1766. *March* 4. Frazer of Culduthel, &c. *against* Duke of Gordon, &c.

No 50.
The privilege of the Saturday's slap is not lost by the negative prescription.

The heritors of the upper fishings upon Lochness brought a process against the inferior heritors, for correcting several abuses committed by them in the face of public law, and concluding particularly that they should be obliged to observe the Saturday's slap. The defence was, that the Saturday's slap had been in disuse above 40 years; and that the pursuers had lost their right to challenge by the negative prescription. It was agreed on both sides that laws made for improving the salmon-fishing cannot be hurt *non utendo*, more than other laws enacted for the good of the public; but that the Saturday's slap was only a privilege granted to superior heritors, and did not tend to the good of the fishing in general. And therefore that this privilege may be renounced by the negative prescription as well as by express consent.

"The Lords sustained the declarator as far as it concludes that the defenders should be ordained to keep the Saturday's slap, according to the act of Parliament."

We were not so learned in the natural history of salmon as to be able to pronounce clearly that the Saturday's slap is a public benefit for the salmon-fishing in general. But we see it enjoined by many statutes as publicly beneficial, even so much as that the transgression is made a point of dittay.

Fol. Dic. v. 4. *p.* 92. *Sel. Dec. No* 243. *p.* 316.

SECT. VII.

Negative Prescription of Immunity from Servitudes.

No 51.

1682. *January* 20. Cockburn *against* Brown.

In the declarator pursued by Major Cockburn *contra* Brown of Dolphington, for declaring his lands of Millrig to be free of a servitude of 16 soums of grass, which was alleged to have been constituted upon the lands of , whereof Millrig is a pendicle, the Lords, after a visitation and examination of witnesses, found the servitude sufficiently constituted by the writs produced, and the depositions of the witnesses, who proved 40 years possession of the pasturage of the said soums grass, not only upon the rest of the lands, but also upon Millrig; and that by receiving of eight merks yearly as Millrig's propor-

tion of the said 16 soums grass; but in regard that the prescription of 40 years was made up partly by the natural possession of pasturing, and partly by receiving the said eight merks; the LORDS restricted the servitude only to eight merks, and declared the servient tenement liable thereto in time coming, and not to be liable to the pasturing of the 16 soums. No 51.

P. Falconer, No 18. *p.* 9.

*** Sir P. Home reports this case:

1682. *January.*—MAJOR COCKBURN and William Douglas pursued a declarator against Mr Andrew Brown of Dolphington, for disburdening the lands of Millrig of a servitude of 18 soums grass, which he pretended was due to him upon the lands; and the LORDS before answer, having appointed a visitation, that witnesses might be examined upon these points, viz. 1*st*, Whether or not past all memory, the lands of Millrig be kend and known by meiths and marches, to be one distinct land from the land of Robertoun; 2*dly*, If there be one common and several on the Whytemount, which are known commonty of Robertoun, sufficient to maintain 18 soums and more; 3*dly*, If the lands of Millrig be all arable land or meadow, and if there be any commonty thereon; 4*thly*, If there be any loaning or leading from the Whytemount and Hachellie to the lands of Millrig; 5*thly*, What lands lie interjected betwixt the common and lands of Millrig; 6*thly*, What possession Dolphinton or his authors have had of the foresaid servitude, and what interruptions have been made thereagainst. It was after *alleged* for the pursuers, That the lands ought to be declared free of a servitude, because Dolphington and his authors having only right to a servitude of 18 soums pasturage in the common and several *villæ et terrarum de* Robertoun, that could not be extended to the lands of Millrig, which was a separate tenement, and known by distinct meiths and marches; as also the pursuers authors were publicly infeft in the lands under the great seal, in the year 1519, free of any such servitude; before which time, Dolphington's authors were only but base infeft in the lands. To which it is *alleged*, That that servitude did belong, and any rights produced by Dolphington before the year 1619 are null, being either sasines wanting warrants, or precepts wanting sasines. *Answered* for the defender, That he and his authors being infeft in the servitude, out of the common and several of Robertoun, *conservando prata* and *grana*, he had good right to exercise the servitude within the hail parts and bounds of the lands of Robertoun, whereof the four oxengate of the lands of Millrig are a part; and albeit the lands of Robertoun are now divided, and that there are now three or four severals upon the said lands of Robertoun; yet the defender has right to exercise the servitude upon all the lands, they being united at that time when the servitude was constituted, and may make use of the servitude to pasture upon all places that are not grass nor corn; and the defender's authors were distressed for the said soums grass by the relict of Malcom In-

No 51. glis, who had obtained a decreet of eviction therefor, *in anno* 1653, and there is a decreet of recourse against the heir of Inglis *in anno* 1624; and albeit there be not such a compleat progress produced for the defender, as may secure the property of the lands, prior to the pursuers public infeftment in the year 1619, yet a servitude may be constituted by a charter, or other personal right without a sasine; and the defender produced a special sasine of the servitude granted by the superior, *propriis manibus*, with several subaltern base infeftments following thereupon; and the defender has been in constant possession of the servitude, at least by recovering of a certain duty for the same from the pursuers tenants in Millrig; and Major Cockburn, one of the pursuers, did set tacks, whereby he did take the tenants obliged to free him of that servitude. *Replied*, That as to the commonty of Robertoun, the pursuer, *non facit vim*, and seeing the servitude is principally due to the commonty, and that the several must be understood only to be subsidiary liable, in case the commonty was not sufficient; and seeing the commonty is sufficient for to maintain the 16 soums, without affecting the several lying contiguous thereto, the servitude must be restricted to the commonty; and albeit all the lands that are now several, did of old, go under the name of the lands of Robertoun, yet being before the constitution of the servitude, the lands were divided in severals, and distinctly known, and every one of the said lands had a distinct several of their own, except the pursuer's lands of Millrig; so that there being at the time of the constitution of the servitude four distinct severals, that servitude, upon any particular several of Robertoun, cannot be extended to the other severals which were distinctly kend and known at that time from the lands of Roberttoun; far less can the same be extended to the lands of Millrig, in which there is neither commonty nor several; and that the tenantry of Robertoun was divided at that time, is evident by a decreet of recognition, bearing, that some of the tenements so separate and designed, were disponed to several persons, and so recognized to the superior, by virtue of the base infeftments, and the pursuers lands of Millrig lie at a distance from these lands to which the servitude is due, there being other lands interjected; and there is no way or passage from these lands to the pursuer's lands of Millrig, and the lands being divided and designed, as said is, before the servitude, it being only granted out of the common and several of the lands of Robertoun, it must be restricted to the common and several of the lands of Robertoun, as they were then kend and known from the other lands, especially seeing that was a way and loaning for the beasts to go from the lands to which servitude was due, to the common and several of the lands of Robertoun, conform to the first institution, and the words *conservando prata* and *grana*, does restrict the servitude to the common and several, that is not meadow nor corn ground; but so it is, that the pursuer's lands of Millrig is all corn ground, and the decreets in the year 1622 and 1624 cannot be respected, seeing neither the heritors nor tenants of the pursuer's lands were then called; and there is nothing decerned in these decreets, in relation to the

18 soums grass; and albeit a servitude may be constituted without a sasine, and that the same will be sustained, being clad with possession before a subsequent right in favours of third party, but Dolphington cannot instruct, that ever he or his predecessors, did exercise the servitude upon the pursuer's lands of Millrig prior to the pursuer's public infeftment in the year 1619; and therefore, any right that the defender has before that time, being either base or uncompleat, cannot be sustained, as the constitution of a servitude, and the sasine granted by the superior *propriis manibus*, is but the assertion of a notary, which is not sufficient, unless the warrant were produced; and any possession the defender had, was unwarrantable, and cannot be sustained to give him the right of that servitude, unless he had been 40 years in possession without interruption; and any gratuity paid to him by the tenants, which may be done by collusion, cannot prejudge the pursuer, and they always paid their full rent without craving of any abatement upon that account; and albeit Major Cockburn, who is known to be a mere soldier, and knows nothing of law, had taken the tenant obliged by the tack to relieve him of the servitude, yet that will not get the defender a right to the servitude, unless it were otherwise legally constituted. THE LORDS assoilzied the defender from the declarator; but in respect the pursuer's tenant of Millrig had made payment of 8 merks for the soums grass contraverted, and that both parties had acquiesced thereto for several years; therefore, the LORDS modified the 8 merks to be the rate of the soums grass reclaimed yearly out of the lands, in all times coming. No 51.

Sir P. Home, MS. v. 1. *No* 110. *p.* 167.

*** This case is also reported by Fountainhall:

IN the debate between Brown of Dolphingston and Major Cockburn about a pasturage, "the LORDS found the servitude of pasturage proven: But in regard it appeared, that for 30 years together, the parties had always transacted it, and taken 10 merks by year in lieu thereof, therefore the LORDS modified and liquidated it to that price yearly, in all time coming." So that these customs of a voluntary conversion are not safe, because they may be afterwards obtruded as an acquiescence.

Fountainhall, v. 1. *p.* 170.

1735. *February* 7. GRAHAM of Douglaston *against* DOUGLAS of Barloch.

No 52.
A servitude of pasturage, though engrossed in the rights both of the dominant and of the

A PROPRIETOR of two adjacent tenements, sold the one, granting the purchaser a servitude of pasturage upon the other tenement. Having thereafter feued out that other tenement, the said servitude of pasturage was mentioned in the disposition, and excepted out of the warrandice; by which it came, that this servitude was ingrossed in the rights of both dominant and servient tene-