

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 exclusive privileges of an incorporated trade.

No 163. 'litic,' and that as such, they were entitled to an exclusive privilege of exercising their trade within the liberties of the Town.

This declarator was conjoined with the advocation; and being reported to the Court by the Lord Ordinary, the pursuers

*Pleaded*; The possession of corporate rights, and exclusive privileges from time immemorial, is equivalent to a written grant. The pursuers only claim what takes place in every burgh. The erection of subordinate corporations of craftsmen is a necessary consequence of the creation of a royal burgh; and the sanction of the Magistrates is a sufficient title for the different crafts to exercise the usual privileges; Bankton, b. 1. tit. 2. § 27. In fact, the various corporations of craftsmen in the different burghs of Scotland, derive their right from no other source. So much are these rights a matter of course, that a seal of cause granted by a baron to tradesmen within his jurisdiction, is a sufficient title to a craft for the enjoyment of exclusive privileges; Fleshers of Canongate against Town of Edinburgh, November 22d 1677, Stair, No 3. p. 1824.; Cordiners of Leith against Cordiners of Edinburgh, January 20th 1731, (See APPENDIX;) Trades of Leith against Corporation of St Mary's Chapel, December 21st 1734, (See APPENDIX.) The possession of exclusive privileges has been admitted as a legal title for societies of tradesmen exercising their crafts within a royal burgh, although they have no connection with its political constitution; so that a share in the government of the burgh is no criterion of the existence of a corporation; Trades of Burntisland against the Magistrates, February 20th 1679, Stair, No 2. p. 1836.

Since these exclusive privileges are sanctioned by law in every burgh, prescription affords a legal title to possess them; Feuars of Kelso against the Duke of Roxburgh, January 8th 1755, Kames, No 6. p. 1830.; Tailors of Perth against Lyon and others, December 10th 1756, No 71. p. 1947.; Procurator-fiscal of Paisley against Corporation of Wrights, February 17th 1761, No 76. p. 1956.; Lawson against Thomson, August 5th 1768, No 83. p. 1965.; Tailors of Potterrow against Brown, January 26th 1776, No 330. p. 7709. This is likewise agreeable to the law of England with respect to corporations; Coke, Litt. 114; Douglas' Reports, 374; and is supported by the civil law, which holds prescription to apply to every species of right; L. 4. C. De præser. trig. vel quad. ann.; L. 12. C. De præ. long. temp.; L. 14. C. De fund. patr. There are royal charters in favour of the burgesses and communities; and the fate of the Town of Dundee, at different periods of our history, makes it extremely probable that the special grant to the corporation of wrights was lost or destroyed along with most of the written documents relative to the rights of the Town. At all events, the pursuers have been in use to exercise all the privileges of an incorporated trade; and the defenders are the first burgesses who have attempted to carry on their trade without becoming members of the craft. And as their society has always been subjected to the burdens and contribu-

tions imposed upon the incorporated trades, it is likewise entitled to the immunities and privileges.

*Answered*; Corporate rights must be derived from the grant of the Sovereign, and a prescriptive title has no other force than as presumptive evidence of such a grant. The society of wrights in Dundee are not in possession of any charter, or seal of cause, entitling them to the privileges of a corporation; and they cannot acquire, by usage, a right which must proceed directly from the Sovereign, having no title upon which to found the plea of prescription. The writings produced by them, so far from affording any evidence of their having been once in possession of a charter, afford a contrary presumption. The set of the burgh includes a certain number of incorporated trades, which compose a convenery, and are recognised as enjoying the privileges of corporations. The wrights do not form one of these, but, along with two other crafts, are denominated 'The Pendicle Trades,' to distinguish them from those that are regularly incorporated. These three pendicle trades have no concern in the political constitution of the burgh, nor are they under the government of the Town-Council, who exercise a jurisdiction over the incorporated trades. Their preses, till lately, was not denominated deacon, as is the case with the various corporations, but merely visitor; and they are to be considered only as voluntary associations, totally distinct from the incorporated trades of Dundee. Whatever power they may have, therefore, over those who chuse to become members, they have no right to exclude such as are not members, from practising their respective trades within the burgh. There is a material distinction between a body politic, authorised to acquire property, and one in possession of an exclusive privilege of the exercise of a particular employment; Heritors and Kirk-session of Dalry against Newall and others, November 17th 1791. *voce* SOCIETY.

Every exclusive privilege is unfavourable in law, and to be allowed only to those who possess it by a special grant. This, accordingly, is agreeable to the law of England, where the King's consent is absolutely necessary to the erection of a corporation; Blackston, b. 1. cap. 18.; Bac. Abrid. *voce* Corporation; Brady on Burgh's Pres.; Jacob's Law Dictionary, *voce* Corporation, § 1. The fact, therefore, that the wrights of Dundee have for a length of time, assumed to themselves the exclusive privileges of a corporation, can never confer upon them a right to such privileges; Crawford against Mitchell, June 13th 1761, No 77. p. 1958.; Goodfellow against the Hammermen of Stirling, July 4th 1766, No 82. p. 1963.

THE LORDS sustained the reasons of advocacy, and decerned agreeably to the conclusions of the declarator.

Some of the Judges seemed to think, that though the wrights of Dundee had shown that they were a corporation, it did not follow that they had made out a title to exclusive privileges, and that they were to be considered merely as a separate portion of the guildry. But it was the general opinion of the Court, that their title to all the usual privileges of a corporation was establish-

No 163. ed by prescription ; and, though it was not now extant, the presumption was, that they had originally possessed a seal of cause, or charter.

Lord Ordinary, *Meadowbank.* Act. *Williamson, Jo. Murray.* Agent, *G. Andrew.*  
 Alt. *Corbet.* Agent, *D. Freer, W. S.* Clerk, *Menzies.*

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*Fac. Col. No 76. p. 170.*

### S E C T. XIII.

What kind of possession requisite.—Connection of possession.

1665. *June 30.* YOUNGER *against* JOHNSTONS.

No 164.

In a competition of two heirs, one of them founding upon the positive prescription, the liferenter's possession flowing from the defunct's predecessor, was not found profitable to either of them in prejudice of the other ; but the Lords declared that the liferenter's possession should be the possession of him who should be found to be the righteous heir.

ONE Porteous merchant in Edinburgh, having died infest in several tenements in Edinburgh above 50 years ago, his relict possessing them as liferenter to this time ; shortly after his death, one Patrick Porteous was served nearest and lawful heir to him, and thereupon infest, so that his right came by progress to Johnston 40 years after. Younger takes a right from one Stephen Porteous, residenter in Polland, and gets him served nearest heir to the defunct, and thereupon raises reduction of the first retour, and all the infestments following thereupon. Defence absolvitor, because the defender's author being served heir 40 years before the pursuer's author's service, it is prescribed, and likewise being infest 40 years since, all quarrel against the infestment is prescribed. For the first point they condescend upon the second act of Parliament anent prescription, of the reduction of retours, which bears, that if they be not pursued within 20 years, they shall never be quarrellable thereafter.

THE LORDS having considered this case at length, most part thought that the retour could not prescribe by the first act of Parliament, because it excepted minors, and absents out of the country, which they found not to be meant of absents *republicæ causa*, but of any absence, nor that it fell not directly within the second act, which bears expressly, retours to have been reduced thereafter, should be only reduceable within 20 years. Others thought the act might not be extended, but bearing expressly to the future it could not be drawn back, and the act of prescription 1617 meets not this case ; for if, under the prescription of actions not pursued within 40 years, serving of persons to their predecessors' heirs were comprehended, it would impede any person to serve himself heir to any defunct after 40 years, which is yet ordinary, and as to the infestment, they found that it fell not in the case of the act of Parliament 1617, because it was not cled with possession, in respect of the life.