

*nemini servit.* Yet the Lords considered, if these two were not conjoined, how many pleas this might awaken where heritors had sold off some of their baronies, and though they had not reserved their ways and passages in their dispositions, yet these servitudes being *innocix utilitatis*, it must be presumed, if they had been mentioned at the time of the sale, they would have been presently granted and yielded to. As to the thirlage, and other more onerous servitudes of pasturage, &c. it may be otherwise, unless they were specially reserved. And therefore the Lords found Bogie had right to this road, he proving immemorial possession, by conjoining his use and custom of going that way either before or after the alienation of the lands of Bennochty.

No 140.

*Fountainball, v. 2. p. 91. & 104.*

1713. June 5.

The DUKE of ROXBURGHE *against* the MAGISTRATES, TOWN-COUNCIL, and COMMUNITY of DUNBAR.

IN the mutual declarators, one at the instance of the Duke of Roxburghe against the Town of Dunbar, concluding a declarator of property of the Links of Broxmouth, *usque ad mare*, free of all servitude of passage, and the other at the Town's instance against the Duke, concluding, that it ought to be found and declared, that they had right to all highways through the Links of Broxmouth, possessed by them past memory of man, and to stop the inclosure by a dike his Grace was building; the LORDS, by their interlocutor February 9th last, found, That no public way can be made upon the Duke's property without his consent, or the uninterrupted prescription for 40 years. But found it proved, That when by high winds fishers on that coast cannot make Dunbar harbour with their boats, they are in use of landing on the Duke's ground, and the lieges of leading fishes, and necessaries for fishing, to and from Dunbar and the neighbouring country, through that ground, upon payment of eight pennies Scots for the loaded horse, and sixteen pennies for the loaded cart;—and therefore declared the Duke's property with the said quality, that there should be still access to the lieges for passing through the said ground, for the said ends, for payment of the said duties; and assoilzied from the Town's declarator accordingly. It was *observed* at advising, That in highways through a private subject's ground, the Crown acquires the property of the road, which makes the prescription of 40 years necessary. And it might prove inconvenient, should every use of going through a private man's ground constitute a highway.

The Town of Dunbar reclaimed against this interlocutor, upon the grounds following: *imo*, Forty years prescription is not necessary to the constitution of a highway; because that, being *juris gentium*, the rules concerning it fall not under statutes made concerning prescriptions of obligations, property, or servitude.

No 141.

Found, that no public way can be made upon a private property, without consent, or uninterrupted prescription for 40 years. But it being proved that the fishers of Dunbar coast, when they could not, by reason of high winds, make the harbour of Dunbar with their boats, were in use of landing on the Duke of Roxburghe's ground, and the lieges of leading fishes, and necessaries for fishing, to and from Dunbar and the neighbouring country, through that ground, upon payment of eight pennies Scots the loaded horse, and sixteen pennies for

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And though a highway may be particularly assigned, measured out by the civil magistrate, where no way formerly hath been, yet the original of all highways is *utilitas, justı prope mater et æqui*, and the manner of constitution is *usus*, without the addition of any number of years or period of time, Act 53. Parl. 6. Queen Mary; Act 159. Parl. 12. Ja. VI. For the law of Scotland allows of no prescription but what is established by statute; and no such statute comprehends highways. The words *use* and *custom* can only be understood of such a frequency of acts, or *diuturnus usus*, as renders the possession certain, though much less than 40 years, which sufficeth to make a custom. Yea, according to the law of the Twelve Tables, *usus et auctoritas fundi biennium esto, cæterarum rerum annus usus esto*. The Crown hath no property in highways, because these, in the construction of law, are *nullius*, and *jure gentium omnibus vacant*, L. 21. D. De Religios. The property remains in the heritor, with reservation of the use of the superfice; as he would have right to mines of coal or lead found under the highway. 2do, The Duke's park-dike, which he is building, doth take in the *littus maris*, which cannot be inclosed; for *naturali jure communia sunt aer, aqua profluens et mare, et per hoc littora maris; et nemo ad littus maris accedere prohibetur*, Inst. De Rer. Divis. And the act second of the Parliament 1705 asserts the right of the subject to take, buy, and cure herrings and white fish, in all seas, channels, bays, lochs, rivers, &c. and authorising them, for conveniency, to have free use of all ports, harbours, shores, forelands, and others, for bringing, pickling, drying, unloading and loading the same, for payment of the dues where harbours are built; which cannot take place if the roads along the barren links on the shoreside be cut off by inclosures carried on to the sea. The civil law decides the matter plainly in a like case.—A liferent being left by testament of certain lands, where the testator forgot to charge his heirs with the servitude of a way to the liferented lands, the law says, *usus fructus legatus adminiculis eget, sine quibus uti frui quis non potest, ideo necesse est ut sequatur eum aditus*, L. 1. § 1. 2. 3. D. Si Ususfructus petatur. And, therefore, the act of Parliament, which gives the shore for the aforesaid uses of buying, drying, &c. doth necessarily import, that such access be left to the shore as the nature of the trade requires. 3tio, The inconveniencies to the lieges in general, and to the town of Dunbar in particular, are not saved by the quality of the interlocutor allowing a passage through the Duke's ground for leading fishes, and materials for fishing, in cases of necessity: For, 1. Who is to be judge of this necessity? When the Duke is in possession of such an inclosure, persons in distress by storms, perhaps in the night-time, must go a great way off to his Grace's house to represent this necessity, and obtain a liberty of passage: 2. This liberty is only allowed upon payment of a certain duty; whereas, the act of Parliament 1705 allows the free use of all ports, harbours, shores, forelands, and others; that is, such as are next adjacent to the shores; without payment of any manner of duty, except where harbours are built.

*Answered* for the Duke; It is needless for the town to mention the acts of Parliament of Queen Mary and King James VI. concerning the prescription of ways leading to and from royal burghs; for, where such are constituted and known, no question public policy requires the preservation of them; but the question is, Whether the way in debate is one of these public highways? Which is not made appear, all the town's acts of possession being precarious and by toleration. They have a common highway leading from the town to all places on that side; and people used only to go this private way through the links, in the winter-time, for a drier passage; which can never introduce a servitude of passage, let be the heavy burden of a highway. No right, of whatever denomination, is constituted in law without either paction or prescription. To take up other names, as *use* and *custom*, are but words which, in the matter of acquiring a right, come just to an use or custom of 40 years, the term prefixed by law. To say that prescription is but statutory in matter of private right, and doth not concern highways which are *juris gentium*, is but giving the thing another turn; for our public highways are not *juris gentium* with us; they are regulated by our own laws, require the same length of time to constitute them through another's property as any other right by mere time; and a highway can no more unjustly encroach upon another's property, than any other private servitude of passage. *2do*, The Duke does not pretend to inclose the *littus maris*, which is only *quatenus hybernus fluctus maximus excurrit*, and not to be extended upon the account of extraordinary flowings or out-breakings of the sea by storms and high winds. Nor is the *littus maris* any further public than it is subservient to the use of the sea, viz. for fishing and navigation: So that the Duke, having his right *usque ad mare*, may fence his property, if the public use be provided for, and no ways hindered. *3tio*, As to the insinuation, that the townsmen will be straitened by having access only in case of necessity to pass through the links, upon payment of a piece of money, of which necessity the Duke would be sole judge, and by being put always to apply for opening of gates; it is *answered*, There being no harbour nor conveniency for landing at that part, necessity is still presumed. And since the interlocutor orders free access, the Duke is bound to observe, and is for that end to build a lodge at the gate, that when boats or barks arrive upon any part of his sands, the gate may be opened. Again, the small duty is proved to have been customary; and no man is bound to suffer the loss and prejudice of his grass without some recompence.

THE LORDS adhered to their former interlocutor. But further found, That the Duke could not run his dike within the *littus maris*; and remitted to the Lords Ormistoun, Forglen, and Pencaitland, to visit the ground, and take probation how far the sea flows, and to fix march-stones. Upon whose report, June 19th instant, the LORDS found, That the *littus maris* comes to the foot of the green brae, and that there is no passage, either for horse or cart, betwixt the

No 141. foot of that green brae and the rock in the sea; and therefore, that the Duke had right to build the wall of the inclosure upon the said rock, but with such steps over the wall within the *littus maris* as will allow a passage for walking on foot upon the *littus maris*, for public use allenarly; and decerned and declared the Duke's right and property in these serms, according to this and the former interlocutor, February 19th last.

*Fol. Dic. v. 2. p. 108. Forbes, p. 675.*

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S E C T. XI.

What Title requisite to the Prescription of annual Duties and Pres-  
tations?

1621. November 15.

TOWN of LINLITHGOW *against* the FLESHERS of EDINBURGH.

No 142.

A town found to have no right by possession without a special grant, to custom for bestial passing through the street.

IN the suspension pursued at the instance of the Town of Linlithgow *contra* the Fleshers of Edinburgh, for suspending of the charges raised by the fleshers upon the decreet of the burghs, in their convention; by the which decreet, the town of Linlithgow was ordained to desist from taking of any custom from the fleshers for their goods, driving, and passing, either by their town, within their liberties, or through the town itself; which was impugned by the town of Linlithgow, upon this reason, that they had a charter granted by the King, of their liberties, customs, and of small customs expressly, and which was shortly ratified in Parliament, and that, conform thereto, they had been in continual possession of taking of two pennies for ilk ox, cow, or horse, and four penies for ilk ten sheep that were driven either through their town, or by their town, within their liberties, albeit the samen was neither bought, nor sold, nor brought to their market; the LORDS found, That the town of Linlithgow had no right to uplift such customs, and that such customs and consuetudes ought not to be authorized, seeing all the King's lieges have liberty to drive their goods through the King's public way and streets, without any exaction of that nature, except it had been granted for a public good of the realm, such as bridges, or such like common works.

Act. Nicolson.

Act. Hope.

Clerk, Gibson.

*Fol. Dic. v. 2. p. 109. Durie, p. 3.*