to impose a servitude upon that inferior ground, somewhat of kin to the servitude *de cloacis* or *de stillicidiis*. And though, in the event, the inferior tenement may afterwards find some consequential advantages from the water's being so let in upon it, that can never alter the nature of the right, and make that inferior tenement the dominant one; because, *initium cujusque rei est inspiciendum*. So, if the Colonel had gathered a mill-dam for his own use, no question but he might remove it, though thereby the heritor of the lower ground should lose any consequential advantage he might otherwise reap from the former situation of the dam, or course of the water. The application of all to the present case, is obvious. Since the first bringing in of the water to the dam of Inzevar was for the utility of the Colonel's authors, proprietors of Inzevar, to serve their coal-works; and the setting of it down from these coal-works through Craigmill ground, for the voidance thereof, was a deed tending to impose a servitude upon that tenement, the proprietors whereof cannot *ex post facto mutare sibi causam possessionis*, possess as a dominant tenement.

2do, The acquisition of a servitude by possession, without a title, being founded only on the presumed will of the proprietor of the servient tenement, how can it be presumed, that the setting down the water by Colonel Erskine's authors upon Craigmill ground, for their own convenience and advantage, was to constitute such a right to the proprietors of Craigmill, or the coal-work of Valleyfield, as would deprive themselves of the property and use of that water, acquired with so much expense, pains, and loss of ground. At this rate, no man making use for 40 years of a water of this kind to drain a coal in one part of his ground, can ever use that water to drain the coal in another, which cannot be done without altering the course of the water.

In respect it was *answered* for Brigadier Prestoun, &c. Their plea for a servitude upon the water aforesaid, for the use of their mill and coal-works, and of casting feal and other materials for the use aforesaid, upon the Colonel's lands, is established by *L. 10. D. Si servit vind. L. ult. D. De aqua et aqua pluv. hic*, and the decision, 20th July 1677, L. Gairltoun against Stevenson, *voce SERVITUDE*. It is not the bare using of the water that the heritors of Valleyfield have been in possession of, but likewise of mending and repairing the dam-heads of Carniel and Inzever, and the leads and aqueducts whereby the water is carried from these dams to the works of Valleyfield, and of casting feal and divots, clay, and other materials necessary for that work upon the adjacent ground; which several acts, by the proprietary of the dominant tenement joined with possession, are sufficient to constitute a servitude; *L. 6. § 2. D. Si servit. vind.*

*Fol. Dic. v. 2. p. 111. Forbes, MS. p. 23.*

1803. *January 19.* SKIRVING and Another *against* SMELLIE and Another.

THOMAS SMELLIE, and several other carpenters in Dundee, carried on their trade within the burgh, without having been admitted members of the corporation of wrights. A complaint was presented to the Magistrates against them, in the name of John Skirving the deacon or visitor, and William Kay the boxmaster, as being guilty of an infringement of the exclusive privileges of the corporation. Their defence was, that the wrights had neither a charter from the Crown, nor a seal of cause from the Magistrates, and therefore that there was no legal foundation for their assumed privileges. The Magistrates sustained the defence.

Upon this, the deacon presented a bill of advocation, which was reported to the Court by the Lord Ordinary; and it was then suggested from the Bench, that the question ought to be discussed in the form of a declarator. The bill of advocation was accordingly passed, and a summons of declarator raised in the name of the deacon and boxmaster, concluding, 'That the pursuers, the freemen or members of the said corporation, called the wright trade of Dundee, have for time immemorial been, and now are, a body corporate and po-

No 162.

No 163.  
Prescription  
sustained as a  
sufficient title  
to the exclu-  
sive privi-  
leges of an  
incorporated  
trade.