

S E C T. VI.

Title requisite to carry a right to Salmon Fishing.

1623. July 15.

FORBES *against* MONYMUSK.

No 106.

IN the action betwixt Monymusk and Forbes of Barns, for the fishings on the water of Dee, the LORDS gave many instances where men had salmon fishings where they had no land on either side of the water by the space of many miles; and that the privilege and servitude of drawing their nets on their neighbour's lands depended upon their possession, and was to be sustained if it were possessed peaceably past memory of man.

Fol. Dic. v. 2. p. 104. Haddington, MS. No 2900.

* * * Kerse reports this case :

1623. December 18.—PRESCRIPTION of 40 years possession in salmon fishing sustained *ad hoc*, that they might draw in other men's lands than their own, albeit only infeft in a barony with salmon fishing upon a side of the water.

And when it was *replied*, upon interruption by a summons of ejection, the LORDS repelled it *quia nihil secutum*.

Kerse, MS. fol. 93.

1665. January 26.

The HERITORS of the FISHING of DON *against* The TOWN of ABERDEEN and Their FEUERS.

No 107.

A charter with a general dispositive clause *cum piscationibus* with 40 years possession was sustained, to give right to a salmon fishing.

THE Heritors having salmon fishing in the water of Don above Aberdeen, pursue a declarator of their right of salmon fishing, and that they ought to be free of the prejudice sustained by the cruives built at Aberdeen, and insist upon these particulars: That the Town of Aberdeen hath no right to cruives, but is only infeft *cum piscationibus et piscariis*, and within such a bounds which cannot carry salmon fishing, being *inter regalia*, much less cruives. It was *answered*, That such a clause granted to an incorporation or community, or being *in baronia* with immemorial possession is sufficient; and that there is a later right to the Town with power of cruives within the said bounds *uti possidebantur*. It was *answered*, That the pursuers had their cruives established before that time.

THE LORDS found the Town of Aberdeen's title to cruives, albeit conceived, but conform to the first clause, with long possession, was sufficient.

2dly, The pursuers insisted against the transporting of the cruives from one place to another, which they could not do, cruives being a servitude *strictissimi juris*; as a way being once chosen and fixed cannot be changed, especially in respect of the clause *uti possidebantur*. It was answered, That there being a bounds expressed, and mentioning cruives to have been there before, the meaning can be no other than that these cruives should be removed, if inundations alter the present stance, and *uti possidebantur* is only understood of the way of building as before.

THE LORDS found, by the said clause, That the cruives might be transplanted within the bounds having but one cruive-dyke, and the former dyke demolished, so that the fishings above be in no worse condition than formerly.

3dly, They insisted for the widness of the hecks, whereanent it was *alleged*, That by an act of Parliament King James IV., hecks were appointed to be five inches wide, which is confirmed by an act 1661. It was answered, That the act King James IV. did relate to a former act of King David's, which was not to be found; but there were two acts by King James III. relating to the old act by King Alexander, which was found to bear three inches; so that the act King James IV. though posterior, being but relative, and the act related not known:

THE LORDS found it was a mistake in the writing of the act; and that, in the stead of King David, it should have expressed King Alexander; and so borne only three inches, seeing otherwise five inches would let the greatest part of salmon pass.

4thly, They insisted for the Saturday's slap, and craved, that on Saturday the whole cruives might stand open, so that fish might be taken thereby, according to the old statute of King Alexander, from the even sun on Saturday till the sun rising on Monday.

THE LORDS found that the Saturday's slap ought to be of the whole cruives, and that from Saturday at six o'clock till Monday at sun rising.

5thly, They insisted for the height of the cruives, and *alleged*, That the same ought to be no higher than the water in its ordinary course, neither the time of the flood nor of the drought; otherwise they might build the same as high as they pleased, and that it ought not to be built perpendicular, which will hinder the salmons up-coming, but sloping from the ground to the top.

THE LORDS, considering that there was no particular law as to the height of cruives, and these parties had suffered the other to enjoy the cruives above 40 years, that therefore the same should be *uti possidebantur* no higher than the old cruives were.

6thly, They insisted for the liberty of the middle stream beside and attour Saturday's slap, which is specially contained in the acts of Parliament of King Alexander and King James III. and IV., and is renewed in the late act of Par-

No 107. liament of King Charles II, the least quantity of which bears, " That five foot of the middle stream must be constantly free.

It was *answered, imo*, That the old acts anent the middle stream were wholly in desuetude, and were in effect derogate by the act of King James VI. anent cruives, which ordains the Saturday's slap to be kept, but mentions not the middle stream; and, as for the late act of Parliament, it was impetrate by these same parties, and never passed in these articles or noticed by the Parliament but as an ordinary confirmation. It was *answered*, That there was no prescription of public rights against standing laws, and albeit the desuetude of such laws could be effectual, yet the late law revives and confirms them all *per expressum*, which is not a particular confirmation, bearing mention of any particular party or particular right, but as a general confirmation of general laws anent all the cruives in Scotland.

THE LORDS, considering that the middle stream has been long in desuetude, and that this late ratification was passed without notice; therefore, before answer, they ordained the parties to adduce witnesses, whether the middle stream was accustomed in any cruives in Scotland, and whether the same would be beneficial or hurtful to the salmon fishing of the kingdom in general, and whether it were destructive to the cruives in common; and likewise, they gave commission to examine the witnesses *hinc inde*, whether their new cruives were built upon challes, or they otherwise built the former cruives to the prejudice of the fishing above in the water. See SALMON FISHING.

Fol. Dic. v. 2. p. 104. Stair, v. 1. p. 255.

1667. February 22.

Earl of SOUTHESK *against* Lady EARLSHALL.

No 108.

A clause in the dispositive part of a charter from the Crown *cum privilegio piscendi in aqua*, does not constitute right to a salmon fishing, unless the person to whom it was granted had fished for salmon 40 years without interruption.

THE Earl of Southesk being infeft in certain lands upon the water of Eden and the salmon fishing, pursues declarator that Earlshall hath no right thereto. The pursuer produces an infeftment *in anno* 1558, in which, after the land is disposed, there follows a clause, " Una cum salmonum in piscationibus in aqua de Eden," with a *novodamus*. It was *alleged* for the defender, That he hath the like declarator against the pursuer, which he repeats by way of defence, and produces an infeftment of the same year of God, bearing, in the dispositive clause, " Una cum privilegio piscandi in aqua de Eden solito et consuet," and *alleges*, That by virtue thereof, he had good right to fish in the water, and that he had been in immemorial possession by virtue thereof. It was *answered, first*, That this clause cannot carry salmon fishing, which is *inter regalia*, and must be specially disposed. *2dly*, The defender's right, though in the same year of God, is yet some months posterior to the pursuer's; and as to the defender's immemorial possession, it cannot consist nor give prescription without a sufficient title by infeftment, and it hath been frequently interrupted by the pursuer. It was *answered* by the defender, That he and the pursuer, and the Laird