

No. 40.

Mr. Crawford answered :

Although the servitude claimed in the present instance had never before been known or heard of, no reason occurred why, upon the general principles of law, it should not be made effectual, if constituted by any of the known modes in which servitudes were established. Voet. Lib. 8. tit. 3. § 12. The servitude of seaware was not mentioned in any of the books, and had yet been repeatedly sustained upon prescription alone. But this astriction to a smithy was not a servitude unknown in the laws and practice of this country ; it was established, like all others of that nature, upon account of the necessities of an early period ; it naturally grew up into an exclusive privilege ; and, in fact, was very common in several parts of Scotland, particularly in the northern counties. A particular account of this servitude was given by Sir Thomas Craig, L. 2. Dieg. 8. § 25. whose words did by no means admit of the interpretation, either in sense or spirit, that the petitioner had endeavoured to give them.

The respondent's title, in the present instance, was unchallengeable, not only to the smithy itself, but to all the duties and privileges which the proprietor had been in use to receive out of any lands liable to the servitude. The alienations made since the servitude first obtained could not dissolve the obligation, unless it had been lost by immemorial disuse, or by express liberation given up. There was therefore a good prescriptive title ; and the immemorial possession that had followed, which was proved not only by parole testimony, but by express mention made of the astriction in the tacks to the petitioner's tenants 57 years back, must unalterably establish the right.

The Lords remitted to the Lord Ordinary to pass the bill.

Lord Ordinary, *Hailes.*
Clerk, *Gibson.*

For Yeaman, *H. Dundas.*
For Crawford, *Ilay Campbell.*

R. H.

*Fac. Coll. No. 61. p. 186.*1779. *January 14.*SIR ARCHIBALD HOPE *against* ANDREW WAUCHOPE.

No. 41.

An *opus manufactum*, in an inferior coal-pit, by the proprietor, to prevent the water of a higher coal-pit from flowing down upon it, how far legal?

THE lessee of Niddry coal, in working it, left a wall of a certain breadth, stipulated by the lease, betwixt it and the coal of Woolmet, which is a continuation of the same seam, but lies higher than that of Niddry. The coal of this wall being of a porous nature, the water which came down from the coal of Woolmet pierced through it, and was carried off by the level of the Niddry coal to the sea. Mr. Wauchope, proprietor of the Niddry coal, in order to prevent the water from piercing the wall, caused make downsetts, or pits in the wall, which he was proceeding to fill up with clay, when Sir Archibald Hope, lessee of Woolmet coal, obtained a suspension, which was conjoined with a process, at the instance of Mr.

Wauchope, against the suspender. In this action, Mr. Wauchope supported his claim to fill up these pits on the following grounds.

By the operations of the proprietor in the Woolmet coal, the natural course of the water was altered, and it was brought down in larger streams upon the Niddry coal than before these operations took place. A superior heritor on the surface would not be allowed to collect separate rills, flowing down to an inferior tenement, by a cross ditch, into one channel, and thus send the whole, in one body, upon his neighbour's ground. The civil law not only permits the inferior heritor to defend himself in such a case, but gives him an action of damages against the superior heritor; *L. 1. § 1. De aqua et aq. pl. arc.* Bank. v. 1. p. 682. § 30.

It will not entitle a superior heritor to alter or increase a natural servitude, that the inferior heritor cannot qualify damage thereby, or that he may easily prevent the damage. If the servitude is altered or increased, the obligation on the inferior heritor to submit to it is removed, and he is entitled to make such *opus manufactum* as the present, on his own grounds, to counteract the effect of the operations made on the superior tenement.

Answered for the defender: In working the coal of Woolmet, the defender carried on no operations but what are usual in working coal. The Niddry coal being the inferior tenement, was subject to a natural servitude of receiving the water that came down from the coal of Woolmet; and these operations did not bring down the water of any other coal upon it. They had no other effect than to reduce the water into fewer channels than would otherwise have been the case. It is nothing more than what happens frequently on the surface. A superior heritor, in cultivating his lands, makes small ditches or furrows, by which means the water becomes more collected, and discharges itself somewhat differently from what it did before. This does not come up to what the law considers to be an *opus manufactum*, for changing the natural course of the water, or increasing its quantity. The inferior heritor would not be allowed, on this pretence, to erect an *opus manufactum* on his property, to make the water regorge on the superior tenement.

Even when the *opus manufactum* was a real benefit to the inferior heritor, the Court have ordained it to be removed; Earl of Eglinton *contra* Fairly, No. 15. p. 12780. *voce* PROPERTY.

In the present case, Mr. Wauchope can suffer no damage from the water passing through the Niddry coal, as the level is more than sufficient to carry off all the water that comes into it, either from Niddry or Woolmet. This operation, therefore, must be considered as merely *in amulationem vicini*, and on purpose to overflow the coal of Woolmet. On that account, it ought not to be permitted.

The Court found, "That Mr. Wauchope of Niddry cannot make the downsets complained of by Sir Archibald Hope, upon any of the seams of coal within the lands of Niddry, so as to prevent the natural passage of the water through the seams, in its present course, and thereby occasion a reflux or stagnation of

No. 41. the water upon the property and coal of the superior lands of Edmonston and Woolmet.

But, upon advising a reclaiming petition and answers, the Court found,

“ That the petitioner, Andrew Wauchope of Niddry, is entitled to make downsets in the seams of coal upon his own ground, and to fill up the same with clay, stone, or other materials, so as to effectually prevent the water from coming down upon his coal of Edmonston and Woolmet.”

Lord Ordinary, *Kennet*. Act. *D. Rae, Ilay Campbell, M'Laurin*. Alt. *Blair*: Clerk, *Menzies*,

Fol. Dic. v. 4. p. 282. Fac. Coll. No. 54. p. 96.

* * This case was appealed.—The House of Lords, 21st February, 1780,
 “ ORDERED and ADJUDGED, That the Cases be remitted back to the Court of Session in Scotland, with liberty to each party to reclaim and amend the process, as he shall be advised; and with particular directions to the said Court, to inquire respecting the communications of the level in question.”

SECT. VII.

Servitude of Pasturage.—Servitude of Feal and Divot.

1583. *February*.

LAIRD OF KNOCKDOLIAN *against* TENANTS OF PARTHICK.

No. 42.
 Effect of a
 servitude of
 pasturage as a
 defence
 against re-
 moving.

THE Laird of Knockdolian warned the tenants of Parthick to flit and remove from the wood thereof. Alleged, That they had the lands of Parthick, as rentallers of the Bishop of Glasgow, whereof the woods were a part and pertinent, in so far as they had common pasturage through the same. Replied, That the wood could not be part and pertinent of the lands by reason of pasturage, *quia aliud est servitus et jus pascendi, aliud fundus*; and except they alleged themselves to be rentalled in the wood especially, or that the wood was absolutely a part and pertinent of the lands, the allegiance behoved to be repelled. Duplied, That as to the wood, and trees of the same, *et quod ad superficiem*, they acclaimed no right thereunto; but, as to the servitude, *et jus pecoris pascendi, ita inhæret fundo, et fundum sequitur*, that they could not remove the one from the other; *nam jus servitutis (ut ait Bartol.) totum est in toto, et totum in qualibet parte totius*. The Lords, *in præsentia Regis*, admitted the exception.

Spottiswood, (SERVITUDES), p. 307.