

1780.

ST. CLAIR
v.
THE
MAGISTRATES,
&C. OF DYSART.

After hearing counsel, it was
Ordered and adjudged that the interlocutors be affirmed.

For Appellants, *Henry Dundas, Edw. M' Cormick.*

For Respondents, *Al. Wedderburn, Al. Wight.*

NOTE.—This case not reported in Court of Session.

(M. 14519.)

Colonel JAMES ST. CLAIR of St. Clair, *Appellant* ;
The MAGISTRATES and TOWN COUNCIL of the } *Respondents.*
Burgh of Dysart, - - -

House of Lords, 8th March 1780.

SERVITUDES—OF BLEACHING—OF FOOT ROAD—OF TAKING WATER—PRESCRIPTION—USE AND POSSESSION.—A servitude of bleaching linen sustained; also a servitude in favour of the inhabitants of a burgh, of taking water from the wells in a neighbouring heritor's property for family use, as well as a servitude acquired by immemorial use of a right to a foot road to these wells. Also that the burgh, as a corporate body, by the charter of the burgh, had a sufficient title to acquire such servitudes, by prescription and immemorial use and possession of its inhabitants.

Delarator was raised by the appellant, stating that “ it ought and should be found and declared, that he had the only good and undoubted and exclusive property of the wells and enclosures, called the Lethem Wells and Ashlerhead Parks, and to the rock called the Ashlerhead Rock, situated within his barony, and that free of any servitude in favour of the magistrates, town council, community, burgesses, and inhabitants of Dysart, of taking water from the said wells, or washing, bleaching and drying their clothes and linens at the same, or upon the grounds adjacent thereto; or occupying or possessing any part of the said enclosures; and that the said magistrates, town council, and community, burgesses and inhabitants of the said burgh, have no right or title to any roads, ways, or passages to and from the said wells through the said enclosures, or any part thereof, and that they should desist and cease from all further troubling and molesting the said pursuer in taking water from the said wells, or by washing, bleaching or drying their clothes and linens thereat or upon the grounds adjacent thereto.” In de-

fence to this summons the respondents alleged that the magistrates, community and inhabitants of Dysart had been in the peaceable and uninterrupted possession for time immemorial of the springs called Lethem Wells, together with a piece of ground or green adjacent thereto, called Dysart Washing Green, for bleaching and drying their clothes, and bleaching their linen webs and yarn, about a quarter of a mile from the town, upon the sea coast. And the said inhabitants have from time immemorial since the existence of the burgh, been in the constant *use of taking water from the said wells for their houses and families*, and have used the ground adjoining thereto as a washing-green for washing, bleaching and drying their linens, without the smallest interruption—this being a pertinent of the burgh, and which belonged to them as much as any other part of the common good; and therefore a servitude was established in their favour. In reply, it was admitted that the town's people had been in the immemorial use, not only of washing at the two wells, but of drying and bleaching their clothes and linens upon the west washing green; but contended in point of law that this was by mere tolerance, and therefore could not create the right of servitude, however long their possession; because no such servitude as of bleaching was known in the law of Scotland.

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The Lord Ordinary pronounced this interlocutor, with Nov. 22, 1777. respect to that article of the appellant's summons, whereby he claims to have it found and declared "that the Ashlerhead and Lethem Wells Parks, with the wells themselves, and grass grounds adjacent to said wells, are his sole and exclusive property free from any servitude in favour of the magistrates and council of Dysart, burgesses and inhabitants, of taking water from or washing their clothes and linens at said wells, or of bleaching and drying their clothes and linens upon the grounds adjacent to said wells, or of any roads, ways and passages to and from said wells, through the Ashlerhead and Lethem Wells Parks." As it stands acknowledged on the part of the defenders that the grounds and other particulars above mentioned, comprehended under this article of the pursuer's summons, lie locally within the pursuer's barony, and without the bounds of the royalty of Dysart, found and declared that the sole and exclusive property of all and singular the premises belongs to the pursuer; and that any right or interest which the town as a body corporate, and for behoof

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“ of its burgesses and inhabitants, have or can pretend to
 “ or upon any of the premises, can be no other than a right
 “ of servitude; and however comprehensive the pursuer’s
 “ summons is, as to a total exemption from any such servi-
 “ tude, as in the course of the proceedings he has so far
 “ restricted his claim under this article, in consideration of
 “ the distress it would be to the town were they to be to-
 “ tally deprived of the wells, as to yield to them (*ex gratia*
 “ as he contends) the liberty and privilege of taking water
 “ from the two westmost wells, for the use of their families,
 “ and of one road to said wells; for the foresaid purpose;
 “ but opposes an extension of said privilege to the taking
 “ water from said two wells for washing their clothes and
 “ linens, or of bleaching or drying the same upon that spot of
 “ ground adjacent to the said two wells, described in the
 “ plans by the words west washing green: acknowledging at
 “ the same time, that the town’s people have been immemo-
 “ rially in use, not only of washing at the said two wells,
 “ but of drying and bleaching their clothes and linens upon
 “ the aforesaid West washing green, but which he pretends
 “ was a mere precarious indulgence, and therefore could
 “ create no right; and that the *town as a body corporate*, or
 “ its burgesses and inhabitants as individuals, could not ac-
 “ quire any such servitude by prescription, nor any such
 “ servitude known in law: Finds, *That the town of Dy-*
 “ *sart, as a body corporate, could, for behoof of its burgesses*
 “ *and other inhabitants, acquire by purchase, or by imme-*
 “ *morial usage and prescription, the servitude here contend-*
 “ *ed for in its full extent, of water from said wells for*
 “ *family use, washing, drying, and bleaching their clothes and*
 “ *linens; and therefore, independent of the concession made*
 “ *by the pursuer, of the water of these two wells for family*
 “ *uses: Finds, That the corporation, for behoof of its bur-*
 “ *gesses and inhabitants, have by immemorial usage and pre-*
 “ *scription, acquired a servitude or privilege of taking water*
 “ *from said two wells, both for family uses and for washing*
 “ *their clothes and linens, and of drying and bleaching the*
 “ *same, upon the said west green; and prohibits and discharges*
 “ *the pursuer from molesting them in the enjoyment of said*
 “ *right. And with respect to the roads by which the inha-*
 “ *bitants shall have access to and from said wells, as it*
 “ *stands acknowledged on the part of the pursuer, that be-*
 “ *fore the Ashlerhead and Lethem Wells Parks were en-*
 “ *closed in 1754, the town’s people had passage to said*

“ wells by two foot roads, as marked in the plans; and
 “ which they continued to use till within these few years,
 “ that the deceased General St. Clair caused remove said
 “ stile to the north-east corner of said park, where it now
 “ stands; found That the corporation of Dysart, for behoof
 “ of its burgesses and other inhabitants, have, by the like
 “ immemorial usage and possession, acquired right to a foot
 “ road from the lower part of said town along the beach to
 “ the foresaid wells; and for that end, to place a stile upon
 “ any dyke that may intercept the passage by said road;
 “ and found, That they are likewise entitled to another
 “ foot-road or passage to said wells, by a stile to be placed
 “ either at the north-west or north-east corner of the Leth-
 “ em Wells Park, and to have the use of the said stile where
 “ it now stands at the north-east corner.” On reclaiming
 petition the Court adhered.

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Mar. 3, 1779.

Against these interlocutors the present appeal was brought, in so far as the use of the water was taken for washing and bleaching, and also against the bleaching of clothes on the appellant's property.

Pleaded for the Appellant.—There is no such servitude known in law as the drying and bleaching of clothes or linen; such a servitude would resolve itself into a right of property, for, while the ground was covered with linen, it could be of no use to the owner. No right of property is claimed. They do not profess to have any title to such, because the washing green is the appellant's exclusive property. And the right which the inhabitants have exercised over it, by the indulgence and tolerance of the appellant, of bleaching linen, is not a right of property, nor can it be a right of servitude, because such a servitude the law does not acknowledge; which view of the law was supported by the case of *Jaffray v. Roxburgh*, where it was found that a servitude of bleaching and drying linen upon the island called the Ana or Sandbed, was not sustainable, as unknown in law. And the inhabitants of the burgh as individuals, who have thus claimed the right, have no title in them to acquire such by prescription.

Kelso Case,
ante Vol. I. p.
 632; and App.
 Vol. ii. p. 4.

Pleaded for the Respondents.—The corporation and community of the town of Dysart have been in the immemorial use and possession of the wells and washing green in question, and have bleached their linen thereon ever since the town was a burgh. And though the ancient charters of the

1780. burgh are now lost, and cannot now be appealed to, yet the last charter 1483 grants the territory of the town limited by no precise boundaries, with *all the privileges, liberties, and pertinents thereto belonging*. These latter words are equivalent to an express grant, as they suppose that, in the original charters, such a right had been conferred. At any rate, if the burgh has not a *right of property* over the same, it has acquired by this possession a right of servitude upon the wells and green, of taking water from the former, and bleaching their linens upon the latter. The servitude of bleaching linen is perfectly legal, and may be acquired. And it does not follow because such a servitude has not hitherto been known, that therefore it is not sustainable, because Lord Stair (B. i. tit. 7. § 5.) says, "That there may be as many servitudes as there are ways." The burgh, therefore, as a corporate body, and not the individual inhabitants for themselves, had acquired this right on behalf of the whole burgh, comprehending the burgesses and inhabitants of the burgh; and the magistrates and town council, being the trustees or managers of the burgh, and representatives of the community, the corporation can in no case possess, use, or acquire rights of this kind otherwise than through the inhabitants individually. And it has never been disputed that a corporate body has a good title to acquire such rights, and to preserve them by the use and possession of its inhabitants.

After hearing counsel, it was
Ordered and adjudged that the interlocutors complained of be affirmed.

For Appellant, *Al. Wedderburn, Ar. Macdonald.*

For Respondents, *Henry Dundas, T. Erskine.*

NOTE.—The question as to bleaching, and the use of the water for washing and bleaching, was alone appealed. The judgment of the Court of Session as to the use of the water of the wells by the inhabitants *for family use*, and a road or access thereto, was acquiesced in.