

of Reiris having two-thirds of one barony all lying run-ridge, the King's granting the pursuer his third cum salmonum piscationibus, added to the lands as a pendicle thereof, it cannot be understood exclusive of the other two-third parts of the same barony, likeas Reiris hath the same clause in his infeftment; and albeit Earlshall's clause be not so express, yet it not being the common clause in the tenendas cum piscationibus, but in the dispositive clause of this special tenor, it must needs comprehend salmon fishing, or otherwise it would have no effect, verba autem interpretanda sunt cum effectu, and albeit the clause were dubious, yet it hath been in long possession, immemorial, which sufficiently instructs the accustomed fishing to have been before the same. *2dly*, As to the anteriority of the pursuer's infeftment, the defender offers to prove that his predecessor was infeft before him, with this clause that is in his own infeftment produced. *3dly*, Albeit the defender's right were posterior, yet it is sufficient to give him a joint right to the salmon fishing with the pursuer, because he offers him to prove that he hath 40 years peaceably possessed the salmon fishing as the pursuer hath, whenever they were in the river.

THE LORDS found that the clause in the defender's infeftment, albeit it had been prior to the pursuer's, could not give right to the salmon fishing in prejudice of the pursuer's express infeftment of salmon fishing, unless the defender's infeftment had been clad with immemorial and 40 years peaceable possession, which being so alleged by the defender, the pursuer offered to prove interruption, and therefore a term was granted to either party to prove.

Fol. Dic. v. 2. p. 104. Stair, v. 1. p. 456.

1672. February 7.

FULLERTON against Earl of EGLINTON.

No 109.

GEORGE FULLERTON being infeft in the lands of Dreghorn, with a *novodamus* containing salmon fishing in the water of Irving, pursues a declarator of his right against the Earl of Eglinton, who *alleged* no declarator, because he stood infeft in the barony of Robertson cum piscationibus in aqua de Irving, clad with immemorial possession. The pursuer *answered*, *Non relevat*, because salmon fishing being *inter regalia*, cannot be conveyed unless it be expressed. It was *answered*, That the general denomination of fishing in the water of Irving in the *tenendas*, though it could not have been a sufficient right alone, yet it is *titulus præscriptionis*, the lands being in *baronia*, which is *nomen universitatis*, and is perfected with 40 years uninterrupted possession.

Which the LORDS found relevant, and assoilzied.

Fol. Dic. v. 2. p. 104. Stair, v. 2. p. 64.

* * * Gosford reports this case :

No 109.

IN a declarator pursued at the said George's instance, of his right in the salmon fishing in the water of Irving, as being infest in the lands of Dreghorn *cum piscatione salmonum*, it was *alleged* for the Earl of Eglinton, That he was infest in the barony of Robertson *cum piscationibus*, and by virtue thereof, had been in immemorial possession of salmon fishing in both the sides of the water which included the lands of Dreghorn. It was *replied*, Salmon fishing being *inter regalia* did require a special sasine, and was not comprehended under the name of barony.

THE LORDS did sustain the defence notwithstanding of the reply, and found an infestment in *baronia cum piscationibus* to be a sufficient title to acquire a right of salmon fishing by 40 years possession.

Gosford, MS. No 466 p. 242.

No 110.

Found in conformity to Heritors of the Fishing of Don against Town of Aberdeen, No 107. p. 1084c.

A Bishop's charter disposing of a salmon fishing, with 40 years possession, was sustained as a good right, notwithstanding that salmon fishing is *inter regalia*; because the Bishop may have got a grant from the King; and the author's title is presumed, in this case, *presumptione juris et de jure*, as

1678. December 6. BROWN against The TOWN of KIRKCUDBRIGHT.

BROWN of Nunton having pursued the Town of Kirkcudbright to remove from a salmon fishing on a part of the water of Dee, in which fishing he is infest, and pays a considerable number of salmon to the Bishop of Galloway; the Town proponed a defence upon their charter *cum piscationibus*, and upon 40 years possession, which was sustained, though it bore not salmon fishing; and the pursuer having *replied* upon interruption, which he offered to prove *scripto*, the same was also sustained, and an act of litiscontestation extracted accordingly, and a part of the probation adduced by the Town, but not concluded; Nunton, by supplication, desired the rectification of the act as to the manner of probation, which by the act is only *scripto*, and yet is certainly competent *prout de jure*. It was *answered*, That the acquiescence of parties in the allegances and interlocutors, when themselves extract the act, are not thereafter questionable, otherwise most of the decreets of Session may be called in question, and desired to be rectified, as being proponed by mistake of advocates, or minuted, or extracted, by the error of clerks.

THE LORDS refused to alter the act as to Nunton, being extracted by himself; but the Bishop of Galloway having compeared, who was not in the process, but having an interest to defend the salmon fishing, for which he has a considerable feu-duty; the LORDS admitted him and ordained the interruptions to be proved *prout de jure*.