

* * * 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*.

1680. *January 13.*—BROWN of Nunton pursued a removing against the Town of Kirkcudbright, from the salmon fishing in the water of Dee, adjacent to his lands, especially in the pool called gible-pool. The defenders *alleged*, That they were infeft in their burgh and burrow-lands, *cum piscariis*, and by virtue thereof have been forty years in possession of salmon-fishing in this pool, and though their infeftment bear not expressly salmon-fishing, yet it is a title for prescription of a salmon fishing, as well as an infeftment *in baronia*, both being *nomina universitatis*; and the pursuer is only infeft in his lands, by a late infeftment in the salmon-fishing of this pool by the bishop of Galloway, and by the college of Glasgow, who had right during the suppression of bishops. But salmon-fishing being *inter regalia*, can only be given by the King, and not by the bishop, unless it had been instructed, that the King had disposed the same to the bishop, which is not done. THE LORDS having before answer ordained either party to prove their possessions and interruptions, witnesses were adduced for either, with a precept of warning and execution for Nunton, and a summons before the steward of Kirkcudbright against the town, with some minutes of process on it, with the extract of letters of advocation taken off the signet, raised at the town's instance, for advocating the process at Nunton's instance against them, for removing from this fishing, from the steward to the Lords. THE LORDS having advised the probation, found, ' That by the space of forty years before this process, the town had fished with two boats, and Nunton with one boat, in the bounds controverted, and they found them both to have right to a salmon fishing in the same manner in time-coming, and had no regard to any interruption by Nunton, because neither party had a full right to salmon-fishing, but were perfecting their right by prescription; so that interruptions by either of them before their rights were complete, could have no effect, unless the parties' right interrupted, had been intermitted, and had not constant possession yearly.' It was further *alleged* for Nunton, That he produces rights more than 40 years *cum piscationibus* bearing a *reddendo* of salmon to the bishop, whereby his right was complete, for in the church patrimony *decennalis et triennalis possessor non tenetur docere de titulo*; and therefore the bishop's title is presumed, as if produced, bearing the salmon-fishing, because he has proved possession by his vassal for salmon-fishing, for much more than 13 years; and therefore after the first 13 years possession, Nunton's right was complete, and so the interruptions used by him against the Town, were effectual to him to interrupt prescription. Whereupon it was *answered* for the Town; That the prescription of a title from possession, can go no further than the possession, so that the bishop's possession by his vassal being only of one boat's fishing, the bishop's title can only be presumed to be with salmon-fishing by one boat, which could not exclude the King to give fishing to the Town of two boats; this the Lords did also sustain. It was further *alleged* for Nunton, That the reason of the Lords' limiting the bishop's

No 110.

well as in the case of lands or other subjects in commerce.

No 110. right to one boat, was, because he possessed only by one, and the Town by two; but it is offered to be proved, that anterior to the 40 years now proved as to a conjunct probation, Nunton did several years before possess alone, whereby his title will not be limited, but absolute, as if he were infeft in salmon-fishing, whereby his interruptions against the Town within 40 years are effectual. It was *answered* for the Town, That they offered to prove their possession was as ancient as Nunton's; and though they should not prove it, his interruption is null, proceeding upon a null warning, raised before he was infeft. *2do*, Any infeftment he had *ex post facto* was improved, and he hath taken late infeftment after the improbation. *3tio*, The execution of the warning is false, being attested by one who designs himself notary, and it is notour that he was not admitted notary 10 years thereafter. And as to the process before the steward, there is no execution produced, nor is it evident that the pretended minutes thereon were the true hand of the clerk, much less that they were written when they bare date. And as to the advocation, it is no deed of Nunton's but did proceed upon hearing of his intending a process before the steward.

THE LORDS found the allegiance relevant for Nunton, that he possest alone before the Town possest, and granted warrant to either party to prove who had the most ancient possession, and in case the bishop's vassal were found more ancient, they sustained the interruption by Nunton upon the warning, notwithstanding of the erroneous designation of the notary, unless the verity of the executions were improved; and found Nunton's new right after the improbation did carry with it all the pertinents of the right, and so consequently the salmon-fishing.

Fol. Dic. v. 2. p. 104. Stair, v. 2. p. 652. & 736.

* * * Fountainhall reports this case :

1678. December 7.—IN Brown of Nunton's declarator against the Town of Kirkcudbright, of his sole right of salmon-fishing upon that water, at least in the gible-hole-pool, the Town's defence having been admitted to probation, viz. that they had been in immemorial possession of fishing there, and the pursuer finding the Town had proved it, he gives in a bill to the Lords, craving he might be admitted to a conjunct probation of his deeds of possession, and interruption of the Town's right. THE LORDS refused to grant him a probation now, in respect of his acquiescence in extracting the act himself, and not craving it *debito tempore*, though it was only an act before answer; but they, as to the points debated, are equiparate to acts of litiscontestation. Then Nunton caused the bishop of Galloway, his superior in that fishing and lands, and to whom he paid 108 salmon *nomine feudifirmæ* yearly, to give in a bill, and represent his interest and prejudice. And the LORDS granted him a term for probation of the interruptions, but declared they would not stop the advising of the

cause thereby, when it came in by the course of the roll. Then a new bill was presented, craving a commission might be granted for examining their witnesses; which the LORDS refused.

No 110.

1679. *January 15.*—IN the declarators betwixt Brown of Nunton and the Town of Kirkcudbright, the Lords, on Pitmedden's report, refused to admit Lidderdale of St Mary Isle as a witness for Nunton, because he had married Nunton's sister, albeit the affinity was dissolved by her death, many years ago, and that the diligence was not at Nunton's instance, but the bishop of Galloway's, as superior; yet, in regard the benefit would redound to Nunton the vassal, and that by interpretation and extension of the act of Parl. 1621, (See Mack. Observes on it), brethren in law are reputed conjunct persons, *esto* there were no bairns procreate of the marriage, (which are *chara pignora amoris*, and the cement of affinity), the Lords repelled him, unless there had been a *penuria testium*; in which case, they would have received him *cum nota*. See WITNESS.

1679. *December 4.*—THE probation led in the cause betwixt the Town of Kirkcudbright and William Brown (15th January 1679) being advised, and the Lords having considered the rights and infestments produced for both parties, with the depositions of the witnesses adduced by either of them, "they find Nunton the pursuer's possession proven as to his liberty of one boat's fishing in the bounds of the water libelled; and the defender's possession of freedom for two boats fishing on the said water, in the bounds foresaid." And therefore decern and declare accordingly.

1680. *January 13.*—THE action Nunton *contra* the Town of Kirkcudbright (mentioned 4th December last) was this day again heard, and of new declared. In this cause, the President remembered that in the action between the Earl of Aboyne and Francis Farquharson, No 5. p. 4147.; the right of keeping fairs and markets being *inter regalia*, and only concessions that can be given by the King, and since they held only of a bishop, he could not grant them the freedom and liberty of markets and fairs, unless the bishop in his own patent, gift, or erection, derived a right and privilege of holding markets within the temporality of his jurisdiction from the King, else the bishop could not *concedere jus quod ipse non habet*. But in regard that bishops and churchmen are not able to instruct a progress of rights, their antient evidents being lost, therefore law receives small and slender presumptions, such as 13 years possession, conform to the *regula Cancellariæ, triennalis et decennalis possessor non tenetur docere de titulo*; which some interpret to be 13, 3 and 10 being 13. See Bishop of Dumblain, No 28. p. 7950; *Ludovic. Gomez. ad dict. regul. Cancellariæ*. Yea, 7 years possession is enough to a churchman to give him a possessory judgment, (as others have) and to prove it to be a part of his benefice. The occasion of this

No 110. reflection was, that we objected against Nunton that he was only the Bishop of Galloway's vassal, and that salmon fishing was *inter reglia*, and so the bishop could not convey it unless he had it himself.

Though salmon-fishing comes not under a general disposition, yet *includitur sub nomine universitatis*, v. g. if a barony be disposed, *piscatio salmonum* is included, though not so much as *cum piscariis* in the general be mentioned in the right, as Craig affirms, L. 1. D. 16; but law and practice have not seconded his opinion: Or, if it be a charter to a bishop, (for that is likewise *nomen officii et universitatis*); or if it be to a burgh-royal, especially if the said town have their erection with the privilege of a sheriffship, or even of a baron's jurisdiction, by holding of courts, fining, &c. within themselves; or if their charters bear *cum furca et fossa*, which words import *merum imperium*, and the erection into a barony; for these, or the like words, though the disposition or charter bear no mention of a barony, yet they do infer a baron's jurisdiction.

The interlocutors in this cause, as they stand recorded in the President's book of Practiques, run thus: *imo*, "THE LORDS found, That 40 years before Nunton's process, the town had fished with two boats, and Nunton with one, in the bounds controverted: So they found them both to have right to the salmon-fishing in the same manner in all time coming; and had no regard to any interruption by Nunton, because neither party had a full right to salmon-fishing, but were only perfecting their rights by prescription; so that interruptions by either of them, before their rights were complete, could have no effect, unless the party's right interrupted had been intermitted, and had no constant possession yearly." *2do*, "They found, upon a futher debate, That the presumption of a title from possession can go no further than the possession; so that the bishop's possession by his vassal being only of a boat's fishing, the bishop's fishing can only be presumed to be of salmon-fishing by one boat; which could not hinder the King to give fishing to the town of Kirkcudbright with two boats." *3tio*, Upon Nunton's further debate, "the Lords found his allegiance relevant, that he possessed alone, before the town's possession of 40 years; and granted warrant to either party to prove who had the most antient possession; and, in case the bishop's vassal was found more antient, they sustained the interruption by Nunton's warning, notwithstanding of the erroneous designation of the notary, unless the verity of the executions were improven. And found Nunton's new right, after the interruptions, did carry with it all the pertinents of the right, and consequently the salmon-fishing."

1680. July 3.—BROWN of Nunton gains the cause against the Town of Kirkcudbright anent the salmon-fishing, the Lords having advised the report of the last depositions taken.

Fountainhall, v. 1. p. 27. 33. 67. 74. & 106.