

speedy payment of the debts of the person forfeiting. It was devised for the special purpose of avoiding those intricacies. The Act *8vo Annæ* is absurd if a prior common-law right had been established. The additional clause for 14 years more, if he is still alive, has never received an answer.

On the 27th July 1773, the Lords sustained the defences, and assoilyied.

*Act.* A. M'Connochie, A. Murray, D. Rae. *Alt.* J. Boswell, Ilay Campbell, J. M'Laurin.

*Diss.* Monboddo.

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1773. August 4. DUKE OF QUEENSBERRY *against* VISCOUNT OF STORMONT.

SALMON-FISHING.

[*Faculty Collection, VI. 215 ; Dictionary, 14,251.*]

ALVA. Nothing in the *tenendas* clause can enlarge the dispositive clause.

MONBODDO. Even in charters from the Crown, were it not that the *tenendas* clause is not revised by the Barons, a grant of fishings in the *tenendas* clause would be good. It is always good in charters from a subject. If the Duke of Queensberry and his predecessors had continued in possession, there would have been more difficulty; but the direct contrary is the case. I think there is both a title and prescription.

KAIMES. A salmon-fishing is *inter regalia*, so that it passes by a particular symbol. There is no such thing here. If a man have a salmon-fishing from the Crown, may not that go as part and pertinent without any symbol? It occurred to me, that no exclusive grant was given, but only a permission to possess promiscuously. It is proved, however, that the possession was not promiscuous, but as large as a vassal could enjoy.

JUSTICE-CLERK. The charter, 1649, not only grants the lands, but also the salmon-fishings, or what is equivalent to salmon-fishing. This conveys to my mind that the adjudger has taken the description from the title-deeds of his debtor, as mentioning a particular mode of fishing. There is some defect in the progress; but the charter 1687 is a voluntary charter: bearing a *novodamus*, it confirms all the charters of apprising. If the Duke's challenge had been recent, there might have been more difficulty; now there is a proof, on Lord Stormonth's part, of long possession, not for pleasure, but for profit: On the other side, a precarious possession, yielding no profit to the Duke of Queensberry. I do not find myself at liberty to play with the rights of parties, so as to take the subject from the Viscount and give it to the Duke of Queensberry.

KENNET. In order to acquire a right of prescription, there must be a title, and there must be possession. The defender has both. There is no doubt as to *possession*. The titles produced are not sufficient to give a right *per se*, but they are sufficient with possession. According to the present mode of revising charters in Exchequer, I would lay no weight upon the *tenendas* clause in a

crown-charter, because that is filled up at the seal. The case is different as to a charter from a subject. There is no common right here; because the pursuer has had, properly speaking, no possession at all. The whole tenants of his estate fished *tanquam quilibet* without acknowledging him.

AUCHINLECK. The argument of the Duke of Queensberry proceeds upon a mistake in our feudal law: some decisions there are which seem to favour the error; a charter is but one deed, comprehending in it the dispositive clause, *tenendas*, and *reddendo*. Originally, the *tenendas* contained the most material circumstance of all, the substitution of heirs: so matters stood till the reign of James I. The Barons of Exchequer have got into the practice of neglecting to revise the *tenendas* clause. Their predecessors must have done otherwise, because the *tenendas* bore the right of the grantee. It would be strange to argue, from the carelessness of the Barons of Exchequer, that the doers for private people are equally careless.

On the 4th August 1773, "The Lords found that Lord Stormonth, by his titles, joined to possession, has right to the salmon-fishings; and therefore assailed."

*Act.* G. Clerk, Ilay Campbell, R. M'Queen. *Alt.* A. Murray, H. Dundas, D. Græme.

1773. July 1. LORD ADAM GORDON *against* JAMES DUFF.

MEMBER OF PARLIAMENT.

Subjects to be valued.

[*Faculty Collection*, VI. 244; *Dictionary*, 8656.]

AUCHINLECK. Here boats were furnished to the tenants by the proprietor. This is no feudal property, but merely a rent arising from the furnishing. If one should have a coach-house, and let it with coaches and chaises, this would be no feudal property, as to the profit of coaches and chaises.

GARDENSTON. This is an imaginary valuation. By the same rule, a right of catching fowls in the air might be valued, as a right of catching fish in the sea.

PITFOUR. There can be no valuation of fishing, unless the fishings are held of the Crown: How can a white fishing be held of the Crown?

AUCHINLECK. The sasine is good, were there any thing to be seized in.

On the 1st July 1773, "The Lords repelled the objection to the sasine, but sustained the objection, that the fishing-boats was no feudal subject."

*Act.* H. Dundas. *Alt.* Ilay Campbell.

1773. August 6.—COALSTON. I doubt how far the King has a power of granting an exclusive right of white-fishings.

PITFOUR. Not in the sea, but in creeks.