

*piscaria* carried all sorts of fishings; and, in the present case, the sasines of the parties made it clearer, wherein the symbols for tradition bore boats, nets, cruives, &c. which are only applicable to salmon fishing. No 6.

*Fol. Dic. v. 2. p. 360. Fountainhall.*

\* \* This case is No. 40. p. 7812. *voce* JUS TERTII.

1773. *August.*

DUKE of QUEENSBERRY *against* VISCOUNT of STORMONT, and JAMES ROME, in Torduff, and JOHN ROME in Hills.

THE Duke of Queensberry brought an action against the Viscount of Stormont, and his tenants, Romes, for having it declared; that he had the sole right to the salmon fishing in the river, or frith of Solway, opposite to the lands of Torduff, Stocks, and Wylies, belonging in property to Viscount Stormont, and holden of his Grace as superior: That the defender, the Viscount, has no right thereto, and ought to be decerned to desist from all such fishing in time coming; and that Romes, the tenants and possessors of these fishings under him, should be decerned to remove therefrom.

The pursuer founded upon a charter of resignation under the great seal, in his favour, dated July 26, 1716, and seisin thereon, 29th September following. This charter contained salmon fishings in the Solway frith, opposite to the barony of Torthorwald, and of other lands, comprehending the lands of Torduff.

The defender produced a charter, dated 20th January 1649, granted by James Earl of Queensberry, as superior, to James Earl of Annandale, proceeding upon a decree of apprising, deduced against Fergus Graham of Blatwood; the dispositive clause of which charter is in these words: Totas et integras praedict. decem libras terrarum de Torduff, cum pendiculis earundem vocat. Stocks et Wylies, cum piscariis et lie Skaris et Coups dictarum terrarum, aliisque piscariis et privilegiis earund. usitat. et consuet. cum omnibus et singulis adeficiis, &c. He likewise produced a charter granted in 1687, by William Duke of Queensberry, in favour of David Viscount of Stormont, of the lands of Torduff, Stocks, and Wylies, which charter contains a clause of *de novodamus*; and, in the *tenendas*, the lands are declared to be held of the granter, 'in feodo et haereditate, ac libera firma, in perpetuum, cum venationibus, piscationibus, &c.

Thereafter, in obedience to an appointment of the Lord Ordinary, the defender gave in a condescence of the acts of possession consequent upon this right, namely, by the family of Stormont letting leases of these fishings to their tenants, at a certain rent, prior to the year 1669, and progressively down to the 1763, when the defender himself set the last leases, and which are still current, to the other two defenders, referring to the leases, and other written evidence; and it was stated, that, under these several rights, the tenants had uniformly and uninterruptedly possessed the whole fishings on the coast of the lands of Torduff, particularly the

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A charter from a subject superior, mentioning *cum piscationibus* in general, joined with possession by the vassal, is sufficient to establish a right in him to a salmon fishing, though not expressed in his titles, in a question with the superior claiming the exclusive right, in virtue of a crown charter containing an express grant of the salmon fishing to him.

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salmon fishings, and no other person, excepting such as they employed, or had toleration from them, possessed any species of fishing on the coast of these lands. And of these facts a proof was offered.

To this condescendence, the pursuer answered in substance, that it has been within these few years only that salmon fishings have been considered as objects of attention; every person who thought proper was allowed to fish; fishing of salmon having been considered rather as a matter of pleasure than profit, especially upon the south-coast: That, therefore, possession will not operate so strongly in completing a defective title to fishings as it will in other subjects. It must be unchallenged and uninterrupted. Besides, the negative prescription does not take place, if the subjects continue to be at all possessed; that can only be completed by a total desertion: That, though the pursuer does not deny that the defender's tenants fished opposite to the lands possessed by them, yet, as the pursuer's tenants had a promiscuous possession there, within which they were not interrupted, these acts of possession must have the effect to preserve the original right of fishing vested in him by the crown, so as even to prevent any prescription on the part of the defender; whose possession can, at no rate, go farther than to establish in him a promiscuous right of fishing along with the pursuer.

The Lord Ordinary, before answer, allowed a proof of the facts contained in the condescendence and answers, which being led, and reported to the court, both parties were allowed to give in memorials.

*Argued for the pursuer:* In order to acquire a right of property by prescription, the law not only requires a constant and uninterrupted possession, without challenge, for the space of forty years, but likewise a title, which, if it flowed *a vero domino*, would be sufficient instantly to transfer the right; and, as a title without possession is unavailable for creating a prescriptive right, so possession without a title is equally so; and, therefore, the whole proof of possession which has been brought in this case, can be of no avail, if the defender has not a habile title of prescription in his person.

If any of the deeds flowing from the pursuer's predecessors, as superiors of the lands of Torduff, did contain a grant of salmon fishing, the defender would have no occasion for prescription; as the pursuer's predecessors had an undoubted good right to the salmon fishings adjacent to the said lands, in virtue of grants from the crown, such grant from them, as flowing *a vero domino*, would immediately vest the right, but none of the titles which the defender has produced can import such a grant.

The title first in date, scil. the charter of apprising 1649, contains no special grant of salmon-fishing, but only conveys the lands, 'cum piscariis dictarum terrarum, aliisque piscariis et privilegiis earund. usitat. et consuet.' This could not be extended to a grant of salmon fishing, which is a *separatum tenementum* from lands, and, as such, requires both a special conveyance and infeftment by a particular symbol, but only to such fishings as are part and pertinent of the lands, and

which would pass along with them as part and pertinent, even although not expressed.

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It is indeed true, that a disposition of lands, *cum piscariis*, has been found a title upon which a right of salmon fishing might be acquired by prescription; but then, as the defender had produced no title by which he connects with the foresaid charter of apprising, the possession which the defender and his predecessors are proved to have had in this case cannot be attributed to that title, so as to establish a right to the salmon fishing by prescription.

But, *2da*, The foresaid charter is not a renewal of the former investiture upon the resignation of the vassal, but it is a charter given to an appriser, in obedience to a charge against the superior upon the decree of apprising, and which he was bound to grant in the precise terms of the decree. But a charter of this sort conveys no right to the appriser that was not in the former vassal. It is given *periculo petentis, et salvo jure cujuslibet*; so that, when the investitures come afterwards to be renewed, the terms of the charter of apprising, or adjudication, are not regarded; but it is adapted to the right that was truly in the vassal, unless where a forty years possession had followed upon such charter and seisine.

This accordingly happened in this case. When William Duke of Queensberry came to renew the investiture in favour of David Viscount of Stormont, the defender's grandfather, in 1687, the charter which he then granted conveys *totas et integras terras de Torduff, Stocks, et Wylies, cum suis pertinent. extenden. ad decem libratas terrarum, &c.* and this charter contains a clause of *novodamus*, granting the lands, as aforesaid, *una cum omni jure et titulo, &c.* Here the terms of the charter of apprising are entirely innovated. As it was then known that the vassal had a right to no salmon fishing adjacent to these lands; so the charter disposes the lands, with its pertinents, without making mention of any fishings. A charter containing a *novodamus*, which is intended to supply any defect in former grants, or to discharge casualties of superiority which have been incurred, does particularly enumerate every thing intended to be conveyed; and when no fishings are mentioned, either in the dispositive clause of the charter, or in the subsequent clause of the *novodamus*, it is plain that it was understood that the vassal had not a right to any of the fishings in the superior's own charters; and it is a plain declaration that none were intended to be conveyed. The vassal's accepting of the charter in these terms, implies, upon his part, a discharge and renunciation, in favour of the superior; of any farther right he might have had by the conception of the charter 1649; as, indeed, the vassal's right can in no case be regulated by a charter of apprising, in so far as it is varied by the after investitures; and, therefore, as the charter 1687 contains no grant of any fishings, the possession which the defender has proved in this case could not avail him, even although he had connected a title with the charter of apprising 1649.

Nothing contained in the *tenendas* clause of this charter can either imply a grant of salmon fishing, or even be held as a title for acquiring a right of salmon fishing.

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by prescription. A salmon fishing does not pass as part and pertinent of the lands, but is a *separatum tenementum*.

If any right of fishing, different and distinct from the right to the lands, had been intended to be conveyed, fishings would have been expressed, either in the dispositive clause, or in the clause of *novodamus*. Where fishings are disposed, forty years possession of a salmon-fishing may perhaps be sufficient to explain the grant accordingly; but, where no fishings are disposed, possession for any period of time can be of no avail, there being no title to which the same is applicable.

The word *piscationibus*, in this *tenendas* clause, is no more than a mere word of stile, thrown in along with many other words of stile usual in every charter, as expressive of the various particulars which are understood to be comprehended under that of part and pertinent of the fee, and which would be carried as such, though no enumeration thereof had been made in the *tenendas* clause of the charter. But it is impossible that such words of stile thrown into that clause can carry what was clearly a separate tenement, and would not pass as part and pertinent of the lands disposed. There are fishings of a certain nature that pass as part and pertinent of the lands; and the foresaid term in the *tenendas* clause can only be understood as expressive of such.

*Pleaded, 2do*, Were this to be deemed a good title after all, yet, when the proof that has been adduced in this case, relative to the possession of the parties, is attended to, it will clearly appear that there hath been a promiscuous possession by the tenants of both the pursuer and defender; and, consequently, there is not the least room for the claim of an exclusive right of possession set up by the defenders.

*Pleaded for the defenders*: The pursuer's predecessors were totally divested of the right to the fishings now in question, by the right established in Graham of Blatwood, by the charter of apprising in the year 1649, and infestment following thereupon, in favour of the Earl of Annandale, with whom the Viscount of Stormont, the defender, connects a right. That salmon fishings are *inter regalia*; and that, in grants from the crown, they ought to be specially expressed in the dispositive clause of these grants, they will readily admit; but, when such grants are once made by the crown, they will more readily be presumed to be transmitted from one subject to another, than they will be presumed to have been originally transmitted by the crown. Thus, then, it appearing that the family of Queensberry had a grant of these salmon fishings from the crown; that the Earl of Annandale obtained a charter from the Earl of Queensberry of the lands of Torduff, with the fishings belonging thereto, which fishings must be held to have been disposed by the family of Queensberry to Graham of Blatwood, from whom the Earl of Annandale apprised the lands of Torduff, with the fishings, it seems to be extremely unnatural to think, that this right of fishing was exclusive of salmon fishing, especially as the pursuer himself admits, that the salmon fishing was, in those days, an object of no attention. It is extremely probable, that even the right of salmon fishing was expressly established in the person of Fergus Graham of Blat-

wood, against whom the Earl of Annandale led the apprising, in which case there can be no doubt that the salmon fishing fell under the decree and charter of apprising.

Upon the supposition, then, that the right to the salmon fishings was, by the charter 1649, established in the person of the Earl of Annandale, the defender thinks he can very justly infer, that this right is now in the person of the defender, and that the pursuer has no right to any fishings in that part of the frith of Solway; the defender's possession, allowing the pursuer to have had a promiscuous possession with him, being fully sufficient to preserve a right, once in him, from the negative prescription, which must concur before a right can be acquired by the positive prescription. Besides, it is to be here observed, that, if the pursuer's family was denuded of this right of fishing, they had no right whereupon they could afterwards acquire a right thereto by prescription, they only having a right to the superiority, which could be no ground of a prescription of the property in their favours.

The defender can by no means agree with the pursuer's doctrine, that, in a charter granted by a subject-superior, nothing is to be understood conveyed but what is contained in the dispositive clause, and that the *tenendas* clause is to be considered only as words of stile; for the whole charter makes but one sentence. The dispositive words thereof apply to what is contained in the *tenendas*, as much as what is contained in the dispositive clause itself; and the reason given by our lawyers, why what is contained in the *tenendas* clause of a charter, does not affect the crown, namely, that the clause is not revised by the Lords of Exchequer, does not apply to charters granted by subjects, for they must be considered to have perused, and to have understood the whole particulars mentioned in any part of a writ that is granted by them.

The defender does not understand the pursuer's argument drawn from the charter in the year 1687, not mentioning fishing in the dispositive clause thereof, as if, by that omission, it had been intended to correct the charter of apprising in the 1649. That last charter gives and disposes to the defender's grandfather, *totas et integras terras de Torduff, Stocks, et Wylies, cum suis pertinentiis*, which, as the charter bears, formerly belonged to the deceased James Earl of Annandale, and which lands then belonged to David Viscount of Stormont, as heir of the deceased David Viscount of Stormont, his father, which deceased Viscount had acquired right thereto by different persons, apprisers thereof from the said deceased Earl of Annandale; then proceeds to ratify and confirm all writs granted by his predecessors, or authors, to the then Viscount of Stormont, his father, the different persons apprisers thereof, to the Earls of Annandale, or their predecessors, as if these whole rights were at length therein insert: And, further, of new, grants these lands of Torduff, Stocks, and Wylies, with the pertinents, *tenen. et haben. cum piscationibus, &c.* By that charter, the former rights are confirmed, particularly the apprisings. The clause of *novodamus* could not possibly be adjected in order to restrict these apprisings, but was, in the nature of the thing, surely intended

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2dly, Even upon the supposition, that, though the right of fishings, in general, was granted to Graham of Blatwood, and contained in the decree of apprising led against him, which must be presumed, yet the charter of apprising, in the year 1649, would not, by itself, have carried a right to these salmon fishings: The possession that appears to have followed upon it is sufficient to explain what was meant by the word *piscariis* in that charter. That, under that word, a right of salmon fishing may be comprehended, if such appears to have been the intention of parties, even when the right is granted by the crown, and far more when such is granted by a subject, who originally had the right from the crown, cannot well be disputed: And that such was the Earl of Queensberry's intention, when he granted the charter of apprising in the year 1649, appears to have been sufficiently explained from the possession that has followed thereon; the constant and uninterrupted possession, as far as the memory of witnesses can go, of these fishings, particularly of salmon-fishings, on the part of the defender, and his predecessors, being not only distinctly proved, but it being likewise proved, that, as far back as the 1669, these fishings were regularly set to the Viscount of Stormont's tenants at a certain rent: Whereas there is nothing more proved on the part of the pursuer, than that his tenants, without having any authority from him, or particular sets of the fishings, sometimes fished upon that part of the frith, which was very natural for them to do, in regard of their neighbourhood thereto, and that the thing was looked upon as a matter of no great consequence. What, then, the defenders contend on this head is, that the Lord Stormont, and his predecessor's possession, does not properly give him a right to the salmon fishing, by a right thereto acquired by prescription, but explains what was meant by the word *piscariis* in the charter 1649; so that his right to these fishings must be considered in the same view as if salmon fishings had been expressly therein mentioned.

3dly, Even considering the defender's right to these fishings to stand only upon the footing of prescription, the possession on the part of him and his predecessors hath been so strong, as to give him a right thereto, exclusive of the pursuer.

The Court were of opinion, that the defender had a good right to the salmon fishing in question, in virtue of the titles produced, joined with the proof of possession thereon, which appeared very strong; and that, on the other hand, the pursuer did not seem to have had a possession arising from any right of property, but precarious only.

The judgment was in these terms: 'Sustain the defences, assoilzie, and decern.'

Act., Masqueen.

Alt., D., Graeme.

Clerk, Kirkpatrick.

Fac. Col. No. 86. p. 215.