

S E C T. IV.

What Subjects are to be Valued.

1772. *July 31.*SIR LUDOVICK GRANT, Baronet, and Others, *against* JAMES EARL FIFE,
and Others.

No 57.

THE COURT reduced a decree of valuation, challenged upon various grounds ; particularly, that it had proceeded without proper proof, and that the rent of a garden and orchard had been omitted in the proof the real rent.

Reporter, *Aubinleck.* Act. *Rae.* Alt. *Solicitor Dundas et Ilay Campbell.* Clerk, *Pringle.*
Fac. Col. No 23. p. 65.

* * * This case was appealed :

THE HOUSE OF LORDS, 11th March 1773, ' ORDERED and ADJUDGED, That the interlocutors complained of in the said appeal be, and the same are hereby reversed.'

1773. *August 7.*LORD ADAM GORDON of Prestonhall, *against* JAMES DUFF, Sheriff-Clerk
of Banff.

No 68.

Fishing-boats included in the grant of a barony from the Crown, and immemorially possessed, by letting them along with fishermen's houses and crofts, at a permanent rent, sustained as a proper subject of valuation, when separately disposed, to make up a note.

JAMES DUFF was enrolled as a freeholder in the county of Banff at Michaelmas last, upon a liferent superiority disposed to him by James Earl Fife, comprehending, amongst other subjects, the boats of Down, stated at a valuation of L. 46 : 17 : 7 Scots, being the sum allotted to the boats of Down, paying L. 18 Sterling of yearly rent, at a division of the *cumulo* valuation of the lands and barony of Down, comprehending the particular subjects conveyed to Mr Duff, and others, made by a general meeting of Commissioners of Supply of said county in May 1771.

A complaint having been preferred against this enrolment, it was *objected* in point of form, That the statute of the 16th of Geo. II. limits the time for giving in complaints to four kalendar months after the Michaelmas meeting: That the last Michaelmas meeting at Banff was held upon the 25th of September 1772 years ; but the record of court, appointing the complaint to be served, does not bear date till the 26th of January 1773, being after the four months are expired.

Answered, The complaint was put into the Lords' boxes upon Friday the 22d January, which was clearly within the four kalendar months; it was moved upon Saturday the 23d, and ordered to be served, although the deliverance appointing the service was not wrote out by the clerk, so as to be signed, till Tuesday the 26th January.

The delay of the clerk, however, does not vary or alter the day, either of presenting the complaint, or of pronouncing the deliverance; and the clause of the 16th of the late King, which regulates this matter, bears expressly, that a freeholder is 'to apply by complaint to the Court of Session, so as such application be made within four kalendar months after such enrolment.' It is therefore sufficient if the complaint is presented within the four kalendar months; and, if that is done, it saves the prescription, although the Court, from accident or necessity, should delay to pronounce any deliverance on the complaint, or that the clerk, by accident, as in this case, delays to write out the deliverance after it is pronounced.

THE COURT 'repelled the objection made to the competency of the complaint, in respect of the answer.'

One objection chiefly *insisted* on against Mr Duff's qualification was, That part of it was made up of what is called the Boats of Down, which not being a proper feudal subject, or yielding a permanent rent, except what arises from the value of the boats themselves, ought not to have had a part of the *cumulo* valuation allotted to them. And in support of this objection, it was *argued*, That white fishing upon the coast of the sea is not a right of property; and that, though the heritor adjacent to the coast may have boats, and employ fishers, yet this is altogether a precarious subject; and, as it cannot debar others from fishing in the same place, he cannot be allowed to consider it as his property, or to lay any proportion of his *cumulo* valuation upon it.

THE COURT, by their first judgment, 'sustained the objection to Mr Duff's qualification, that the fish-boats of Down are not a proper feudal subject.'

This judgment having been brought under review, it was *contended* for Mr Duff, *imo*, That there is nothing to hinder the Crown from granting an exclusive right of white fishing within bays or creeks, or adjacent to the lands of the grantee; he likewise condescended on sundry instances of such grants of white fishings for more than a century back; and averred, that, in every division that has been hitherto made, the rents of such white fishings had been taken *in computo* in making such divisions, and a share of the *cumulo* valuation has been allotted to them accordingly. And here such a right was effectually granted and established by the charters from the Crown to Lord Fife, and his predecessors, of the barony of Down, with white fishings, and others belonging thereto, and particularly 'the whole boats, fishings, shores, and anchorages, 'pertaining thereto,' &c. Under which grants, his Lordship, and his predecessors, stood infeft in those fishings, boats, &c. as well as the lands of the barony, for more than two centuries past, as appears from the charters and sasines on

No 68.

record; and the claimant himself stands infeft in the subjects in question, upon the charter under the Great Seal, conveyed to him, containing a warrant for infeftment in the boats as well as the lands.

Even supposing, for argument's sake, that the boats or fishings were not originally the proper subject of a feudal investiture, it would not now be a good objection. Subjects not in their nature capable of infeftment, may by usage become so. In whatever light, therefore, this matter would have fallen to be viewed in the beginning, the usage of two centuries must be sufficient to render the boats and fishings the proper subject of a feudal investiture.

2do, Although it were to be admitted that a right of white fishing was in no degree capable of appropriation, it would not in the least hurt the claimant's plea. The objector does not seem to attend to the nature of the subject from which the article of valuation in dispute does arise. The persons who possess and occupy these boats, have also houses and yards, or crofts, along with their boats; and the rent is payable for the whole. These houses and lands are not only in the strictest sense feudal, but they are undoubtedly the proper subject of valuation, and the boats fall to be considered as a proper pertinent thereof.

That is truly the nature of the subject for which the rent is payable, according to which a proportional share of the valuation was given off; and, as the rent has been a fixed and a permanent rent for time immemorial, as can be instructed by authentic rentals, in which it had always been included, it does not occur to the claimant, how the Commissioners of Supply could avoid laying upon these subjects a proper share of the *cumulo*.

And, therefore, it is unnecessary to enquire whether the proprietor of these houses and lands had an exclusive right of fishing white fish in the sea adjacent to the lands or not; for, if the heritor has received a fixed and permanent rent for his property, his subjects fall to be valued agreeably to the extent of the rent he received; and, in dividing the *cumulo* under which they were comprehended, a share of it would fall to be given off, effeiring to the rent which they truly yielded.

Upon advising petition, answers, and replies, the COURT 'altered the former interlocutor, repelled the objection, and assoilzied from the complaint.'

Act. Solicitor Dundas, Cosmo Gordon. Alt. D. Rae, Ilay Campbell. Clerk, Ross.

Fol. Dic. v. 3. p. 409. Fac. Col. No 89. p. 224.

* * * A similar decision was pronounced, M'Leod of Cadboll against Blair.

See APPENDIX.