

1670. *July 13.* BEATON of Bandoch *against* OGILVIE of Martoun.

No 156.

A mill having an immemorial possession of a burn, an absolute right was found established thereto, and the heritors through whose grounds it ran, prevented from diverting it to water their grounds, though they had done so 34 or 35 years. If they had done it 40 years they would have had right to continue.

BEATON of Bandoch having a mill upon a burn, running by the lands of Greendykes and Martoun, the tenants of these lands did by sheuchs and casts divert the water, and therewith watered their ground, which thereafter returned to the burn, before it came to Bandoch's dam. Bandoch pursues a declarator, that he, and his predecessors, and authors, have been in immemorial possession of the mill, and have had the free use of the burn, until of late the tenants of Greendyke and Martoun have diverted the same to water their ground, whereby so much thereof is drunk up by the ground that there remains not water sufficient for his mill.

In this process the LORDS having before answer allowed witnesses to be adduced on either part, it was proved that Bandoch was in possession of the mill, with the free use of the burn, these threescore years, and that it was commonly known, that he and his predecessors had been in immemorial possession thereof till the diversion. It was also proved, that the tenants of Greendykes had been 40 years in use to water their ground as now they do. It was also proved, that the tenants of Martoun have been in use to water their ground this 34, or 35 years, whereupon it occurred to the LORDS to consider, whether the watering of the ground being the most natural and ordinary effect of burns and waters, the building of a mill beneath, could hinder that liberty, or, at least, if 34 years possession were not sufficient to continue the watering.

The LORDS did not consider what effect the building of a mill, with a short possession of the water free of diversion, would hinder the heritors from diverting the water from watering their ground; but finding that the ancient and immemorial possession of this mill, and full enjoyment of the water, was as much proved, as could be known to precede the 34 years, during which the diversions upon the lands of Martoun were proved, they found that the mill and her privilege being once so constituted, no less than 40 years peaceable possession of diverting the water for watering was sufficient, that being the only legal term; and therefore allowed the lands of Greendykes to continue the watering, but discharged the lands of Martoun to continue the same.

Fol. Dic. v. 2. p. 111. Stair, 1. p. 694.

No 157.

1681. *January 17.* JACK *against* TOWN of STIRLING.

POSITIVE prescription cannot run without a title; and therefore not in face of the public laws, anent election and continuation of magistrates of royal burghs.

Fol. Dic. v. 2. p. 111.

* * This case is No 3. p. 1838.; *voce* BURGH ROYAL.